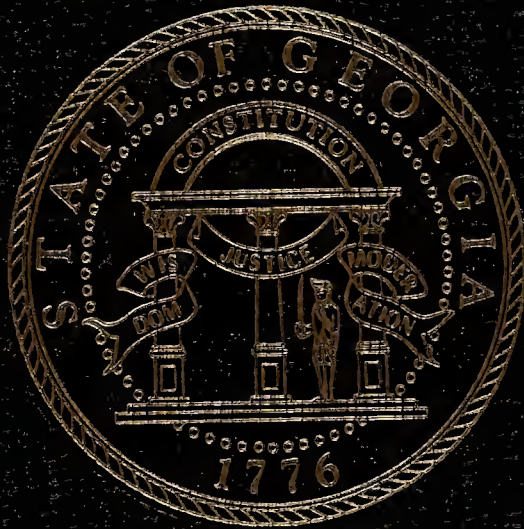


**OFFICIAL CODE  
OF  
GEORGIA**  

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**ANNOTATED**




**VOLUME 9**

**Title 11. Commercial Code**

**2002 Edition**

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Official code of Georgia  
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# OFFICIAL CODE OF GEORGIA ANNOTATED

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With Provision for Subsequent Pocket Parts

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*Prepared by*

The Code Revision Commission

The Office of Legislative Counsel

*and*

The Editorial Staff of LexisNexis™



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## Volume 9

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Title 11. Commercial Code

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Including Acts of the 2002 Session of the General Assembly  
of Georgia and Annotations taken from the Georgia  
Reports and the Georgia Appeals Reports

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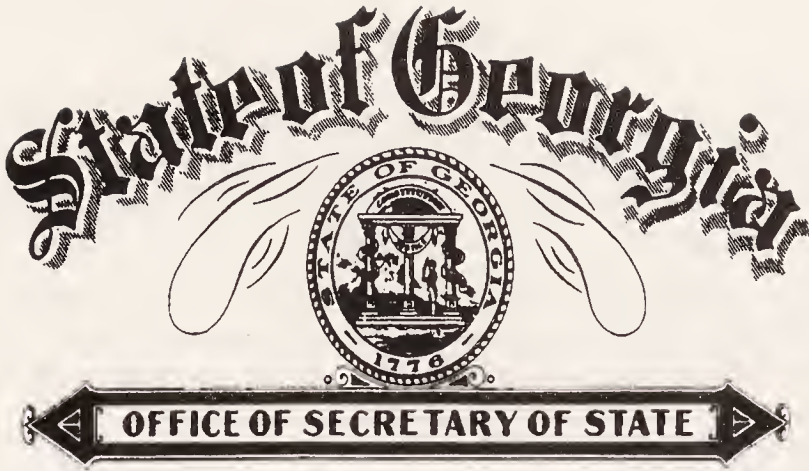
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*I, Cathy Cox, Secretary of State of the State of Georgia, do hereby certify that* the statutory portion of the Official Code of Georgia Annotated contained in this volume is a true and correct copy of such material as enacted by the General Assembly of Georgia; all as same appear of file and record in this office.



IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of my office, at the Capitol, in the City of Atlanta, this 1st day of August, in the year of our Lord Two Thousand and Two and of the Independence of the United States of America the Two Hundred and Twenty-sixth.

*Cathy Cox*

SECRETARY OF STATE





## Preface

This volume cumulates and replaces the 1994 edition of Volume 9 of the Official Code of Georgia Annotated, as supplemented by the 2001 Cumulative Supplement. The 1994 Volume 9 and its 2001 Supplement may be recycled or, if so desired, retained for historical purposes.

This volume contains all laws specifically codified in Title 11 by the General Assembly through the 2002 Session. This volume also contains case annotations reflecting decisions posted to LEXIS-NEXIS® through March 25, 2002. These annotations will appear in the following traditional reporter sources: Georgia Supreme Court Opinions; Georgia Appeals Court Opinions; Southeastern Reporter, Second Series; Supreme Court Reporter; Federal Reporter, Third Series; Federal Supplement, Second Series; Federal Rules Decisions; and Bankruptcy Reporter. As official and traditional citations become available, substitutions for the LEXIS-NEXIS® citations will be made.

Additionally, LexisNexis™ has prepared annotations and references to Attorney General Opinions, law reviews, and other research sources that we hope will be beneficial as you utilize this product. A complete listing of those sources is as follows: Official and Unofficial Attorney General Opinions; Opinions of the Judicial Qualifications Commission; Advisory Opinions of the State Disciplinary Board of the State Bar; Formal Advisory Opinions of the State Disciplinary Board of the State Bar, issued by the Supreme Court of Georgia; Emory Law Journal; Georgia Law Review; Georgia State University Law Review; Mercer Law Review; Georgia State Bar Journal; and American Law Reports. Also included where appropriate are cross-references to the Official Code of Georgia Annotated.

This volume retains amendment notes and effective date notes for Acts passed during the 2000, 2001, and 2002 Sessions of the General Assembly. In order to determine the changes which were made or the effective date applied to a Code section by an Act passed prior to the 2000 Session of the General Assembly, the user should consult the Georgia Laws.

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## **User's Guide**

In order to assist both the legal profession and the layperson in obtaining the maximum benefit from the Official Code of Georgia Annotated, a User's Guide containing comments and information on the many features found within the Code has been included in Volume 1 of the Official Code of Georgia Annotated.



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# TITLE 11

## COMMERCIAL CODE

- Art. 1. General Provisions, 11-1-101 through 11-1-209.
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**Editor's notes.** — The numbering of sections for this title varies slightly from that used in other titles of the Code. In general, individual section numbers include the Georgia Code title number and the section number of the Uniform Commercial Code upon which the Code section is based.

**Law reviews.** — For article examining scheme of this title, see 24 Ga. B.J. 330 (1962). For article, "Things Attached to Realty," see 15 Mercer L. Rev. 343 (1964). For article discussing Georgia commercial law in 1976 to 1977, see 29 Mercer L. Rev. 41 (1977). For annual survey of commercial law, see 35 Mercer L. Rev. 53 (1983). For annual survey on commercial law, see 36 Mercer L. Rev. 115 (1984). For article surveying commercial law in 1984-1985, see 37 Mercer L. Rev. 139 (1985). For annual sur-

vey of commercial law, see 38 Mercer L. Rev. 85 (1986). For annual survey of commercial law, see 39 Mercer L. Rev. 83 (1987). For annual survey of commercial law, see 40 Mercer L. Rev. 91 (1988). For survey article on commercial law, see 42 Mercer L. Rev. 107 (1990). For annual survey article on commercial law, see 45 Mercer L. Rev. 87 (1993). For annual survey article discussing commercial and banking law, see 49 Mercer L. Rev. 95 (1997). For annual survey article on commercial law, see 50 Mercer L. Rev. 193 (1998). For article, "'Dear Diary' Moments in the Semester of a UCC Law Professor," see 50 Mercer L. Rev. 603 (1999). For annual survey article discussing developments in commercial law, see 51 Mercer L. Rev. 165 (1999). For article, "Commercial Law," see 53 Mercer L. Rev. 153 (2001).



## COMMERCIAL CODE

For note discussing title and risk of loss under Uniform Commercial Code, see 26 Ga. B.J. 322 (1964).

## JUDICIAL DECISIONS

**Purpose.** — Uniform Commercial Code was developed and enacted to establish standard business laws throughout the United States, and uniform interpretation and application of the code promotes general welfare by simplifying interstate business activity. *Citizens Bank v. Ansley*, 467 F. Supp. 51 (M.D. Ga.), *aff'd*, 604 F.2d 669 (5th Cir. 1979).

Uniform Commercial Code was designed to avoid artificial pitfalls and technicalities. *Citizens Bank v. Ansley*, 467 F. Supp. 51 (M.D. Ga.), *aff'd*, 604 F.2d 669 (5th Cir. 1979).

**Title 11 and Ch. 3, T. 40, must be construed in pari materia.** — O.C.G.A. T. 11 and Ch. 3, T. 40, were adopted at the same session of the Georgia General Assembly and they relate in part to the same subject matter and must be construed in *pari materia*. *GMAC v. Whisnant*, 387 F.2d 774 (5th Cir. 1968).

**Special property class legislation.** — Though the commercial code applies to all commercial transactions in personal property in this state, some transactions are governed by laws dealing with special classes of

property. *Anderson v. Kensington Mtg. & Fin. Corp.*, 166 Ga. App. 604, 305 S.E.2d 128 (1983).

**This title does not purport to change law relating to instruments transferring interests in land.** *Newton v. Allen*, 220 Ga. 681, 141 S.E.2d 417 (1965).

**Writing purporting to lease trees for turpentine purposes,** not merely product thereof, was lease of realty, and did not constitute a contract for sale of personalty under O.C.G.A. T. 11. *Newton v. Allen*, 220 Ga. 681, 141 S.E.2d 417 (1965).

**Cited in** *Timeplan Loan & Inv. Corp. v. Moorehead*, 221 Ga. 648, 146 S.E.2d 748 (1966); *Berman v. Airlift Int'l, Inc.*, 302 F. Supp. 1203 (N.D. Ga. 1969); *Lashley v. Ford Motor Co.*, 359 F. Supp. 363 (M.D. Ga. 1972); *Bank of S. v. Hammock*, 140 Ga. App. 552, 231 S.E.2d 407 (1976); *Patterson v. Professional Resources, Inc.*, 242 Ga. 459, 249 S.E.2d 248 (1978); *FDIC v. Kucera Bldrs., Inc.*, 503 F. Supp. 967 (N.D. Ga. 1980); *GECC v. Home Indem. Co.*, 168 Ga. App. 344, 309 S.E.2d 152 (1983); *Arford v. Blalock*, 199 Ga. App. 434, 405 S.E.2d 698 (1991).

## RESEARCH REFERENCES

**ALR.** — Excessiveness or inadequacy of attorney's fees in matters involving commer-

cial and general business activities, 23 ALR5th 241.

ARTICLE 1  
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11-1-102.	Purposes; rules of construction; variation by agreement.	11-1-202.	Prima-facie evidence by third party documents.
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11-1-107.	Waiver or renunciation of claim or right after breach.	11-1-207.	Performance or acceptance under reservation of rights.
11-1-108.	Severability.	11-1-208.	Option to accelerate at will.
11-1-109.	Section captions.	11-1-209.	Subordinated obligations.

Law reviews. — For note discussing the Uniform Commercial Code and consumer protection, see 25 Emory L.J. 445 (1976).

RESEARCH REFERENCES

Am. Jur. 2d. — 15A Am. Jur. 2d, Commercial Code, § 1, 16 et seq.

PART 1  
SHORT TITLE, CONSTRUCTION, APPLICATION, AND SUBJECT  
MATTER OF TITLE

11-1-101. Short title.

This Title 11 shall be known as and may be cited as the “Uniform Commercial Code.” (Code 1933, § 109A-1—101, enacted by Ga. L. 1962, p. 156, § 1.)

Law reviews. — For article, “The Good Faith Purchase Idea and the Uniform Commercial Code,” see 15 Ga. L. Rev. 605 (1981).

## JUDICIAL DECISIONS

**Effect of prior case law.** — Cases dealing with rescission and with measure of damages for breach of warranty decided prior to the adoption O.C.G.A. § 11-1-101 in 1962 are not controlling in cases arising under O.C.G.A. § 11-1-101. *Jacobs v. Metro*

*Chrysler-Plymouth, Inc.*, 125 Ga. App. 462, 188 S.E.2d 250 (1972).

**Cited in** *Tidwell v. Slocumb (In re Ga. Steel, Inc.)*, 71 Bankr. 903 (Bankr. M.D. Ga. 1987).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 11 Am. Jur. 2d, Bills and Notes, § 5.

**C.J.S.** — 82 C.J.S., Statutes, §§ 217 et seq., 238.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 1-101.

**11-1-102. Purposes; rules of construction; variation by agreement.**

(1) This title shall be liberally construed and applied to promote its underlying purposes and policies.

(2) Underlying purposes and policies of this title are:

(a) To simplify, clarify, and modernize the law governing commercial transactions;

(b) To permit the continued expansion of commercial practices through custom, usage, and agreement of the parties;

(c) To make uniform the law among the various jurisdictions.

(3) The effect of provisions of this title may be varied by agreement, except as otherwise provided in this title and except that the obligations of good faith, diligence, reasonableness, and care prescribed by this title may not be disclaimed by agreement but the parties may by agreement determine the standards by which the performance of such obligations is to be measured if such standards are not manifestly unreasonable.

(4) The presence in certain provisions of this title of the words “unless otherwise agreed” or words of similar import does not imply that the effect of other provisions may not be varied by agreement under subsection (3) of this Code section.

(5) In this title unless the context otherwise requires:

(a) Words in the singular number include the plural, and in the plural include the singular;

(b) Words of the masculine gender include the feminine and the neuter, and when the sense so indicates words of the neuter gender may refer to any gender. (Code 1933, § 109A-1—102, enacted by Ga. L. 1962, p. 156, § 1.)

**Law reviews.** — For article on choice-of-law of contracts in Georgia, see 21 Mercer L. Rev. 389 (1970). For article discussing the resolution of conflicting claims to goods between an unsecured seller of goods and a creditor of a buyer claiming under an after-acquired property clause, see 28 Mercer L. Rev. 625 (1977). For article discussing the applicability of warranty provisions under the Uniform Commercial Code to domestic solar energy devices, see 30 Mercer L. Rev. 547 (1979). For article, "Computer Software: Does Article 2 of the

Uniform Commercial Code Apply?," see 35 Emory L.J. 853 (1986). For article, "Contract Litigation and the Elite Bar in New York City, 1960-1980," see 39 Emory L.J. 413 (1990).

For note, "Negotiable Promissory Notes Containing Time and Demand Provisions: The Need for Consistent Interpretation," see 19 Ga. L. Rev. 717 (1984). For note, "Enforcing Manufacturers' Warranty Exclusions Against Non-Privity Commercial Purchasers: The Need for Uniform Guidelines," see 20 Ga. L. Rev. 461 (1986).

### JUDICIAL DECISIONS

**Legislative intent.** — The passage of the Uniform Commercial Code by the legislature evinced an intent to have that body of law control all commercial transactions. *City Dodge, Inc. v. Gardner*, 232 Ga. 766, 208 S.E.2d 794 (1974).

**Liberal construction.** — O.C.G.A. § 11-1-102 specifies that the Uniform Commercial Code shall be liberally construed and applied to promote its underlying purposes and policies, one of which, of course, is to broaden within the framework provided the protection of warranties beyond the original notion of privity of contract. *Chastain v. Fuqua Indus., Inc.*, 156 Ga. App. 719, 275 S.E.2d 679 (1980).

**Release of an "Assignment of Proceeds from the Sale of Dairy Products"** constituted a waiver of the lienholder's security interest in milk products. *Thomas v. Ralston Purina Co.*, 43 Bankr. 201 (Bankr. M.D. Ga. 1984).

**Cited** in *Maley v. National Acceptance Co.*, 250 F. Supp. 841 (N.D. Ga. 1966); *Wooden v.*

*Michigan Nat'l Bank*, 117 Ga. App. 852, 162 S.E.2d 222 (1968); *Reddick v. White Consol. Indus., Inc.*, 295 F. Supp. 243 (S.D. Ga. 1968); *Steelman v. Associates Disct. Corp.*, 121 Ga. App. 649, 175 S.E.2d 62 (1970); *In re Carmichael Enters., Inc.*, 334 F. Supp. 94 (N.D. Ga. 1971); *Atkins v. Citizens & S. Nat'l Bank*, 127 Ga. App. 348, 193 S.E.2d 187 (1972); *In re Firth*, 363 F. Supp. 369 (M.D. Ga. 1973); *Barclays Bank v. Mercantile Nat'l Bank*, 481 F.2d 1224 (5th Cir. 1973); *Brannon v. First Nat'l Bank*, 137 Ga. App. 275, 223 S.E.2d 473 (1976); *Argonaut Ins. Co. v. C & S Bank*, 140 Ga. App. 807, 232 S.E.2d 135 (1976); *Pepsico Truck Rental, Inc. v. Eastern Foods, Inc.*, 145 Ga. App. 410, 243 S.E.2d 662 (1978); *Booker v. Commercial Credit Corp.*, 9 Bankr. 710 (M.D. Ga. 1981); *International Harvester Credit Corp. v. Clenny*, 505 F. Supp. 983 (M.D. Ga. 1981); *Varner v. Century Fin. Co.*, 738 F.2d 1143 (11th Cir. 1984).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 11 Am. Jur. 2d, Bills and Notes, §§ 6, 19. 15A Am. Jur. 2d, Commercial Code, §§ 2 et seq., 15 et seq., 30. 67 Am. Jur. 2d, Sales, §§ 70, 71.

**C.J.S.** — 31 C.J.S., Estoppel, §§ 55 et seq., 58 et seq., 86. 82 C.J.S., Statutes, § 309.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 1-102.

**ALR.** — What language in conveyance or contract amounts to assumption of mortgage by grantee, 101 ALR 281.

Effect on negotiability of instrument, under terms of UCC § 3-104(1), of statements expressly limiting negotiability or transferability, 58 ALR4th 632.

### 11-1-103. Supplementary general principles of law applicable.

Unless displaced by the particular provisions of this title, the principles of



law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions. (Code 1933, § 109A-1—103, enacted by Ga. L. 1962, p. 156, § 1.)

**Law reviews.** — For note, “The Scope and Meaning of Waiver in Section 2-209 of the Uniform Commercial Code,” see 5 Ga. L. Rev. 783 (1971). For note, “Negotiable Promissory Notes Containing Time and Demand Provisions: The Need for Consistent Interpretation,” see 19 Ga. L. Rev. 717 (1984).

For comment on *Trust Co. v. Refrigeration Supplies, Inc.*, 241 Ga. 406, 246 S.E.2d 282 (1978), discussing liability of collecting and payor banks for payment of check over missing endorsement of copayee, see 13 Ga. L. Rev. 677 (1979).

## JUDICIAL DECISIONS

**Agreement governs rights and liabilities of parties.** — It is elementary that under the law of contracts the agreement itself governs the rights and liabilities of the parties. Nothing in the Uniform Commercial Code as adopted in Georgia requires a different result. *Tri-County Livestock Auction Co. v. Bank of Madison*, 228 Ga. 325, 185 S.E.2d 393 (1971).

**General law continues to apply where not displaced.** — O.C.G.A. § 11-1-103 requires that one apply general provisions of law where not displaced by the Uniform Commercial Code. *Jacobs v. Metro Chrysler-Plymouth, Inc.*, 125 Ga. App. 462, 188 S.E.2d 250 (1972).

**When common-law causes of action displaced.** — The Uniform Commercial Code displaces common-law causes of action only to the extent they are inconsistent with the provisions of the Code. *Perini Corp. v. First Nat'l Bank*, 553 F.2d 398 (5th Cir. 1977).

**Tort remedy for fraud and deceit not displaced.** — Neither the draftsmen nor the legislature intended to erase tort remedy for fraud and deceit by adoption of the Uniform Commercial Code in Georgia. *City Dodge, Inc. v. Gardner*, 232 Ga. 766, 208 S.E.2d 794 (1974).

**Tort action for fraudulent misrepresentation not precluded.** — The Uniform Commercial Code does not preclude an action in tort based upon fraudulent misrepresentation inducing a sale where plaintiff proves by a preponderance of the evidence the elements of fraud and deceit recognized under Georgia law, and that such a tort action

cannot be controlled by the terms of the contract itself. *City Dodge, Inc. v. Gardner*, 232 Ga. 766, 208 S.E.2d 794 (1974).

**Equitable doctrine of subrogation not abrogated.** — The Uniform Commercial Code does not abrogate, modify, affect, or abridge the equitable doctrine of subrogation. *Argonaut Ins. Co. v. C & S Bank*, 140 Ga. App. 807, 232 S.E.2d 135 (1976).

**Remedies available to creditor of bulk transferor.** — There is nothing in the Uniform Commercial Code to indicate that the creditor of a bulk transferor may not proceed on any common law or equitable cause of action the creditor may have against the transferee, notwithstanding the bulk transfer law. On the contrary, the Uniform Commercial Code provides that unless displaced by particular provisions, the principles of law and equity, including fraud, etc., shall supplement its provisions. *Boss v. Bassett Furn. Indus. of N.C., Inc.*, 249 Ga. 166, 288 S.E.2d 559 (1982).

Where the relationship of the creditor to the bulk transferor is multifaceted, the creditor may pursue common law and equitable remedies, if any, against the transferee without reliance on the bulk transfer law. *Boss v. Bassett Furn. Indus. of N.C., Inc.*, 249 Ga. 166, 288 S.E.2d 559 (1982).

**Effect of “prior endorsement guaranteed” stamp same as under case law.** — Georgia case law prior to Uniform Commercial Code has held that use of “prior endorsement guaranteed” stamp on checks serves to guarantee missing endorsements as well as endorsements on particular check and such

case law interpretation appears to be consistent with law as provided under Uniform Commercial Code. *First Nat'l Bank v. Trust Co.*, 510 F. Supp. 651 (N.D. Ga. 1981).

**Common-law negligence held applicable.**

— While the UCC provides a remedy for the negligent violation of the duties it imposes, it does not provide relief from common-law negligence where a bank employee erroneously informs a customer that a check he deposited is “good.” Therefore, the customer is entitled to bring a common-law negligence action against the bank. *First Ga. Bank v. Webster*, 168 Ga. App. 307, 308 S.E.2d 579 (1983).

**Cited** in *Ellis v. Robins Fed. Credit Union*, 118 Ga. App. 539, 164 S.E.2d 455 (1968); *Jones v. Sheffield*, 122 Ga. App. 574, 178 S.E.2d 299 (1970); *Columbian Peanut Co. v.*

*Frosteg*, 472 F.2d 476 (5th Cir. 1973); *Pirrone v. Monarch Wine Co.*, 497 F.2d 25 (5th Cir. 1974); *James Pair, Inc. v. Gentry*, 134 Ga. App. 734, 215 S.E.2d 707 (1975); *Central Soya Co. v. Bundrick*, 137 Ga. App. 63, 222 S.E.2d 852 (1975); *Brannon v. First Nat'l Bank*, 137 Ga. App. 275, 223 S.E.2d 473 (1976); *Interstate Sec. Police, Inc. v. Citizens & S. Emory Bank*, 237 Ga. 37, 226 S.E.2d 583 (1976); *Wilson v. Dodge Trucks, Inc.*, 238 Ga. 636, 235 S.E.2d 142 (1977); *Trust Co. of Ga. Bank v. Port Term. & Warehousing Co.*, 153 Ga. App. 735, 266 S.E.2d 254 (1980); *Sabin Meyer Regional Sales Corp. v. Citizens Bank*, 502 F. Supp. 557 (N.D. Ga. 1980); *Fowler v. Essex Co.*, 179 Ga. App. 597, 347 S.E.2d 348 (1986); *Allstate Fin. Corp. v. Dundee Mills, Inc.*, 800 F.2d 1073 (11th Cir. 1986).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 15A Am. Jur. 2d, Commercial Code, §§ 2, 15, 30, 43, 49, 64, 73 et seq., 87.

**C.J.S.** — 82 C.J.S., Statutes, § 350.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 1-103.

**ALR.** — Joinder of cause of action for breach of a contract with cause of action for fraud inducing the contract, 10 ALR 756.

Validity and effect of stipulation to the effect that vendee or purchaser does not rely upon representations of vendor or seller, or the latter's agent, 10 ALR 1472.

Relief from contract of sale because of mistake as to amount of commodity which it calls for, 31 ALR 384

Liability of one who signs commercial paper in blank to be used for his own benefit

where it is wrongfully used by an agent or employee, 43 ALR 198.

Trademark or tradename as asset in case of bankruptcy, insolvency, or assignment for benefit of creditors, 44 ALR 706.

Rights and remedies of one whose funds are fraudulently used in the purchase or improvement of real property, 47 ALR 371; 48 ALR 1269.

Estoppel by delay after knowledge in disclosing forgery of commercial paper, 50 ALR 1374.

Validity of contract executed under duress exercised by third person, 62 ALR 1477.

Seller's liability for fraud in connection with contract for the sale of long-term dancing lessons, 28 ALR3d 1412.

### 11-1-104. Construction against implicit repeal.

This title being a general act intended as a unified coverage of its subject matter, no part of it shall be deemed to be impliedly repealed by subsequent legislation if such construction can reasonably be avoided. (Code 1933, § 109A-1—104, enacted by Ga. L. 1962, p. 156, § 1.)

### JUDICIAL DECISIONS

**Cited** in *Cleveland Lumber Co. v. Proctor & Schwartz, Inc.*, 397 F. Supp. 1088 (N.D. Ga. 1975).



## RESEARCH REFERENCES

**Am. Jur. 2d.** — 15A Am. Jur. 2d, Commercial Code, §§ 25, 30.

**C.J.S.** — 82 C.J.S., Statutes, § 287.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 1-104.

**11-1-105. Territorial application of the title; parties' power to choose applicable law.**

(1) Except as provided hereafter in this Code section, when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties. Failing such agreement this title applies to transactions bearing an appropriate relation to this state.

(2) Where one of the following provisions of this title specifies the applicable law, that provision governs and a contrary agreement is effective only to the extent permitted by the law (including the conflict of laws rules) so specified:

Rights of creditors against sold goods. Code Section 11-2-402.

Applicability of the article of this title on leases (Article 2A of this title). Code Sections 11-2A-105 and 11-2A-106.

Applicability of the article of this title on bank deposits and collections (Article 4 of this title). Code Section 11-4-102.

Bulk transfers subject to the article of this title on bulk transfers (Article 6 of this title). Code Section 11-6-102.

Applicability of the article of this title on investment securities (Article 8 of this title). Code Section 11-8-110.

Law governing perfection, the effect of perfection or nonperfection, and the priority of security interests and agricultural liens. Code Sections 11-9-301 through 11-9-307.

Governing law in the article on funds transfers (Article 4A of this title). Code Section 11-4A-507. (Code 1933, § 109A-1—105, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 1978, p. 1081, § 2; Ga. L. 1992, p. 2685, § 1; Ga. L. 1993, p. 633, § 2; Ga. L. 1998, p. 1323, § 15; Ga. L. 2001, p. 362, § 2.)

**The 2001 amendment**, effective July 1, 2001, substituted "Law governing perfection, the effect of perfection or nonperfection, and the priority of security interests and agricultural liens. Code Sections 11-9-301 through 11-9-307." for "Perfection provisions of the article of this title on secured transactions (Article 9 of this title). Code Section 11-9-103." in the sixth undesignated paragraph of subsection (2).

**Editor's notes.** — Ga. L. 1993, p. 633, which amended this Code section, provides, in § 5, not codified by the General Assembly, that: "This Act shall become effective on July 1, 1993, for all lease contracts that are first made or that first become effective between the parties on or after that date. This Act shall not apply to any lease first made or that first became effective between the parties before July 1, 1993, or to any extension,

amendment, modification, renewal, or supplement of or to any such lease contract, unless the parties thereto specifically agree in writing that such lease contract, as extended, amended, modified, renewed, or supplemented, shall be governed by this Act."

**Law reviews.** — For article on choice-of-law of contracts in Georgia, see 21

Mercer L. Rev. 389 (1970). For essay on Georgia conflict of laws questions in contracts cases in the eleventh circuit and certification reform, see 11 Ga. St. U.L. Rev. 531 (1995).

For note on 1992 amendment of this Code section, see 9 Ga. St. U.L. Rev. 163 (1992). For note on 1993 amendment of this section, see 10 Ga. St. U.L. Rev. 34 (1993).

## JUDICIAL DECISIONS

**Contracting parties may choose applicable state law.** — O.C.G.A. § 11-1-105 allows contracting parties to make their own choice of the applicable state law. *Crompton-Richmond Co. v. Briggs*, 560 F.2d 1195 (5th Cir. 1977).

O.C.G.A. § 11-1-105 permits parties to provide by agreement which state's law shall govern their transaction but only if transaction bears "reasonable relation" to state so designated. *United Counties Trust Co. v. Mac Lum, Inc.*, 643 F.2d 1140 (5th Cir. 1981); *Manderson & Assocs. v. Gore*, 193 Ga. App. 723, 389 S.E.2d 251 (1989).

The parties may by contract stipulate that the law of another jurisdiction will govern the transaction. *Wallace v. Harrison*, 166 Ga. App. 461, 304 S.E.2d 487 (1983).

**Limitation on broad choice of law rule of subsection (1).** — Broad choice of law rule provided in O.C.G.A. § 11-1-105(1) is expressly limited by O.C.G.A. § 11-1-105(2), which states that for specific matters listed therein, other conflict of laws provisions located in the Code govern; among specific exclusions from general conflicts rule are article 9 secured transactions, which prior to 1978 were governed by conflicts or situs choice of law rule provided in O.C.G.A. § 11-9-102. *United Counties Trust Co. v. Mac Lum, Inc.*, 643 F.2d 1140 (5th Cir. 1981).

**Conflict of laws rule of forum state determines what state's substantive law applies.** — Where question of whether lessee was entitled to prevail on its failure of consideration defense in diversity action brought for breach of lease depended upon what state's substantive law applied, it was necessary to look to conflict of laws rule of forum state. *United Counties Trust Co. v. Mac Lum, Inc.*, 643 F.2d 1140 (5th Cir. 1981).

**Georgia adheres to the traditional choice of law system.** — Under this system tort

actions are adjudicated according to the law of the place where the wrong occurred, and contract actions are regulated by the law of the state where the contract was made when matters of execution, interpretation, or validity are at issue, and by the law of the state where it is to be performed when the issue is one concerning performance. *Wallace v. Harrison*, 166 Ga. App. 461, 304 S.E.2d 487 (1983).

In a products liability diversity action brought on the theory of breach of implied warranty of merchantability, Georgia procedural law, which looked to the *lex loci delicti*, controlled the claim. Since the injury took place in Georgia, Georgia substantive law, which required privity, was applied. The plaintiff, who was an employee of the purchaser of the product, failed to satisfy this privity requirement. *Morgan v. Mar-Bel, Inc.*, 614 F. Supp. 438 (N.D. Ga. 1985).

**Contract may bear "appropriate relation" to Georgia, though entered into in another state.** — The phrase "applies to transactions bearing an appropriate relation to this state" means, that notwithstanding a contract has been entered into in another state, if it is litigated in Georgia and bears an "appropriate relation" to Georgia, its validity will be governed by Georgia law. *Gulf Collateral, Inc. v. Morgan*, 415 F. Supp. 319 (S.D. Ga. 1976).

**"Appropriate relation,"** which means essentially the same as "significant contacts," is something more than minimum contacts. *United Counties Trust Co. v. Mac Lum, Inc.*, 643 F.2d 1140 (5th Cir. 1981).

**Sale-leaseback agreement.** — Absent effect designation, substantive law applied to sale-leaseback agreement is determined by "appropriate relation" test. *United Counties Trust Co. v. Mac Lum, Inc.*, 643 F.2d 1140 (5th Cir. 1981).



**Defective hand grenade bought in another state but injuring citizen in Georgia.** — Where plaintiff, a Georgia citizen who was injured by explosion of a defective hand grenade at an army base in Georgia, brought suit pursuant to O.C.G.A. § 9-10-91 against the hand grenade's manufacturer which was allegedly doing business in the State of Georgia, the transactions in which defendant manufactured and sold the defective hand grenades to the United States Army in the States of Tennessee and Texas, were "appropriately related" to the State of Georgia within the meaning of O.C.G.A. § 11-1-105. *Whitaker v. Harvell-Kilgore Corp.*, 418 F.2d 1010 (5th Cir. 1969).

**Repossessions of collateral located in Georgia.** — Absent an agreement that the law of another state shall govern, Georgia law applies to the repossession, resale, and right to a deficiency judgment where the collateral was located in Georgia at the time of the repossession and resale. *Lewis v. First Nat'l Bank*, 134 Ga. App. 798, 216 S.E.2d 347 (1975).

**Unilateral reservation of rights in endorsing draft.** — In a tort action in Georgia, where defendant's insurer, a Florida corporation, tendered to plaintiff a draft payable through a Florida bank and plaintiff crossed out the printed endorsement/release before

endorsing the draft to a body shop and added a handwritten endorsement reserving defendant's rights, the *lex fori*, i.e., the law of Georgia, should be applied where both parties are Georgia residents, since the relationship of the insurer to the parties and the action is that of defendant's agent for the payment of a sum or sums due plaintiff under the terms of the contract of insurance between defendant and the insurer and the collecting bank is the agent of the insurer. The residence of the agent or subagent is irrelevant, absent special circumstances. *Wallace v. Harrison*, 166 Ga. App. 461, 304 S.E.2d 487 (1983).

**Foreign jurisdiction's applicable law.** — Where consignment agreement between foreign, debtor-aviation company and domestic aerospace corporation provided for its construction in accordance with the laws of the Province of Ontario, Canada, and the consignment transaction bore a reasonable relationship to Ontario, the court applied Ontario law to determine the validity and effect of the parties' interests. *ATG Aerospace, Inc. v. High-Line Aviation Ltd.*, 149 Bankr. 730 (Bankr. N.D. Ga. 1992).

**Cited in** *Eldon Indus., Inc. v. Paradies & Co.*, 397 F. Supp. 535 (N.D. Ga. 1975); *Moore v. Emery (In re Am. Steel Prod., Inc.)*, 203 Bankr. 504 (Bankr. S.D. Ga. 1996).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 15A Am. Jur. 2d, Commercial Code, §§ 11 et seq., 41 et seq., 75. 16 Am. Jur. 2d, Conflict of Laws, §§ 2, 55. 67A Am. Jur. 2d, Sales, §§ 963-970, 981-985. 68A Am. Jur. 2d, Secured Transactions, §§ 8, 9.

**C.J.S.** — 17 C.J.S., Contracts, § 13 et seq. 21 C.J.S., Courts, § 204.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 1-105.

**ALR.** — Duty of one selling interest in property to another with view to their mutual exploitation of it to disclose what property cost him, 10 ALR 193.

Conflict of law as to conditional sales of chattels, 25 ALR 1153; 57 ALR 535; 87 ALR 1308; 148 ALR 375; 13 ALR2d 1312.

Law of the forum as governing the right to and rate of interest as damages for delay in payment of money or discharge of other obligations, 78 ALR 1047.

Federal constitutional provisions as affect-

ing right of court of forum, when entertaining jurisdiction of action on foreign contract or cause of action, to refuse, on ground of its own public policy or local statute, to give effect to provisions of the contract valid by its proper law or to other rights or obligations available under that law, 92 ALR 932.

Conflict of laws as to chattel mortgages and conditional sales of chattels, 13 ALR2d 1312.

Conflict of laws as to disposition of and relative rights to bank deposits in the names of more than one person, 25 ALR2d 1240.

Law governing assignment of wages or salary, 1 ALR3d 927.

Statute of frauds and conflict of laws, 47 ALR3d 137.

What constitutes "reasonable" or "appropriate" relation to a transaction within the meaning of Uniform Commercial Code § 1-105(1), 63 ALR3d 341.

Choice of law as to applicable statute of limitations in contract actions, 78 ALR3d 639.

Choice of law as to application of comparative negligence doctrine, 86 ALR3d 1206.

Conflict of laws as to validity and effect of arbitration provision in contract for purchase or sale of goods, products, or services, 95 ALR3d 1145.

11-1-106. Remedies to be liberally administered.

- (1) The remedies provided by this title shall be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed but neither consequential or special nor penal damages may be had except as specifically provided in this title or by other rule of law.
- (2) Any right or obligation declared by this title is enforceable by action unless the provision declaring it specifies a different and limited effect. (Code 1933, § 109A-1—106, enacted by Ga. L. 1962, p. 156, § 1.)

JUDICIAL DECISIONS

Cited in *Emmons v. Burkett*, 256 Ga. 855, 353 S.E.2d 908 (1987); *Unique Designs, Inc. v. Pittard Mach. Co.*, 200 Ga. App. 647, 409 S.E.2d 241 (1991); *White County Bank v.*

*Noland Co.*, 214 Ga. App. 780, 449 S.E.2d 325 (1994); *Latex Equip. Sales & Serv., Inc. v. Apache Mills, Inc.*, 225 Ga. App. 516, 484 S.E.2d 274 (1997).

RESEARCH REFERENCES

Am. Jur. 2d. — 11 Am. Jur. 2d, Bills and Notes, § 19. 12 Am. Jur. 2d, Bills and Notes, § 627. 15A Am. Jur. 2d, Commercial Code, §§ 17, 24. 67A Am. Jur. 2d, Sales, § 987.

C.J.S. — 2 C.J.S., Actions, §§ 5, 9.

U.L.A. — Uniform Commercial Code (U.L.A.) § 1-106.

ALR. — Damages for breach by seller or former employee of covenant, express or implied, not to engage in like business or enter employment of competitor of covenantee, 127 ALR 1152.

Awarding damages for delay, in addition to specific performance, of contract for sale of corporate stock, 28 ALR3d 1401.

11-1-107. Waiver or renunciation of claim or right after breach.

Any claim or right arising out of an alleged breach can be discharged in whole or in part without consideration by a written waiver or renunciation signed and delivered by the aggrieved party. (Code 1933, § 109A-1—107, enacted by Ga. L. 1962, p. 156, § 1.)

Law reviews. — For note, “The Scope and Meaning of Waiver in Section 2-209 of the Uniform Commercial Code,” see 5 Ga. L. Rev. 783 (1971).

RESEARCH REFERENCES

Am. Jur. 2d. — 1 Am. Jur. 2d, Accord and Satisfaction, § 12. 11 Am. Jur. 2d, Bills and Notes, § 417. 12 Am. Jur. 2d, Bills and Notes, §§ 554, 555. 15A Am. Jur. 2d, Commercial

Code, § 4. 28 Am. Jur. 2d, Estoppel and Waiver, § 162. 67 Am. Jur. 2d, Sales, §§ 20, 216, 224, 318, 519, 539, 575.

**C.J.S.** — 17B C.J.S., Contracts, § 557 et seq.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 1-107.

**ALR.** — Agent's promise to make endorsement upon policy as a waiver or estoppel to assert provision that any privilege or permission shall be void unless in writing, 38 ALR 636.

### 11-1-108. Severability.

If any provision or clause of this title or application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the title which can be given effect without the invalid provision or application, and to this end the provisions of this title are declared to be severable. (Code 1933, § 109A-1—108, enacted by Ga. L. 1962, p. 156, § 1.)

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 15A Am. Jur. 2d, Commercial Code, §§ 30, 31.

**C.J.S.** — 82 C.J.S., Statutes, § 82 et seq.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 1-108.

### 11-1-109. Section captions.

Section captions are parts of this title. (Code 1933, § 109A-1—109, enacted by Ga. L. 1962, p. 156, § 1.)

**Cross references.** — Headings and catchlines not part of Code generally, § 1-1-7.

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 15A Am. Jur. 2d, Commercial Code, § 31.

**C.J.S.** — 82 C.J.S., Statutes, § 335.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 1-109.

## PART 2

### GENERAL DEFINITIONS AND PRINCIPLES OF INTERPRETATION

#### 11-1-201. General definitions.

Subject to additional definitions contained in the subsequent articles of this title which are applicable to specific articles or parts thereof, and unless the context otherwise requires, in this title:

(1) "Action" in the sense of a judicial proceeding includes recoupment, counterclaim, setoff, suit in equity, and any other proceedings in which rights are determined.



(2) “Aggrieved party” means a party entitled to resort to a remedy.

(3) “Agreement” means the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in this title (Code Sections 11-1-205 and 11-2-208). Whether an agreement has legal consequences is determined by the provisions of this title, if applicable; otherwise by the law of contracts (Code Section 11-1-103).

(4) “Bank” means any person engaged in the business of banking. Wherever the word “branch” is used in this title, with reference to a bank, it shall mean “branch office” as that term is defined in Code Section 7-1-600.

(5) “Bearer” means the person in possession of an instrument, document of title, or certificated security payable to bearer or indorsed in blank.

(6) “Bill of lading” means a document evidencing the receipt of goods for shipment issued by a person engaged in the business of transporting or forwarding goods, and includes an airbill. “Airbill” means a document serving for air transportation as a bill of lading does for marine or rail transportation, and includes an air consignment note or air waybill.

(7) “Branch” includes a separately incorporated foreign branch of a bank.

(8) “Burden of establishing” a fact means the burden of persuading the triers of fact that the existence of the fact is more probable than its nonexistence.

(9) “Buyer in ordinary course of business” means a person that buys goods in good faith without knowledge that the sale violates the rights of another person in the goods, and in the ordinary course from a person, other than a pawnbroker, in the business of selling goods of that kind. A person buys goods in the ordinary course if the sale to the person comports with the usual or customary practices in the kind of business in which the seller is engaged or with the seller’s own usual or customary practices. A person that sells oil, gas, or other minerals at the wellhead or minehead is a person in the business of selling goods of that kind. A buyer in the ordinary course of business may buy for cash, by exchange of other property, or on secured or unsecured credit and may acquire goods or documents of title under a preexisting contract for sale. Only a buyer that takes possession of the goods or has a right to recover the goods from the seller under Article 2 of this title may be a buyer in ordinary course of business. A person that acquires goods in a transfer in bulk or as security for or in total or partial satisfaction of a money debt is not a buyer in ordinary course of business.

(10) “Conspicuous”: A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to



have noticed it. A printed heading in capitals (as: Nonnegotiable Bill of Lading) is conspicuous. Language in the body of a form is "conspicuous" if it is in larger or other contrasting type or color. But in a telegram any stated term is "conspicuous." Whether a term or clause is "conspicuous" or not is for decision by the court.

(11) "Contract" means the total legal obligation which results from the parties' agreement as affected by this title and any other applicable rules of law.

(12) "Creditor" includes a general creditor, a secured creditor, a lien creditor and any representative of creditors, including an assignee for the benefit of creditors, a trustee in bankruptcy, a receiver in equity, and an executor or administrator of an insolvent debtor's or assignor's estate.

(13) "Defendant" includes a person in the position of defendant in a cross-action or counterclaim.

(14) "Delivery" with respect to instruments, documents of title, chattel paper, or certificated securities means voluntary transfer of possession.

(15) "Document of title" includes bill of lading, dock warrant, dock receipt, warehouse receipt or order for the delivery of goods, and also any other document which in the regular course of business or financing is treated as adequately evidencing that the person in possession of it is entitled to receive, hold, and dispose of the document and the goods it covers. To be a document of title a document must purport to be issued by or addressed to a bailee and purport to cover goods in the bailee's possession which are either identified or are fungible portions of an identified mass.

(16) "Fault" means wrongful act, omission, or breach.

(17) "Fungible" with respect to goods or securities means goods or securities of which any unit is, by nature or usage of trade, the equivalent of any other like unit. Goods which are not fungible shall be deemed fungible for the purposes of this title to the extent that under a particular agreement or document unlike units are treated as equivalents.

(18) "Genuine" means free of forgery or counterfeiting.

(19) "Good faith" means honesty in fact in the conduct or transaction concerned.

(20) "Holder," with respect to a negotiable instrument, means the person in possession if the instrument is payable to bearer or, in the case of an instrument payable to an identified person, if the identified person is in possession. Holder with respect to a document of title means the person in possession if the goods are deliverable to bearer or to the order of the person in possession.

(21) To “honor” is to pay or to accept and pay, or where a credit so engages to purchase or discount a draft complying with the terms of the credit.

(22) “Insolvency proceedings” includes any assignment for the benefit of creditors or other proceedings intended to liquidate or rehabilitate the estate of the person involved.

(23) A person is “insolvent” who either has ceased to pay his debts in the ordinary course of business or cannot pay his debts as they become due or is insolvent within the meaning of the federal bankruptcy law.

(24) “Money” means a medium of exchange authorized or adopted by a domestic or foreign government and includes a monetary unit of account established by an intergovernmental organization or by agreement between two or more nations.

(25) A person has “notice” of a fact when:

(a) He has actual knowledge of it; or

(b) He has received a notice or notification of it; or

(c) From all the facts and circumstances known to him at the time in question he has reason to know that it exists.

A person “knows” or has “knowledge” of a fact when he has actual knowledge of it. “Discover” or “learn” or a word or phrase of similar import refers to knowledge rather than to reason to know. The time and circumstances under which a notice or notification may cease to be effective are not determined by this title.

(26) A person “notifies” or “gives” a notice or notification to another by taking such steps as may be reasonably required to inform the other in ordinary course whether or not such other actually comes to know of it. A person “receives” a notice or notification when:

(a) It comes to his attention; or

(b) It is duly delivered at the place of business through which the contract was made or at any other place held out by him as the place for receipt of such communications.

(27) Notice, knowledge, or a notice or notification received by an organization is effective for a particular transaction from the time when it is brought to the attention of the individual conducting that transaction, and in any event from the time when it would have been brought to his attention if the organization had exercised due diligence.

(28) “Organization” includes a corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership or association, two or more persons having a joint or common interest, or any other legal or commercial entity.

(29) "Party," as distinct from "third party," means a person who has engaged in a transaction or made an agreement within this title.

(30) "Person" includes an individual or an organization (see Code Section 11-1-102).

(31) "Presumption" or "presumed" means that the trier of fact must find the existence of the fact presumed unless and until evidence is introduced which would support a finding of its nonexistence.

(31.1) "Public sale" means a sale:

(A) Held at a place reasonably available to persons who might desire to attend and submit bids; and

(B) At which those attending shall be given the opportunity to bid on a competitive basis; and

(C) At which the sale, if made, shall be made to the highest and best bidder; and

(D) Except as otherwise provided in this title for advertising or dispensing with the advertising of public sales, of which notice is given by advertisement once a week for two weeks in the newspaper in which the sheriff's advertisements are published in the county where the sale is to be held, and which notice shall state the day and hour, between 10:00 A.M. and 4:00 P.M., and the place of sale and shall briefly identify the goods to be sold.

The provisions of this paragraph shall not be in derogation of any additional requirements relating to notice of and conduct of any such public sale as may be contained in other provisions of this title but shall be supplementary thereto.

(32) "Purchase" includes taking by sale, discount, negotiation, mortgage, pledge, lien, security interest, issue or reissue, gift, or any other voluntary transaction creating an interest in property.

(33) "Purchaser" means a person who takes by purchase.

(34) "Remedy" means any remedial right to which an aggrieved party is entitled with or without resort to a tribunal.

(35) "Representative" includes an agent, an officer of a corporation or association, and a trustee, executor or administrator of an estate, or any other person empowered to act for another.

(36) "Rights" includes remedies.

(37) "Security interest" means an interest in personal property or fixtures which secures payment or performance of an obligation. The term also includes any interest of a consignor and a buyer of accounts, chattel paper, a payment intangible, or a promissory note in a transaction



that is subject to Article 9 of this title. The special property interest of a buyer of goods on identification of those goods to a contract for sale under Code Section 11-2-401 is not a “security interest,” but a buyer may also acquire a “security interest” by complying with Article 9 of this title. Except as otherwise provided in Code Section 11-2-505, the right of a seller or lessor of goods under Article 2 or 2A of this title to retain or acquire possession of the goods is not a “security interest,” but a seller or lessor may also acquire a “security interest” by complying with Article 9 of this title. The retention or reservation of title by a seller of goods notwithstanding shipment or delivery to the buyer (Code Section 11-2-401) is limited in effect to a reservation of a “security interest.”

Whether a transaction creates a lease or security interest is determined by the facts of each case; however, a transaction creates a security interest if the consideration the lessee is to pay the lessor for the right to possession and use of the goods is an obligation for the term of the lease not subject to termination by the lessee, and

(a) The original term of the lease is equal to or greater than the remaining economic life of the goods,

(b) The lessee is bound to renew the lease for the remaining economic life of the goods or is bound to become the owner of the goods,

(c) The lessee has an option to renew the lease for the remaining economic life of the goods for no additional consideration or nominal additional consideration upon compliance with the lease agreement, or

(d) The lessee has an option to become the owner of the goods for no additional consideration or nominal additional consideration upon compliance with the lease agreement.

A transaction does not create a security interest merely because it provides that

(a) The present value of the consideration the lessee is obligated to pay the lessor for the right to possession and use of the goods is substantially equal to or is greater than the fair market value of the goods at the time the lease is entered into,

(b) The lessee assumes risk of loss of the goods, or agrees to pay taxes, insurance, filing, recording, or registration fees, or service or maintenance costs with respect to the goods,

(c) The lessee has an option to renew the lease or to become the owner of the goods,

(d) The lessee has an option to renew the lease for a fixed rent that is equal to or greater than the reasonably predictable fair market rent

for the use of the goods for the term of the renewal at the time the option is to be performed, or

(e) The lessee has an option to become the owner of the goods for a fixed price that is equal to or greater than the reasonably predictable fair market value of the goods at the time the option is to be performed.

For purposes of this subsection (37):

(x) Additional consideration is not nominal if (i) when the option to renew the lease is granted to the lessee the rent is stated to be the fair market rent for the use of the goods for the term of the renewal determined at the time the option is to be performed, or (ii) when the option to become the owner of the goods is granted to the lessee the price is stated to be the fair market value of the goods determined at the time the option is to be performed. Additional consideration is nominal if it is less than the lessee's reasonably predictable cost of performing under the lease agreement if the option is not exercised;

(y) "Reasonably predictable" and "remaining economic life of the goods" are to be determined with reference to the facts and circumstances at the time the transaction is entered into; and

(z) "Present value" means the amount as of a date certain of one or more sums payable in the future, discounted to the date certain. The discount is determined by the interest rate specified by the parties if the rate is not manifestly unreasonable at the time the transaction is entered into; otherwise, the discount is determined by a commercially reasonable rate that takes into account the facts and circumstances of each case at the time the transaction was entered into.

(38) "Send" in connection with any writing or notice means to deposit in the mail or deliver for transmission by any other usual means of communication with postage or cost of transmission provided for and properly addressed and in the case of an instrument to an address specified thereon or otherwise agreed, or if there be none to any address reasonable under the circumstances. The receipt of any writing or notice within the time at which it would have arrived if properly sent has the effect of a proper sending.

(39) "Signed" includes any symbol executed or adopted by a party with present intention to authenticate a writing.

(40) "Surety" includes guarantor.

(41) "Telegram" includes a message transmitted by radio, teletype, cable, any mechanical method of transmission, or the like.

(42) "Term" means that portion of an agreement which relates to a particular matter.

(43) “Unauthorized” signature means one made without actual, implied, or apparent authority and includes a forgery.

(44) “Value”: Except as otherwise provided with respect to negotiable instruments and bank collections (Code Sections 11-3-303, 11-4-208, and 11-4-209) a person gives “value” for rights if he acquires them:

(a) In return for a binding commitment to extend credit or for the extension of immediately available credit whether or not drawn upon and whether or not a charge-back is provided for in the event of difficulties in collection; or

(b) As security for or in total or partial satisfaction of a preexisting claim; or

(c) By accepting delivery pursuant to a preexisting contract for purchase; or

(d) Generally, in return for any consideration sufficient to support a simple contract.

(45) “Warehouse receipt” means a receipt issued by a person engaged in the business of storing goods for hire.

(46) “Written” or “writing” includes printing, typewriting, or any other intentional reduction to tangible form. (Code 1933, § 109A-1—201, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 1963, p. 188, § 1; Ga. L. 1978, p. 1081, §§ 3, 4; Ga. L. 1981, p. 634, § 2; Ga. L. 1985, p. 825, § 1; Ga. L. 1992, p. 6, § 11; Ga. L. 1992, p. 2626, § 1; Ga. L. 1993, p. 633, § 3; Ga. L. 1996, p. 1306, § 1; Ga. L. 2000, p. 136, § 11; Ga. L. 2001, p. 362, § 3.)

**The 2000 amendment**, effective March 16, 2000, part of an Act to revise, modernize, and correct the Code, substituted “mean ‘branch office’ as that term is” for “mean not only ‘branch bank,’ but also ‘bank office’ and ‘bank facility’ as those terms are” in the last sentence of subsection (4).

**The 2001 amendment**, effective July 1, 2001, rewrote subsection (9), inserted “security interest,” in subsection (32), and, in the first paragraph of subsection (37), deleted the former second sentence, which read “The retention or reservation of title by a seller of goods notwithstanding shipment or delivery to the buyer (Code Section 11-2-401) is limited in effect to a reservation of a ‘security interest.’”, in the current second sentence, inserted “consignor and a”, and substituted “accounts, chattel paper, a payment intangible, or a promissory note in a transaction that” for “accounts or chattel paper which”, deleted the former fifth sen-

tence, which read “Unless a consignment is intended as security, reservation of title thereunder is not a ‘security interest,’ but a consignment in any event is subject to the provisions on consignment sales (Code Section 11-2-326).”, and added the last two sentences.

**Editor’s notes.** — Ga. L. 1993, p. 633, which amended this Code section, provides, in § 5, not codified by the General Assembly: “This Act shall become effective on July 1, 1993, for all lease contracts that are first made or that first become effective between the parties on or after that date. This Act shall not apply to any lease first made or that first became effective between the parties before July 1, 1993, or to any extension, amendment, modification, renewal, or supplement of or to any such lease contract, unless the parties thereto specifically agree in writing that such lease contract, as extended, amended, modified, renewed, or



supplemented, shall be governed by this Act.”

**U.S. Code.** — The bankruptcy law, referred to in paragraph (23) of this section, is codified as 11 U.S.C.S. § 101 et seq.

**Law reviews.** — For article on the 1963 amendment to the Georgia Uniform Commercial Code, see 14 Mercer L. Rev. 378 (1963). For article, “Lease or Security Interest: A Classic Problem of Commercial Law,” see 28 Mercer L. Rev. 599 (1977). For article on Georgia cases dealing with commercial law from June 1977 through May 1978, see 30 Mercer L. Rev. 15 (1978). For article, “The Good Faith Purchase Idea and the Uniform Commercial Code,” see 15 Ga. L. Rev. 605 (1981). For article surveying developments in Georgia commercial law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 33 (1981). For article discussing judicial activism in cases involving claims and defenses under the Uniform Commer-

cial Code, see 17 Ga. L. Rev. 569 (1983). For article, “Impracticability As Risk Allocation: The Effect of Changed Circumstances upon Contract Obligations for the Sale of Goods,” see 22 Ga. L. Rev. 503 (1988).

For note, “The Law of Evidence in the Uniform Commercial Code,” see 1 Ga. L. Rev. 44 (1966). For note on 1992 amendment of this Code section, see 9 Ga. St. U.L. Rev. 168 (1992). For note on 1993 amendment of this section, see 10 Ga. St. U.L. Rev. 34 (1993).

For comment on *Sherrock v. Commercial Credit Corp.*, 290 A.2d 648 (Del. S. Ct. 1972), see 10 Ga. St. B.J. 110 (1973). For comment on *Perini Corp. v. First Nat’l Bank*, 553 F.2d 398 (5th Cir. 1977), see 27 Emory L.J. 393 (1978). For comment, “Lender Liability for Breach of the Obligation of Good Faith Performance,” see 36 Emory L.J. 917 (1987).

## JUDICIAL DECISIONS

### ANALYSIS

#### GENERAL CONSIDERATION

#### AGREEMENT

#### BUYER IN ORDINARY COURSE OF BUSINESS

#### CONSPICUOUS TERM OR CLAUSE

#### GOOD FAITH

#### HOLDER

#### NOTICE

#### PUBLIC SALE

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#### SIGNATURE

#### UNAUTHORIZED SIGNATURE OR ENDORSEMENT

### General Consideration

**UCC definitions inapplicable to criminal prosecution.** *Thogerson v. State*, 224 Ga. App. 76, 479 S.E.2d 463 (1996).

**The drawer of a check made payable to a third party** was deemed to have used the instrument in contemplation of its presentment for payment upon the action of a collecting bank and, thus, was engaged in a transaction governed by the UCC subject to the damage limitation provision of O.C.G.A. § 11-4-103. *Farr v. Trust Co. Bank*, 220 Ga. App. 423, 469 S.E.2d 501 (1996).

**Cited** in *Bennett v. Cannon*, 114 Ga. App. 479, 151 S.E.2d 828 (1966); *Scarboro v. Universal C.I.T. Credit Corp.*, 364 F.2d 10

(5th Cir. 1966); *McDonald v. Peoples Auto. Loan & Fin. Corp.*, 115 Ga. App. 483, 154 S.E.2d 886 (1967); *Sanders v. National Acceptance Co. of Am.*, 383 F.2d 606 (5th Cir. 1967); *Decatur Coca-Cola Bottling Co. v. Variety Vending Corp.*, 277 F. Supp. 393 (N.D. Ga. 1967); *Northside Bldg. & Inv. Co. v. Finance Co. of Am.*, 119 Ga. App. 131, 166 S.E.2d 608 (1969); *First Nat’l Bank & Trust Co. v. Smithloff*, 119 Ga. App. 284, 167 S.E.2d 190 (1969); *First Nat’l Bank & Trust Co. v. McElmurray*, 120 Ga. App. 134, 169 S.E.2d 720 (1969); *Steelman v. Associates Disct. Corp.*, 121 Ga. App. 649, 175 S.E.2d 62 (1970); *United States v. Big Z Whse.*, 311 F. Supp. 283 (S.D. Ga. 1970); *Greater S. Distrib. Co. v. Usry*, 124 Ga. App. 525, 184



S.E.2d 486 (1971); *Rockwin Corp. v. Kincaid*, 124 Ga. App. 570, 184 S.E.2d 509 (1971); *International Harvester Credit Corp. v. Commercial Credit Equip. Corp.*, 125 Ga. App. 477, 188 S.E.2d 110 (1972); *L.M. Berry & Co. v. Blackmon*, 129 Ga. App. 347, 199 S.E.2d 610 (1973); *Harris v. Hill*, 129 Ga. App. 403, 199 S.E.2d 847 (1973); *First Nat'l Bank & Trust Co. v. Olivetti Corp. of Am.*, 130 Ga. App. 896, 204 S.E.2d 781 (1974); *Geohagan v. Commercial Credit Corp.*, 130 Ga. App. 828, 204 S.E.2d 784 (1974); *REA Express, Inc. v. Ginn*, 131 Ga. App. 33, 205 S.E.2d 94 (1974); *Chrysler Corp. v. Wilson Plumbing Co.*, 132 Ga. App. 435, 208 S.E.2d 321 (1974); *International Harvester Credit Corp. v. Associates Fin. Servs. Co.*, 133 Ga. App. 488, 211 S.E.2d 430 (1974); *Kennedy v. Thruway Serv. City, Inc.*, 133 Ga. App. 858, 212 S.E.2d 492 (1975); *Weaver v. Ralston Motor Hotel, Inc.*, 135 Ga. App. 536, 218 S.E.2d 260 (1975); *Brannon v. First Nat'l Bank*, 137 Ga. App. 275, 223 S.E.2d 473 (1976); *Peoples Bank v. Northwest Ga. Bank*, 139 Ga. App. 264, 228 S.E.2d 181 (1976); *UIV Corp. v. Oswald*, 139 Ga. App. 697, 229 S.E.2d 512 (1976); *Rollins Communications, Inc. v. Georgia Inst. of Real Estate, Inc.*, 140 Ga. App. 448, 231 S.E.2d 397 (1976); *Billas v. Dwyer*, 140 Ga. App. 774, 232 S.E.2d 102 (1976); *Jones v. Cranman's Sporting Goods*, 142 Ga. App. 838, 237 S.E.2d 402 (1977); *BVA Credit Corp. v. Mullins*, 552 F.2d 1145 (5th Cir. 1977); *Perini Corp. v. First Nat'l Bank*, 553 F.2d 398 (5th Cir. 1977); *Anthony v. Community Loan & Inv. Corp.*, 559 F.2d 1363 (5th Cir. 1977); *Ginn v. Citizens & S. Nat'l Bank*, 145 Ga. App. 175, 243 S.E.2d 528 (1978); *B & P Lumber Co. v. First Nat'l Bank*, 147 Ga. App. 762, 250 S.E.2d 505 (1978); *Footpress Corp. v. Strickland*, 242 Ga. 686, 251 S.E.2d 278 (1978); *Barton v. Chemical Bank*, 577 F.2d 1329 (5th Cir. 1978); *Central Bank v. American Charms, Inc.*, 149 Ga. App. 218, 253 S.E.2d 857 (1979); *Vincent Brass & Aluminum Co. v. Johnson*, 149 Ga. App. 537, 254 S.E.2d 752 (1979); *Cox Caulking & Insulating Co. v. Brockett Distrib. Co.*, 150 Ga. App. 424, 258 S.E.2d 51 (1979); *Broun v. Bank of Early*, 243 Ga. 319, 253 S.E.2d 755 (1979); *Johnson v. Vincent Brass & Aluminum Co.*, 244 Ga. 412, 260 S.E.2d 325 (1979); *Trust Co. Bank v. Atlanta IBM Employees Fed. Credit Union*, 245 Ga. 262, 264 S.E.2d 202 (1980); *First Bank v.*

*Kilpatrick-Smith Constr. Co.*, 153 Ga. App. 112, 264 S.E.2d 576 (1980); *Trust Co. of Ga. Bank v. Port Term. & Warehousing Co.*, 153 Ga. App. 735, 266 S.E.2d 254 (1980); *Commercial Credit Equip. Corp. v. Bates*, 154 Ga. App. 71, 267 S.E.2d 469 (1980); *Clements v. Central Bank*, 155 Ga. App. 27, 270 S.E.2d 194 (1980); *Guthrie v. Pilgrim Realty Co.*, 156 Ga. App. 692, 275 S.E.2d 686 (1980); *Trust Co. v. Milam*, 4 Bankr. 621 (M.D. Ga. 1980); *Mayo v. Bank of Carroll County*, 157 Ga. App. 148, 276 S.E.2d 660 (1981); *Trust Co. v. Cowart*, 158 Ga. App. 488, 280 S.E.2d 886 (1981); *First Nat'l Bank v. Rivercliff Hdwe., Inc.*, 161 Ga. App. 259, 287 S.E.2d 701 (1982); *Sterling Nat'l Bank & Trust Co. v. Southwire Co.*, 713 F.2d 684 (11th Cir. 1983); *Loeb v. G.A. Gertmenian & Sons (In re A.J. Nichols, Ltd.)*, 21 Bankr. 612 (Bankr. N.D. Ga. 1982); *Ford v. Rollins Protective Servs. Co.*, 171 Ga. App. 882, 322 S.E.2d 62 (1984); *Thomas v. Ralston Purina Co.*, 43 Bankr. 201 (Bankr. M.D. Ga. 1984); *Edmondson v. Northrup King & Co.*, 817 F.2d 742 (11th Cir. 1987); *Trust Co. Bank v. Henderson*, 185 Ga. App. 367, 364 S.E.2d 289 (1987); *Mark Singleton Buick, Inc. v. Taylor*, 194 Ga. App. 630, 391 S.E.2d 435 (1990); *Perimeter Ford, Inc. v. Edwards*, 197 Ga. App. 747, 399 S.E.2d 520 (1990); *Calhoon v. Mr. Locksmith Co.*, 200 Ga. App. 618, 409 S.E.2d 226 (1991); *In re Leeds Bldg. Prods., Inc.*, 141 Bankr. 265 (Bankr. N.D. Ga. 1992); *Perez-Medina v. First Team Auction, Inc.*, 206 Ga. App. 719, 426 S.E.2d 397 (1992); *Tompkins v. Mayers*, 209 Ga. App. 809, 434 S.E.2d 798 (1993); *D.L. Lee & Sons v. ADT Sec. Sys.*, 916 F. Supp. 1571 (S.D. Ga. 1995); *Lewis v. Lease Atlanta, Inc.*, 234 Ga. App. 812, 508 S.E.2d 188 (1998); *Fedeli v. UAPA Ag. Chem., Inc.*, 237 Ga. App. 337, 514 S.E.2d 684 (1999); *Trust Assoc. v. Snead*, 253 Ga. App. 475, 559 S.E.2d 502 (2002).

### Agreement

**Agreement governs rights and liabilities of parties.** — It is elementary that under the law of contracts the agreement itself governs the rights and liabilities of the parties. Nothing in the Uniform Commercial Code as adopted in Georgia requires a different result. *Tri-County Livestock Auction Co. v. Bank of Madison*, 228 Ga. 325, 185 S.E.2d 393 (1971).

### Buyer in Ordinary Course of Business

**Buyer's special relationship with seller does not preclude buyer from being buyer in the ordinary sense.** — Although the fact that a person had a special relationship with the seller would not preclude the person from being a buyer in the ordinary course, this factor, along with other factors that the sale was not handled in every material way as a sale out of inventory to any retail customer, may preclude such person from being a buyer in the ordinary course of business. *Hanington v. Palmer*, 103 Bankr. 348 (Bankr. M.D. Ga. 1989).

**Knowledge of security interest.** — A buyer who merely knows of a security interest of another party covering certain goods constitutes a buyer in ordinary course of business and takes free of that security interest, whereas a buyer who knows that the sale actually violates some term of the security agreement not waived by the secured party takes subject to that security interest. *First Nat'l Bank v. Atlanta Classic Cars, Inc.*, 184 Ga. App. 784, 363 S.E.2d 16 (1987).

### Conspicuous Term or Clause

**Disclaimer of implied warranty was adequate.** — Where the disclaimer was in letters larger than any other type on the form, where significant portions of the disclaimer were capitalized, thus distinguishing them from other language on the form, and where the language was conspicuously set forth, the limitation of the implied warranty of merchantability met the requirements of O.C.G.A. § 11-2-316(2). *Harris v. Sulcus Computer Corp.*, 175 Ga. App. 140, 332 S.E.2d 660 (1985).

Warranty disclaimer language was "conspicuous" where it appeared in capital letters, in a separate paragraph on the front of an invoice, and in a type style which was otherwise employed on the form only with regard to language relating to the limitation of remedies. *Apex Supply Co. v. Benbow Indus., Inc.*, 189 Ga. App. 598, 376 S.E.2d 694 (1988).

Roofing material vendor's disclaimer of warranty, which stated in capitalized letters that the vendor made no warranties, express or implied, including merchantability or fitness for a particular purpose, except as expressly stated therein, was sufficient to

preclude an action against the vendor for breach of the implied warranties of merchantability and fitness. *Steele v. Gold Kist, Inc.*, 186 Ga. App. 569, 368 S.E.2d 196, cert. denied, 186 Ga. App. 919, 368 S.E.2d 196 (1988).

**Disclaimer inadequate.** — Where a paragraph in a lease purporting to disclaim implied warranties of merchantability and fitness was in the same size font as the rest of the printed terms and, although separately numbered, was not otherwise set apart from the other paragraphs, the language was not "conspicuous" within the meaning of O.C.G.A. § 11-1-201(10). *Bailey v. Tucker Equip. Sales, Inc.*, 236 Ga. App. 289, 510 S.E.2d 904 (1999).

A reasonable person would not necessarily have noticed and understood that, by the mere mention of "as is" in the context in which it appeared in a lease agreement, without any mention of any warranties or any disclaimers of warranties, he or she was agreeing to forego any rights to lease a piece of equipment in fit and suitable working condition. *Bailey v. Tucker Equip. Sales, Inc.*, 236 Ga. App. 289, 510 S.E.2d 904 (1999).

### Good Faith

**Determination of "good faith" is a question of fact** requiring consideration of all circumstances attending a transaction; however, where facts of relevant event are clear and fully developed in motion for summary judgment, it remains only for court to determine proper legal inference to be drawn from the facts. *First Nat'l Bank v. Trust Co.*, 510 F. Supp. 651 (N.D. Ga. 1981).

**The 1996 amendments of the UCC** definitions of "good faith" and "holder in due course" (O.C.G.A. §§ 11-3-103 and 11-3-302) did not apply retroactively to transactions before their effective date; rather, the definitions in O.C.G.A. §§ 11-1-201 and 11-3-302 (former version) applied. *Choo Choo Tire Serv., Inc v. Union Planters Nat'l Bank*, 231 Ga. App. 346, 498 S.E.2d 799 (1998).

**Illustrative cases.** — A bank was a good faith purchaser for value of certain cars under the following circumstances: The proprietor of a used-car business maintained a special checking account with the bank; the proprietor purchased cars from a car auction company with checks drawn upon this



account; the proprietor then executed a promissory note to the bank, which loaned the proprietor the purchase price and took a security interest in the car; the account became overdrawn and the bank refused to honor the checks made out to the auction company. *Georgia Cas. & Sur. Co. v. Tennille Banking Co. (In re Smith)*, 51 Bankr. 904 (Bankr. M.D. Ga. 1985).

Bank actions in failing to inform customers of a rule change on signature verification, allowing an employee of customer to place funds in a checking account from the customer's line of credit, and arranging personal loans for the employee were not evidence of a lack of good faith on the part of the bank in paying forged checks. *Eason Publications, Inc. v. Nationsbank*, 217 Ga. App. 726, 458 S.E.2d 899 (1995).

### Holder

**Bank is holder of instrument issued to it even if payee does not endorse it.** — Even if payee does not personally endorse an instrument, a bank is holder of that instrument as long as the instrument was issued to the bank. *Pazol v. Citizens Nat'l Bank*, 110 Ga. App. 319, 138 S.E.2d 442 (1964).

**Bank not holder of instrument lacking joint payee's endorsement.** — A bank never became a holder in due course where a check made payable jointly to the bank's customer and a third party was never endorsed by the third party before deposit in the bank. *Citizens & S. Nat'l Bank v. Sun Belt Elec. Constructors, Inc.*, 64 Bankr. 377 (Bankr. N.D. Ga. 1986).

**The procedural benefit afforded by O.C.G.A. § 13-7-7 is not available to a party who is the original payee of negotiable paper** even though the original payee may qualify as a "holder" under O.C.G.A. § 11-1-201. *Jones v. FDIC*, 151 Ga. App. 619, 260 S.E.2d 751 (1979).

**A party can establish status as holder of instruments sued on by producing the instruments in evidence.** *James Talcott, Inc. v. Allahabad Bank, Ltd.*, 444 F.2d 451 (5th Cir.), cert. denied, 404 U.S. 940, 92 S. Ct. 280, 30 L. Ed. 2d 253 (1971).

### Notice

**Knowledge refers to actual knowledge.** — Knowledge of a fact is defined in the Uni-

form Commercial Code as actual knowledge. *Hopkins v. Kemp Motor Sales, Inc.*, 139 Ga. App. 471, 228 S.E.2d 607 (1976).

Where security interest in an automobile was not properly recorded and was documented only in divorce decree's incorporated agreement, the secured party failed to carry burden of proving that buyer had actual knowledge of secured party's interest, even assuming the buyer had knowledge of the divorce. *Freeman v. Bentley*, 205 Ga. App. 409, 422 S.E.2d 435 (1992).

**Jury question.** — Where there is conflicting evidence on the nature and extent of the debtor's knowledge, the debtor should not be estopped from raising lack of notice as a defense. Rather, the question of "reasonable notification" should be submitted to the jury. *Comfort Trane Air Conditioning Co. v. Trane Co.*, 592 F.2d 1373 (5th Cir. 1979).

### Public Sale

**When sale is commercially reasonable.** — Sale is commercially reasonable where it is done in public, during business hours, upon adequate notice within reasonable time of repossession, and under conditions reasonably calculated to bring fair market price. *Hardin v. Norlin Music, Inc.*, 159 Ga. App. 167, 283 S.E.2d 21 (1981).

**Burden of showing reasonable conduct of sale.** — Secured party bears burden under O.C.G.A. § 11-1-201(31.1) to show that sale was conducted in reasonable fashion. *Hardin v. Norlin Music, Inc.*, 159 Ga. App. 167, 283 S.E.2d 21 (1981).

**Opportunity for competitive bidding required.** — Where advertised sale under O.C.G.A. § 11-1-201(31.1) is held as scheduled, and proper notice is given, any person has right to enter competitive bid. Opportunity for competitive bidding is established and that is all that is required, even if no third party bids at sale. *Hardin v. Norlin Music, Inc.*, 159 Ga. App. 167, 283 S.E.2d 21 (1981).

To require that secured party rebut mere supposition that bidding may have been chilled would be unfair. *Hardin v. Norlin Music, Inc.*, 159 Ga. App. 167, 283 S.E.2d 21 (1981).

### Security Interest

**"Magic words" not required.** — Georgia law does not require "magic words" to cre-

**Security Interest (Cont'd)**

ate a valid security interest. Rather, the court must refer to the general law of contracts and determine whether the parties intended to create a security agreement. *National Traveler, Inc. v. Paccom Leasing Corp.*, 110 Bankr. 619 (Bankr. M.D. Ga. 1990).

**Filing requirements do not apply to leases.**

— Where the agreement is a lease it is beyond the requirements for filing O.C.G.A. § 11-1-201. *Sanders v. Commercial Credit Corp.*, 398 F.2d 988 (5th Cir. 1968).

**A “lease intended as security” is one which has the ultimate intent of a sale.** In re Atlanta Times, Inc., 259 F. Supp. 820 (N.D. Ga. 1966), aff’d sub nom. *Sanders v. National Acceptance Co. of Am.*, 383 F.2d 606 (5th Cir. 1967).

**Three elements for determining whether a lease is a security agreement:** one, there must be an agreement by the lessee to pay lessor a set amount; two, amount must be equivalent to value of leased goods; and three, lessee must become owner or have option to become owner of leased goods. If any one of these elements is lacking, the lease is not a financing agreement but is a true lease. *Trax, Inc. v. Wood*, 7 Bankr. 543 (Bankr. N.D. Ga. 1980); *Shamrock Rental Co. v. Huffman*, 63 Bankr. 737 (Bankr. N.D. Ga. 1986).

**Security agreement need not be in any particular form.** The requirements are as follows: (1) there must be a writing; (2) the language must reflect an intent to create a security interest; (3) the writing must reasonably describe the collateral; and (4) the agreement must be signed by the debtor. *Trust Co. Bank v. Walker*, 35 Bankr. 237 (Bankr. N.D. Ga. 1983).

**Article 9 applies to lease intended as security interest, but not to bona fide leases.** *United Counties Trust Co. v. Mac Lum, Inc.*, 643 F.2d 1140 (5th Cir. 1981).

**While the terms of the agreement created a lease rather than a secured transaction,** any ambiguity caused by the option purchase price at the end of the lease ceased to exist when the parties entered into the addendum, prior to performance by either party, which made the purchase price the fair market value. *Summerhill Neighborhood Dev. Corp. v. Telerent Leasing Corp.*, 242 Ga. App. 142, 528 S.E.2d 889 (2000).

**Name given to transaction by parties not conclusive.** — Whether lease is intended as security is to be determined by facts of each case; name which parties give it is not conclusive. *Ford Motor Credit Co. v. Dowdy*, 159 Ga. App. 666, 284 S.E.2d 679 (1981), overruled on other grounds, *Adams v. D & D Leasing Co.*, 191 Ga. App. 121, 381 S.E.2d 94 (1989).

**Motor vehicle lease agreement.** — Considering the facts of the case in light of the plain language of the Georgia Code, an agreement giving debtor right to possession and use of a new truck in return for certain payments constituted a lease under Georgia law, even though the contract did not give debtor the power to terminate the agreement prior to the expiration of the term of the agreement. In re Paz, 179 Bankr. 743 (Bankr. S.D. Ga. 1995).

The best test for determining the intent of an agreement which provides for an option to buy—that is, whether it is a lease or a security agreement—is a comparison of the option price with the market value of the equipment at the time the option is to be exercised. Such a comparison shows whether the lessee is paying actual value (evidencing a lease) or acquiring the property at a substantially lower price (evidencing a security agreement). *Mejia v. Citizens & S. Bank*, 175 Ga. App. 80, 332 S.E.2d 170 (1985).

When an alleged automobile lease agreement contains an option to purchase the leased vehicle, the “best test” for determining the agreement’s purpose and the parties’ contractual intent is a comparison of the option price with the market value of the equipment at the time the option is to be exercised. If the lessees can acquire the property under the purchase option for little or no additional consideration in relation to its true value, the lease is one intended for security. If the lessees are required to pay at least a reasonable price, if not a price equal to or greater than the actual value of the automobile, at option time in order to exercise their purchase option, the agreement is intended to be and is in fact a true lease and not a disguised security transaction. *Woods v. General Elec. Credit Auto Lease, Inc.*, 187 Ga. App. 57, 369 S.E.2d 334 (1988).

**Factors tending to establish that “lease” transaction is a conditional sale** are: lessor’s purchase of equipment from supplier; re-



quirement that lessee be responsible for payment of all taxes, insurance and expenses for repairs, an initial down payment, and additional payment of security deposit. *Ford Motor Credit Co. v. Dowdy*, 159 Ga. App. 666, 284 S.E.2d 679 (1981), overruled on other grounds, *Adams v. D & D Leasing Co.*, 191 Ga. App. 121, 381 S.E.2d 94 (1989).

Additional factors which tend to establish that a transaction is a conditional sale instead of a true lease include an initial down payment and the requirement that the lessee be responsible for payment of taxes and insurance. *Walton v. Howard*, 198 Ga. App. 804, 403 S.E.2d 90 (1991).

**Lease creating security interest.** — A lease will create a security interest if: (a) it secures payment or performance of an obligation upon personal property reserved by the lease; and (b) the lease is intended as security. Such intention is to be determined objectively on the basis of the facts of the case. *Citizens & S. Equip. Leasing, Inc. v. Atlanta Fed. Sav. & Loan Ass'n*, 144 Ga. App. 800, 243 S.E.2d 243 (1978).

**A lease-purchase agreement** meeting the requirements of O.C.G.A. § 10-1-681 constituted a true lease, not a security agreement, and was subject to § 365 of the Bankruptcy Code, 11 U.S.C.S. § 365. *Central Rents, Inc. v. Johnson*, 203 Bankr. 498 (Bankr. S.D. Ga. 1996).

**Lease disguised as security agreement.** — Creditor's unqualified right to require the debtor to repurchase equipment during or at termination of a purported lease, coupled with a letter agreement that was intended to insure the return of the creditor's investment and a return on the investment of a certain percentage indicated that the lease was a disguised security agreement. *Moore v. Emery (In re Am. Steel Prod., Inc.)*, 203 Bankr. 504 (Bankr. S.D. Ga. 1996).

**"Lease" which requires lessee to purchase the property upon cancellation.** — An agreement termed a "lease," which requires the lessee to purchase the vehicle upon cancellation, is equivalent to a secured sale, even though the lessor retains all indicia of ownership. *Pierce v. Leasing Int'l, Inc.*, 142 Ga. App. 371, 235 S.E.2d 752 (1977).

Where a "lessee" has not been given an option to purchase collateral at a nominal price, but is under a contractual duty to make the purchase, it is the purchaser, and

the "lessor" is the seller and secured party. *USI Capital & Leasing v. Medical Oxygen Serv., Inc.*, 36 Bankr. 341 (Bankr. N.D. Ga. 1984).

**Lease of equipment providing that title remain in lessor and for redelivery to lessor at expiration of term.** — A lease of equipment for five years at an agreed price, with title to the property remaining in the lessor and with delivery of possession of the equipment to lessor to be made at the expiration of the lease, cannot be construed as the creation of a security interest. *McGuire v. Associates Capitol Servs. Corp.*, 133 Ga. App. 408, 210 S.E.2d 862 (1974).

**Lessee becoming owner for nominal, or no, consideration upon compliance with lease.** — An agreement whereby upon compliance with the terms of a lease the lessee shall become or has the option to become the owner of the property for no additional consideration or for a nominal consideration makes the lease one intended for security. *Mann Inv. Co. v. Columbia Nitrogen Corp.*, 173 Ga. App. 77, 325 S.E.2d 612 (1984).

**A lease agreement covering machinery and equipment** was a security instrument, rather than a true lease, where the agreement provided that "the Lessee shall have the option to purchase ... for the sum of \$1.00" and there was evidence which indicated the machinery and equipment were worth much more than \$1.00 upon the termination date of the lease. *Melton v. J.M. Kenith Co.*, 182 Ga. App. 184, 355 S.E.2d 115, overruled on other grounds, *Bank S. v. Jones*, 185 Ga. App. 125, 364 S.E.2d 281 (1987).

**Computer equipment lease agreement** was "true lease," where the terms of the lease required payment of more than a "nominal" price to exercise an option to purchase the equipment. *Third Century, Inc. v. Morgan*, 187 Ga. App. 718, 371 S.E.2d 262 (1988).

**Rental purchase agreements between a rent-to-own business and renter were true leases** where, even though they contained some provisions found in secured sales agreements, the renter could return the property without any further obligation, was not required to renew the agreements or purchase the property, or to make a down payment or security deposit, the company was responsible for maintaining and paying

**Security Interest (Cont'd)**

taxes on the property, and the agreements expressly provided that the renter intended to rent rather than purchase the property and would not own the property unless the renter bought it or acquired ownership as provided by the agreements. *Mr. C's Rent to Own v. Jarrells*, 205 Bankr. 994 (Bankr. M.D. Ga. 1997).

**Contract to lease washing machine for one week, with option to renew lease** "for an additional term at the conclusion of each term or rental period, by the payment to the lessor of the rental payment," was a "true lease" and no security interest was created therein. *Elcan Invs., Inc. v. Kirk*, 187 Ga. App. 676, 371 S.E.2d 146 (1988).

**Telephone equipment lease agreement** was a true lease, not a secured transaction, where the initial term was for five years and the lessee was not required to renew the lease or purchase the equipment at the end of the term and did not have the option to renew the lease or purchase the property at the end of the term for a nominal consideration. *Carter v. Tokai Fin. Servs., Inc.*, 231 Ga. App. 755, 500 S.E.2d 638 (1998).

**Agreement to "lease" equipment for a fixed period** for an amount which approximated the original purchase price, with an option to purchase for no additional consideration, was a security agreement rather than a true lease. *Tri Leasing Corp. v. Fulton Textiles, Inc.*, 116 Bankr. 302 (Bankr. N.D. Ga. 1990).

**Three-year "lease agreement contract,"** by which "lessee" would make monthly payments and, at the end of the three years, without any additional payments, would own the leased equipment, was a security agreement and not a lease. *National Traveler, Inc. v. Paccom Leasing Corp.*, 110 Bankr. 619 (Bankr. M.D. Ga. 1990).

**Agreement which did not stipulate a purchase price** but indicated an intent to negotiate a purchase price was a true lease, and not a conditional sale. *Chapman v. Avco Fin. Servs. Leasing Co.*, 193 Ga. App. 147, 387 S.E.2d 391 (1989).

**Farmers Home Administration.** — Despite the fact that the form executed by the debtors did not contain a clause that "granted" a security interest to the Farmers Home Administration (FmHA), considering other

language in the form, including a heading "Security Agreement (chattels and crops)," a reference to the FmHA as the "Secured Party," and a provision which read: "It is the purpose and intent of this instrument that ... this instrument shall secure payment of the note," the debtors did grant the FmHA a security interest in crops, livestock and offspring, farm equipment, and farm products. *United States v. Hollie*, 42 Bankr. 111 (Bankr. M.D. Ga. 1984).

**Evidence indicative of motor vehicle lease agreement.** — In a "motor vehicle lease" agreement involving a question as to whether the agreement was really a security transaction, the fact that the original lessor was in the automobile rental business and that the lessor did not require a financing statement indicated that a true lease agreement was involved. *Mejia v. Citizens & S. Bank*, 175 Ga. App. 80, 332 S.E.2d 170 (1985).

**Signature**

**Maker's intent.** — Whatever a maker intends as the maker's signature is the maker's signature and gives effect to the maker's contract. *Kohlmeyer & Co. v. Bowen*, 126 Ga. App. 700, 192 S.E.2d 400 (1972).

**A complete signature is not necessary.** — Under O.C.G.A. § 11-1-201(39) a complete signature is not necessary to constitute an authentication, as it may be printed and may be on any part of the document including a billhead or letterhead. *Evans v. Moore*, 131 Ga. App. 169, 205 S.E.2d 507 (1974).

**Signature of face does not authenticate title retention agreement on back.** — Placing of initials and/or signature on face of documents does not suffice to authenticate title retention agreement on reverse and as a consequence does not entitle it to priority over disputed collateral. *Food Serv. Equip. Co. v. First Nat'l Bank*, 121 Ga. App. 421, 174 S.E.2d 216 (1970).

**Unauthorized Signature or Endorsement**

**Apparent authority to execute indorsements.** — Where its president-treasurer had at least apparent authority—if not actual authority—to execute indorsements, a corporation could not defeat such indorsements merely by alleging that in truth and in fact the officer had no such



authority and that the officer's act in indorsing the paper had not been ratified. *Bank S. v. Midstates Group, Inc.*, 185 Ga.

App. 342, 364 S.E.2d 58 (1987); *Holliday Constr. Co. v. Sandy Springs Assocs.*, 198 Ga. App. 20, 400 S.E.2d 380 (1990).

### OPINIONS OF THE ATTORNEY GENERAL

A contract of guaranty is a collateral "obligation" which is just as enforceable as any

other contract. 1971 Op. Att'y Gen. No. 71-69.

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 11 Am. Jur. 2d, Bills and Notes, §§ 54, 84 et seq., 186, 236 et seq., 287 et seq., 361 et seq., 387. 12 Am. Jur. 2d, Bills and Notes, §§ 586, 631. 13 Am. Jur. 2d, Business Trusts, § 1. 15A Am. Jur. 2d, Commercial Code, § 1 et seq. 17A Am. Jur. 2d, Contracts, §§ 1-3. 27A Am. Jur. 2d, Equity, §§ 1, 207. 53A Am. Jur. 2d, Money, § 1. 67 Am. Jur. 2d, Sales, §§ 10-27, 31. 68A Am. Jur. 2d, Secured Transactions, § 31 et seq.

**C.J.S.** — 82 C.J.S., Statutes, § 309.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 1-201.

**ALR.** — Character of bill of lading contemplated by a guaranty of payment of a draft with bill of lading attached, 13 ALR 166.

Right of trustee in bankruptcy as regards property held in trust for bankrupt, 16 ALR 552; 138 ALR 1349.

Right of surety who discharges obligation due to government to be subrogated to priority or preference of latter, 24 ALR 1502; 83 ALR 1131.

Right of receiver, assignee, or trustee in bankruptcy to possession and administration of collateral validly pledged by his insolvent, 28 ALR 409.

What money is legal tender, 31 ALR 246.

Public records as affecting one's character as a holder in due course of negotiable paper, 37 ALR 860.

Branch banks, 50 ALR 1340; 136 ALR 471.

Construction, application, and effect of statute relating to question as to time as essence of contract, 79 ALR 410.

Who must sign and form of signature, in case of partnership, in order to comply with statute of frauds, 114 ALR 1005.

Branch banks, 136 ALR 471.

Right of trustee in bankruptcy as regards property held in trust for bankrupt, 138 ALR 1349.

What constitutes a "public sale," 4 ALR2d 575.

Right to follow chattel into hands of purchaser who took in payment of pre-existing debt, 11 ALR3d 1028.

Extent of duty of transferee of bulk sale to investigate regarding seller's creditors under Uniform Commercial Code Article 6, 67 ALR3d 1056.

Construction and effect of UCC § 2-316(2) providing that implied warranty disclaimer must be "conspicuous," 73 ALR3d 248.

Who is "person in business of selling goods of that kind" within provision of UCC § 1-201(9) defining buyer in ordinary course of business for purposes of UCC § 9-307(1), 73 ALR3d 338.

Maintenance of computer terminal in retail store for purpose of effecting transfer of funds between financial institution and its depositors as conduct of banking business by store, 73 ALR3d 1282.

Equipment leases as security interest within Uniform Commercial Code § 1-201(37), 76 ALR3d 11.

Who is "buyer in ordinary course of business" under the Uniform Commercial Code, 87 ALR3d 11.

What constitutes "money" within meaning of Uniform Commercial Code, 40 ALR4th 346.

### 11-1-202. Prima-facie evidence by third party documents.

A document in due form purporting to be a bill of lading, policy or

certificate of insurance, official weigher's or inspector's certificate, consular invoice, or any other document authorized or required by the contract to be issued by a third party shall be prima-facie evidence of its own authenticity and genuineness and of the facts stated in the document by the third party. (Code 1933, § 109A-1—202, enacted by Ga. L. 1962, p. 156, § 1.)

**Cross references.** — Duty of certified public weigher to obtain official seal from Department of Agriculture, and as to effect of impressing of seal on certificates, § 10-2-45.

**Law reviews.** — For note, "The Law of Evidence in the Uniform Commercial Code," see 1 Ga. L. Rev. 44 (1966).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 15A Am. Jur. 2d, Commercial Code, §§ 32, 51, 58.

**C.J.S.** — 32A C.J.S., Evidence, §§ 819 et seq., 967.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 1-202.

**ALR.** — Construction and effect of § 1-202 of the Uniform Commercial Code dealing with documents which are prima facie evidence of their own authenticity and genuineness, 72 ALR3d 1243.

### 11-1-203. Obligation of good faith.

Every contract or duty within this title imposes an obligation of good faith in its performance or enforcement. (Code 1933, § 109A-1—203, enacted by Ga. L. 1962, p. 156, § 1.)

**Law reviews.** — For survey article on contracts — employment at will, see 34 Mercer L. Rev. 86 (1982). For article, "Baseline Questions in Legal Reasoning: The Example of Property in Jobs," see 23 Ga. L. Rev. 911 (1989). For annual survey article discussing the obligation of good faith, see 46 Mercer L. Rev. 95 (1994).

For note, "The Growth of Lender Liability: An Economic Perspective," see 21 Ga. L. Rev. 723 (1987).

For comment, "Lender Liability for Breach of the Obligation of Good Faith Performance," see 36 Emory L.J. 917 (1987).

### JUDICIAL DECISIONS

**Section construed.** — O.C.G.A. § 11-1-203 in effect states that what is not regulated by contract should be done in such a way as to show good faith in carrying out of what is expressed. *Fulton Nat'l Bank v. Willis Denney Ford, Inc.*, 154 Ga. App. 846, 269 S.E.2d 916 (1980).

**O.C.G.A. § 11-1-203 does not state a cause of action** for which a claim of relief may be granted. *Management Assistance, Inc. v. Computer Dimensions, Inc.*, 546 F. Supp. 666 (N.D. Ga. 1982), *aff'd sub nom. Computer Dimensions v. Basic Four*, 747 F.2d 708 (11th Cir. 1984).

**Inapplicable in financing of residential lots.** — The implied covenant of good faith

under the Uniform Commercial Code was inapplicable to a case involving the financing of residential lots, rather than the sale of goods. *Lake Tightsqueeze, Inc. v. Chrysler First Fin. Servs. Corp.*, 210 Ga. App. 178, 435 S.E.2d 486 (1993).

**Substantial compliance with spirit of contract.** — "Good faith" is merely a shorter way of saying substantial compliance with the spirit, and not the letter only, of the contract. *Crooks v. Chapman Co.*, 124 Ga. App. 718, 185 S.E.2d 787 (1971).

**Banking provision enforceable subject to good faith requirement.** — Business checking account agreement containing provision that bank may charge any indebtedness of



depositor to bank, whether or not matured, against account if the bank deems itself insecure with respect to any such indebtedness, is enforceable, subject to the general requirement of good faith in its enforcement as set forth in O.C.G.A. § 11-1-203. *First Nat'l Bank v. Appalachian Indus., Inc.*, 146 Ga. App. 630, 247 S.E.2d 422 (1978).

**No bad faith discharge of notes due to charge backs under factoring agreement.** — *Delta Diversified, Inc. v. Citizens & S. Nat'l Bank*, 171 Ga. App. 625, 320 S.E.2d 767 (1984).

**Good faith not violated.** — Bank's failure to foreclose sooner on secured collateral did not constitute a breach of good faith and fair dealing owed to guarantors. *Greenwald v.*

*Columbus Bank & Trust Co.*, 228 Ga. App. 527, 492 S.E.2d 248 (1997).

**Cited in** *Geohagan v. Commercial Credit Corp.*, 130 Ga. App. 828, 204 S.E.2d 784 (1974); *Central Soya Co. v. Bundrick*, 137 Ga. App. 63, 222 S.E.2d 852 (1975); *Interstate Sec. Police, Inc. v. Citizens & S. Emory Bank*, 237 Ga. 37, 226 S.E.2d 583 (1976); *Henderson Few & Co. v. Rollins Communications, Inc.*, 148 Ga. App. 139, 250 S.E.2d 830 (1978); *Fratelli Gardino v. Caribbean Lumber Co.*, 447 F. Supp. 1337 (S.D. Ga. 1978); *Brack v. Brownlee*, 246 Ga. 818, 273 S.E.2d 390 (1980); *Smithloff v. Benson*, 173 Ga. App. 870, 328 S.E.2d 759 (1985); *West v. Koufman*, 259 Ga. 505, 384 S.E.2d 664 (1989).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 11 Am. Jur. 2d, Banks and Financial Institutions, § 918. 11 Am. Jur. 2d, Bills and Notes, §§ 276, 283, 295 et seq. 12 Am. Jur. 2d, Bills and Notes, § 586. 15A Am. Jur. 2d, Commercial Code, § 20. 17A Am. Jur. 2d, Contracts, § 342. 67 Am. Jur. 2d, Sales, §§ 21-23.

**C.J.S.** — 17B C.J.S., Contracts, § 562.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 1-203.

**ALR.** — Enforceability of transaction entered into pursuant to referral sales arrangement, 14 ALR3d 1420.

Failure to deliver ordered merchandise to customer on date promised as unfair or deceptive trade practice, 7 ALR4th 1257.

### 11-1-204. Time; reasonable time; “seasonably.”

(1) Whenever this title requires any action to be taken within a reasonable time, any time which is not manifestly unreasonable may be fixed by agreement.

(2) What is a reasonable time for taking any action depends on the nature, purpose, and circumstances of such action.

(3) An action is taken “seasonably” when it is taken at or within the time agreed or if no time is agreed at or within a reasonable time. (Code 1933, § 109A-1—204, enacted by Ga. L. 1962, p. 156, § 1.)

### JUDICIAL DECISIONS

**“Reasonable time” does not mean “immediately.”** *Trailmobile Div. of Pullman, Inc. v. Jones*, 118 Ga. App. 472, 164 S.E.2d 346 (1968); *Solomon Refrigeration, Inc. v. Osburn*, 148 Ga. App. 772, 252 S.E.2d 686 (1979).

What is a reasonable time is ordinarily a matter of fact to be determined by jury under particular circumstances of the case.

*Trailmobile Div. of Pullman, Inc. v. Jones*, 118 Ga. App. 472, 164 S.E.2d 346 (1968); *Solomon Refrigeration, Inc. v. Osburn*, 148 Ga. App. 772, 252 S.E.2d 686 (1979).

**Notice of rejection not reasonable under circumstances involved.** — *Economy Forms Corp. v. Kandy, Inc.*, 391 F. Supp. 944 (N.D. Ga. 1974), *aff'd*, 511 F.2d 1400 (5th Cir. 1975).

**Cited in** *Alimenta (U.S.A.), Inc. v. Cargill, Inc.*, 861 F.2d 650 (11th Cir. 1988); *Amatulli*

*Imports, Inc. v. House of Persia, Inc.*, 191 Ga. App. 827, 383 S.E.2d 192 (1989).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 15A Am. Jur. 2d, Commercial Code, §§ 26, 117. 17A Am. Jur. 2d, Contracts, §§ 478, 479. 67 Am. Jur. 2d, Sales, § 72.

**C.J.S.** — 86 C.J.S., Time, § 4.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 1-204.

**ALR.** — Constitutionality of statute regulating time-measuring instruments or devices, 37 ALR 134.

Time for exercise of reserved option to terminate, cancel, or rescind contract, 164 ALR 1014.

Time within which buyer must make inspection, trial, or test to determine whether goods are of requisite quality, 52 ALR2d 900.

Time for revocation of acceptance of goods under UCC § 2-608(2), 65 ALR3d 354.

### 11-1-205. Course of dealing and usage of trade.

(1) A course of dealing is a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.

(2) A usage of trade is any practice or method of dealing having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to the transaction in question. The existence and scope of such a usage are to be proved as facts. If it is established that such a usage is embodied in a written trade code or similar writing the interpretation of the writing is for the court.

(3) A course of dealing between parties and any usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware give particular meaning to and supplement or qualify terms of an agreement.

(4) The express terms of an agreement and an applicable course of dealing or usage of trade shall be construed wherever reasonable as consistent with each other; but when such construction is unreasonable express terms control both course of dealing and usage of trade and course of dealing controls usage of trade.

(5) An applicable usage of trade in the place where any part of performance is to occur shall be used in interpreting the agreement as to that part of the performance.

(6) Evidence of a relevant usage of trade offered by one party is not admissible unless and until he has given the other party such notice as the court finds sufficient to prevent unfair surprise to the latter. (Code 1933, § 109A-1—205, enacted by Ga. L. 1962, p. 156, § 1.)

**Law reviews.** — For article discussing judicial activism in cases involving claims and

defenses under the Uniform Commercial Code, see 17 Ga. L. Rev. 569 (1983). For

article, "Impracticability As Risk Allocation: The Effect of Changed Circumstances upon Contract Obligations for the Sale of Goods," see 22 Ga. L. Rev. 503 (1988).

For note, "The Law of Evidence in the Uniform Commercial Code," see 1 Ga. L. Rev. 44 (1966).

### JUDICIAL DECISIONS

**There must first be an agreement upon which factors enumerated in O.C.G.A. § 11-1-205(3) can be brought to bear.** *White Lumber Sales, Inc. v. C. Brinson Lamb & Sons Lumber Co.*, 121 Ga. App. 702, 175 S.E.2d 81 (1970).

**Existence and scope of usage of trade must be proved as facts.** — Existence and scope of usage of trade that second-hand or used airplanes were sold without warranty, whether local or universal, are to be proved as facts. *Georgia Timberlands, Inc. v. Southern Airways Co.*, 125 Ga. App. 404, 188 S.E.2d 108 (1972).

**Modification need not be in writing.** — Modification or restitution of the remedy available for breach of warranty need not be in writing. Parole evidence to show the usage of the trade to explain or supplement the available remedies for breach of warranty was improperly excluded. *Topeka Mach. Exch., Inc. v. Stoler Indus., Inc.*, 220 Ga. App. 799, 470 S.E.2d 250 (1996).

Claim that the entitlement of a contractor to remove items from property to be demolished and salvage them is the standard custom in the construction and demolition industry was not sufficiently established to prove a usage of trade and create a question of fact for the jury. *All Angles Constr. & Demolition, Inc. v. Metropolitan Atlanta Rapid Transit Auth.*, 246 Ga. App. 114, 539 S.E.2d 831 (2000).

**Contract language controls.** — Given the plain and unambiguous language in a demolition contract, even if the contractor had successfully established a usage of trade with

regard to the responsibility for ensuring that the gas was turned off at the property, the contract language would control so that no material facts remained to create a jury question on that issue. *All Angles Constr. & Demolition, Inc. v. Metropolitan Atlanta Rapid Transit Auth.*, 246 Ga. App. 114, 539 S.E.2d 831 (2000).

**Contract otherwise unenforceable.** — Since an oral contract for a permanent distributorship is unenforceable, a "custom of the trade" argument was without merit. *Trebor Corp. v. Nutmeg Indus., Inc.*, 208 Ga. App. 697, 431 S.E.2d 402 (1993).

**Cited in** *Tri-County Livestock Auction Co. v. Bank of Madison*, 228 Ga. 325, 185 S.E.2d 393 (1971); *Deroller v. Powell*, 144 Ga. App. 585, 241 S.E.2d 469 (1978); *Peavy Farm Serv., Inc. v. Smith*, 156 Ga. App. 52, 274 S.E.2d 94 (1980); *Abney v. Nikko Audio (In re Environmental Elec. Sys.)*, 2 Bankr. 583 (Bankr. N.D. Ga. 1980); *Chatham v. Southern Ry.*, 157 Ga. App. 831, 278 S.E.2d 717 (1981); *Georgia Vegetable Co. v. Relan*, 731 F.2d 798 (11th Cir. 1984); *Georgia Cas. & Sur. Co. v. Tennille Banking Co. (In re Smith)*, 51 Bankr. 904 (Bankr. M.D. Ga. 1985); *Weil Brothers-Cotton, Inc. v. T.E.A., Inc.*, 181 Ga. App. 122, 351 S.E.2d 670 (1986); *Unique Designs, Inc. v. Pittard Mach. Co.*, 200 Ga. App. 647, 409 S.E.2d 241 (1991); *Breckenridge Creste Apts., Ltd. v. Citicorp Mtg., Inc.*, 826 F. Supp. 460 (N.D. Ga. 1993); *Sharple v. Airtouch Cellular of Ga., Inc.*, 250 Ga. App. 216, 551 S.E.2d 87 (2001).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 15A Am. Jur. 2d, Commercial Code, §§ 2, 27 et seq. 21A Am. Jur. 2d, Customs and Usages, §§ 1, 35 et seq. 67 Am. Jur. 2d, Sales, §§ 74-79. 68A Am. Jur. 2d, Secured Transactions, §§ 146, 147.

**C.J.S.** — 17A C.J.S., Contracts, § 328. 25 C.J.S., Customs and Usages, §§ 1, 14 et seq.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 1-205.

**ALR.** — Custom or previous dealing as imposing an obligation upon party to contract to accept something else in lieu of cash, 8 ALR 1268.

Promise of additional compensation for



completing building or construction contract, 25 ALR 1450; 55 ALR 1333; 138 ALR 136.

Content and effect of symbol or abbreviation “&c.” or “etc.,” 77 ALR 879.

Conflict of laws as to usage and custom,

with respect to interpretation or performance of a contract, 60 ALR2d 467.

Size and kind of trees contemplated by contracts or deeds in relation to standing timber, 72 ALR2d 727.

### **11-1-206. Statute of frauds for kinds of personal property not otherwise covered.**

(1) Except in the cases described in subsection (2) of this Code section a contract for the sale of personal property is not enforceable by way of action or defense beyond \$5,000.00 in amount or value of remedy unless there is some writing which indicates that a contract for sale has been made between the parties at a defined or stated price, reasonably identifies the subject matter, and is signed by the party against whom enforcement is sought or by his authorized agent.

(2) Subsection (1) of this Code section does not apply to contracts for the sale of goods (Code Section 11-2-201) nor of securities (Code Section 11-8-113) nor to security agreements (Code Section 11-9-203). (Code 1933, § 109A-1—206, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 1998, p. 1323, § 16.)

**Cross references.** — Statute of frauds generally, § 13-5-30 et seq.

### **JUDICIAL DECISIONS**

**A school tuition payment** is a payment for services rather than for the purchase of personal property. The inclusion of such incidental items as uniforms, lockers, books, etc. in the tuition fee clearly would not reduce the essential character of the transaction to a sale of personal property. *Bishop v. Westminster Schools, Inc.*, 196 Ga. App. 891, 397 S.E.2d 143 (1990).

**Effect of performance by a party.** — The statute of frauds does not bar enforcement of a contract which has been fully performed on one side. *Bishop v. Westminster Schools, Inc.*, 196 Ga. App. 891, 397 S.E.2d 143 (1990).

**Cited in** *L.M. Berry & Co. v. Blackmon*, 129 Ga. App. 347, 199 S.E.2d 610 (1973).

### **RESEARCH REFERENCES**

**Am. Jur. 2d.** — 72 Am. Jur. 2d, Statute of Frauds, §§ 110, 111.

**C.J.S.** — 77A C.J.S., Sales, § 68 et seq.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 1-206.

**ALR.** — Oral contract to enter into written contract as within statute of frauds, 58 ALR 1015.

Statute of frauds: sufficiency of identifica-

tion of vendor or purchaser in memorandum, 70 ALR 196.

Who must sign and form of signature, in case of partnership, in order to comply with statute of frauds, 114 ALR 1005.

Terms “bags,” “bales,” “cars,” or other terms indefinite as to quantity or weight, as satisfying statute of frauds, 129 ALR 1230.

Contract to fill in land as one for sale of

goods within statute of frauds, 161 ALR 1158.  
Statute of frauds: validity of lease or sublease subscribed by one of the parties only, 46 ALR3d 619.

Construction and application of statute of frauds provision under UCC § 1-206 governing personal property not otherwise covered, 62 ALR5th 137.

**11-1-207. Performance or acceptance under reservation of rights.**

- (1) A party who, with explicit reservation of rights, performs or promises performance or assents to performance in a manner demanded or offered by the other party does not thereby prejudice the rights reserved. Such words as “without prejudice,” “under protest” or the like are sufficient.
- (2) Subsection (1) of this Code section does not apply to an accord and satisfaction. (Code 1933, § 109A-1—207, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 1996, p. 1306, § 2.)

**JUDICIAL DECISIONS**

**Payee’s restrictive endorsement on a draft** had no effect, and O.C.G.A. § 11-1-207 did not permit the reservation of rights, where an accord and satisfaction had been reached through negotiation of the draft. *Rhone v. State Auto Mut. Ins. Co.*, 858 F.2d 1507 (11th Cir. 1988).

**Cited in** *American Food Purveyors, Inc. v. Lindsay Meats, Inc.*, 153 Ga. App. 383, 265 S.E.2d 325 (1980); *Meadows v. Barclays Am. Corp.*, 9 Bankr. 882 (N.D. Ga. 1981); *City of Bremen v. Regions Bank*, 274 Ga. 733, 559 S.E.2d 440 (2002).

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 4 Am. Jur. 2d, *Alternative Dispute Resolution*, § 95. 15A Am. Jur. 2d, *Commercial Code*, § 33. 17 Am. Jur. 2d, *Contracts*, § 390.  
**C.J.S.** — 17B C.J.S., *Contracts*, §§ 557 et seq., 587, 596. 31 C.J.S., *Estoppel and Waiver*, § 133 et seq.

**U.L.A.** — *Uniform Commercial Code* (U.L.A.) § 1-207.  
**ALR.** — Application of UCC § 1-207 to avoid discharge of disputed claim upon qualified acceptance of check tendered as payment in full, 37 ALR4th 358.

**11-1-208. Option to accelerate at will.**

A term providing that one party or his successor in interest may accelerate payment or performance or require collateral or additional collateral “at will” or “when he deems himself insecure” or in words of similar import shall be construed to mean that he shall have power to do so only if he in good faith believes that the prospect of payment or performance is impaired. The burden of establishing lack of good faith is on the party against whom the power has been exercised. (Code 1933, § 109A-1—208, enacted by Ga. L. 1962, p. 156, § 1.)

**Law reviews.** — For note, “Negotiable Promissory Notes Containing Time and Demand Provisions: The Need for Consistent Interpretation,” see 19 Ga. L. Rev. 717 (1984). For note, “The Growth of Lender Liability: An Economic Perspective,” see 21

Ga. L. Rev. 723 (1987).

For comment, "Lender Liability for Breach of the Obligation of Good Faith

Performance," see 36 Emory L.J. 917 (1987).

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**Applicable to paper payable at future date.** — O.C.G.A. § 11-1-208 applies only to agreement or paper which in first instance is payable at future date. *Fulton Nat'l Bank v. Willis Denney Ford, Inc.*, 154 Ga. App. 846, 269 S.E.2d 916 (1980).

**Inapplicable to demand instruments.** — O.C.G.A. § 11-1-208 is inapplicable to demand instruments or obligations whose nature permits call at any time with or without reason. *Fulton Nat'l Bank v. Willis Denney Ford, Inc.*, 154 Ga. App. 846, 269 S.E.2d 916 (1980).

**Enforcing payment of "immediately" due and payable instrument.** — There is no reason why obligor on "immediately" due and payable instrument should be entitled to contest holder's decision to enforce payment anytime within statute of limitations as being in bad faith. *Fulton Nat'l Bank v. Willis Denney Ford, Inc.*, 154 Ga. App. 846, 269 S.E.2d 916 (1980).

**Creditor must communicate decision to exercise option to accelerate to debtor.** — A creditor cannot in own mind effectively exercise option to declare whole principal due; the creditor must communicate that decision to the debtor, or manifest it by some outward affirmative act sufficient to constitute notice of the creditor's election, such as service of notice of attorney's fees, filing of suit for the entire debt, written notice of the creditor's exercise of the option, or by advertisement under power of sale, to collect entire principal. *Chrysler Credit Corp. v. Barnes*, 126 Ga. App. 444, 191 S.E.2d 121 (1972).

**Parties may agree on acceleration without notice.** — Failure of a creditor to notify a debtor of its intention to accelerate due dates on notes did not support assertions of the creditor's lack of good faith if the terms of the parties' loan agreement provided that such action could be taken without notice. *First Bank v. Kilpatrick-Smith Constr. Co.*, 153 Ga. App. 112, 264 S.E.2d 576 (1980).

**Question when discretionary decision to accelerate is challenged.** — Where decision is left to the discretion of a designated entity,

the question is not whether it was in fact erroneous, but whether it was in bad faith, arbitrary, or capricious so as to amount to an abuse of discretion. *Ginn v. Citizens & S. Nat'l Bank*, 145 Ga. App. 175, 243 S.E.2d 528 (1978).

**The fact that creditor may have been financially unstable** does not evince lack of good faith, but provides support for its action in accelerating payment of notes it deems insecure. *First Bank v. Kilpatrick-Smith Constr. Co.*, 153 Ga. App. 112, 264 S.E.2d 576 (1980).

**Burden of proving lack of good faith.** — Under O.C.G.A. § 11-1-208, "party against whom the power to accelerate has been exercised" has burden of proving lack of good faith of party exercising the power. *American Fletcher Mtg. Co. v. First Am. Inv. Corp.*, 463 F. Supp. 186 (N.D. Ga. 1978).

**Good faith in determining insecurity.** — The seller defended a tort conversion claim in part on the basis that it had properly exercised its right to terminate the agreement under the provision permitting it to do so in the event it felt "insecure for any reason." The issue was not whether the seller was in fact insecure, but whether in determining the loan insecure the seller acted honestly, in good faith, and not arbitrarily or capriciously. Good faith was a question for the jury. *Builders Transp., Inc. v. Hall*, 183 Ga. App. 812, 360 S.E.2d 60, cert. denied, 183 Ga. App. 905, 360 S.E.2d 60 (1987).

In an action by a debtor against a creditor-bank for damages arising from the repossession of debtor's car, evidence that the bank acted without checking the facts before ordering the repossession created a genuine issue of material fact as to whether the bank failed to exercise good faith. *Fulton v. Anchor Sav. Bank*, 215 Ga. App. 456, 452 S.E.2d 208 (1994).

**Bad faith not shown.** — Where the contract specified a date upon which the note would be due in full, the creditor cannot be held to have acted in bad faith by expecting that payment to be received in full. No



extension, as defined by the note, was granted; the fact that the creditor knew that the partnership was in bankruptcy did not alter its right to proceed against the individual partners for collection of the debt; and the fact that the creditor offered to take over the collateral, in lieu of payment of the debt was not indicative of the creditor's good or bad intent but merely represented an alternative solution to payment in full. *Westinghouse Credit Corp. v. Hall*, 144 Bankr. 568 (S.D. Ga. 1992).

**Summary judgment where issue of good faith not properly joined.** — When issue of good faith is not properly joined by party asserting lack of good faith under O.C.G.A. § 11-1-208, the party asserting its good faith may be granted summary judgment on such

issue. *First Bank v. Kilpatrick-Smith Constr. Co.*, 153 Ga. App. 112, 264 S.E.2d 576 (1980).

**Summary judgment improperly presumed creditor's good faith.** — The trial court erred in granting summary judgment to bank because of evidentiary conflicts regarding the material issue of whether loan officer's actions in deeming the bank insecure and calling in loans may have been arbitrary and capricious. *Crosson v. Lancaster*, 207 Ga. App. 404, 427 S.E.2d 864 (1993).

**Cited in** *Custom Panel Sys. v. Bank of Hampton*, 143 Ga. App. 681, 239 S.E.2d 558 (1977); *First Nat'l Bank v. Appalachian Indus., Inc.*, 146 Ga. App. 630, 247 S.E.2d 422 (1978); *Mayo v. Bank of Carroll County*, 157 Ga. App. 148, 276 S.E.2d 660 (1981).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 15A Am. Jur. 2d, Commercial Code, § 34.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 1-208.

**ALR.** — Acceleration clause as affected by cross indebtedness or obligation, 151 ALR 896.

Acceleration of note or mortgage as automatic or optional, 159 ALR 1077.

What is essential to exercise of option to accelerate maturity of bill or note, 5 ALR2d 968.

What constitutes "good faith" under UCC § 1-208 dealing with "insecure" or "at will" acceleration clauses, 85 ALR4th 284.

## 11-1-209. Subordinated obligations.

An obligation may be issued as subordinated to payment of another obligation of the person obligated, or a creditor may subordinate his right to payment of an obligation by agreement with either the person obligated or another creditor of the person obligated. Such a subordination does not create a security interest as against either the common debtor or a subordinated creditor. This Code section shall be construed as declaring the law as it existed prior to the enactment of this Code section and not as modifying it. (Code 1933, § 109A-1—209, enacted by Ga. L. 1978, p. 1081, § 7.)

**Cross references.** — Effect of Art. 9 of this title on subordination of obligations, § 11-9-339.

**Law reviews.** — Commercial Law, see 53 Mercer L. Rev. 153 (2001).

## JUDICIAL DECISIONS

**Cited in** *United Carolina Bank v. Capital Auto. Co.*, 163 Ga. App. 796, 294 S.E.2d 661

(1982); *Counts v. Yancey Bros. Co.*, 187 Ga. App. 438, 370 S.E.2d 506 (1988); *F & W*

Agriservices, Inc. v. UAP/Ga. Ag. Chem.,  
Inc., 250 Ga. App. 238, 549 S.E.2d 746  
(2001).

#### RESEARCH REFERENCES

**U.L.A.** — Uniform Commercial Code  
(U.L.A.) § 1-209.

**ALR.** — Validity of instrument for pay-  
ment of money as affected by mere fact that  
payment is postponed until death, 2 ALR  
1471.

Application of payments made without

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and unsecured items, 97 ALR 345.

Right of debtor who pays creditor to con-  
trol application of payments made by latter  
to his creditor with proceeds of original  
payment, 166 ALR 641.

## SALES

### ARTICLE 2

#### SALES

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11-2-510.	Effect of breach on risk of loss.	11-2-703.	Seller's remedies in general.
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11-2-513.	Buyer's right to inspection of goods.	11-2-706.	Seller's resale including contract for resale.
11-2-514.	When documents deliverable on acceptance; when on payment.	11-2-707.	"Person in the position of a seller."
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11-2-713.	Buyer's damages for nondelivery or repudiation.	11-2-720.	Effect of "cancellation" or "rescission" on claims for antecedent breach.
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11-2-719.	Contractual modification or limitation of remedy.		

**Cross references.** — Effect of unsolicited sending of goods, §§ 10-1-50, 10-1-51. Deceptive or unfair trade and consumer practices generally, § 10-1-370 et seq.

**Law reviews.** — For article, "Negotiable Instruments Problems in the Financing of Home Improvements," see 11 Mercer L. Rev. 316 (1960). For article advocating repudiation of the patent danger rule as a manufacturer's defense to personal injury suits resulting from product defects, see 29 Mercer L. Rev. 583 (1978). For article, "The Applicability of The Uniform Commercial Code to Construction Contracts," see 28 Emory L.J. 335 (1979). For article discussing the application of Article 2 of the Uniform Commercial Code to contracts for the installation and customization of a computer sys-

tem, see 20 Ga. St. B.J. 6 (1983). For article, "Computer Software: Does Article 2 of the Uniform Commercial Code Apply?," see 35 Emory L.J. 853 (1986). For article, "Contract Litigation and the Elite Bar in New York City, 1960-1980," see 39 Emory L.J. 413 (1990). For article, "Contribution Arguments in Commercial Law," see 42 Emory L.J. 897 (1993). For annual survey article discussing developments in commercial law, see 51 Mercer L. Rev. 165 (1999). For article, "Consumers Surfing for Sales in Cyberspace: What Constitutes Acceptance and What Legal Terms and Conditions Bind the Consumer," see 16 Ga. St. U.L. Rev. 741 (2000).

For note discussing the Uniform Commercial Code and consumer protection, see 25 Emory L.J. 445 (1976).

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**Coverage of article.** — Since adoption of Georgia Uniform Commercial Code, every contract for sale of goods is governed by Article 2 of the Code, and this is true whether action brought with respect to such contract is deemed to be one in equity or in

law. *Mansfield Propane Gas Co. v. Folger Gas Co.*, 231 Ga. 868, 204 S.E.2d 625 (1974).

**Cited in** *Foster v. National Ideal Co.*, 119 Ga. App. 773, 168 S.E.2d 872 (1969); *Solomon Refrigeration, Inc. v. Osburn*, 148 Ga. App. 772, 252 S.E.2d 686 (1979).

## RESEARCH REFERENCES

**ALR.** — Construction and effect of Uniform Commercial Code Art. 2, dealing with sales, 17 ALR3d 1010; 42 ALR3d 182; 66 ALR3d 145; 66 ALR3d 190; 73 ALR3d 248; 88 ALR3d 416; 90 ALR3d 1141; 91 ALR3d 1237; 93 ALR3d 584; 96 ALR3d 299; 96

ALR3d 1275; 97 ALR3d 908; 98 ALR3d 586; 4 ALR4th 85; 4 ALR4th 912; 26 ALR4th 294; 30 ALR4th 396; 36 ALR4th 544; 44 ALR4th 110; 45 ALR4th 1126; 51 ALR4th 537; 82 ALR4th 709; 38 ALR5th 191.

Contractual liquidated damages provi-



sions under Uniform Commercial Code Article 2, 98 ALR3d 586.

What constitutes a transaction, a contract for sale, or a sale within the scope of UCC Article 2, 4 ALR4th 85.

Finance company's liability in connection with consumer fraud practices of party selling goods or services, 18 ALR4th 824.

## PART 1

### SHORT TITLE, GENERAL CONSTRUCTION, AND SUBJECT MATTER

#### 11-2-101. Short title.

This article shall be known and may be cited as "Uniform Commercial Code — Sales." (Code 1933, § 109A-2—101, enacted by Ga. L. 1962, p. 156, § 1.)

**Law reviews.** — For article, "The Good Faith Purchase Idea and the Uniform Commercial Code," see 15 Ga. L. Rev. 605 (1981).

For comment, "Medical Expert Systems and Publisher Liability: A Cross-Contextual Analysis," see 43 Emory L.J. 731 (1994).

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**Cited in** Rollins Communications, Inc. v. Georgia Inst. of Real Estate, Inc., 140 Ga. App. 448, 231 S.E.2d 397 (1976); Citicorp

Indus. Credit, Inc. v. Rountree, 185 Ga. App. 417, 364 S.E.2d 65 (1987).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 15A Am. Jur. 2d, Commercial Code, § 69. 64 Am. Jur. 2d, Public Works and Contracts, § 17.

**C.J.S.** — 82 C.J.S., Statutes, §§ 217 et seq., 238.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 2-101.

**ALR.** — Preemption of strict liability in tort by provisions of UCC Article 2, 15 ALR4th 791.

Impracticability of performance of sales contract under UCC § 2-615, 55 ALR5th 1.

#### 11-2-102. Scope; certain security and other transactions excluded from this article.

Unless the context otherwise requires, this article applies to transactions in goods; it does not apply to any transaction which although in the form of an unconditional contract to sell or present sale is intended to operate only as a security transaction nor does this article impair or repeal any statute regulating sales to consumers, farmers, or other specified classes of buyers. (Code 1933, § 109A-2—102, enacted by Ga. L. 1962, p. 156, § 1.)

**Cross references.** — Deceptive or unfair consumer practices, § 10-1-393.

choice-of-law of contracts in Georgia, see 21 Mercer L. Rev. 389 (1970). For article,

**Law reviews.** — For article on

"Computer Software: Does Article 2 of the

Uniform Commercial Code Apply?," see 35 Emory L.J. 853 (1986). For article, "Impracticability As Risk Allocation: The Effect of Changed Circumstances upon Contract Obligations for the Sale of Goods," see 22 Ga. L. Rev. 503 (1988).

For comment on Redfern Meats, Inc. v.

Hertz Corp., 134 Ga. App. 381, 215 S.E.2d 10 (1975), appearing below, see 27 Mercer L. Rev. 347 (1975). For comment making comparative analysis of negotiability of promissory notes payable in specifics between Georgia and other jurisdictions, see 4 Ga. B.J. 5 (1942).

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**Legislative intent** was that Article 2 of Uniform Commercial Code apply only to "sales." Redfern Meats, Inc. v. Hertz Corp., 134 Ga. App. 381, 215 S.E.2d 10 (1975).

**Contract to sell future crop** is sale of goods within scope of O.C.G.A. § 11-2-102. R.N. Kelly Cotton Merchant, Inc. v. York, 379 F. Supp. 1075 (M.D. Ga. 1973), aff'd, 494 F.2d 41 (5th Cir. 1974).

**Sale of horse for recreational use.** — A transaction for purchase of a horse, apparently for recreational use, while possibly a casual sale, nevertheless, is provided for in the Uniform Commercial Code and is a transaction in goods. Key v. Bagen, 136 Ga. App. 373, 221 S.E.2d 234 (1975).

**Contracts for services and labor.** — Where agreement is one for furnishing of services and labor, the Uniform Commercial Code is clearly inapplicable. Dixie Lime & Stone Co. v. Wiggins Scale Co., 144 Ga. App. 145, 240 S.E.2d 323 (1977).

A contract for services and labor with an incidental furnishing of equipment and materials is not a transaction involving the sale of "goods" and is not controlled by the Uniform Commercial Code. OMAC, Inc. v. Southwestern Mach. & Tool Works, Inc., 189 Ga. App. 42, 374 S.E.2d 829 (1988).

Use of attachment hardware incidental to installation of 2,200 gallon tank on vehicle, when both tank and vehicle are supplied by purchaser of installation, is not sufficient to cause transaction to be characterized as a "sale of goods" rather than a "sale of services." W.B. Anderson Feed & Poultry Co. v. Georgia Gas Distribs., Inc., 164 Ga. App. 96, 296 S.E.2d 395 (1982).

If two purchase orders constitute but a single contract between the parties which involves furnishing both labor and materials, the UCC does not apply. American Aluminum Prods. Co. v. Binswanger Glass Co., 194 Ga. App. 703, 391 S.E.2d 688 (1990).

Medical center's furnishing of facility for

use in connection with surgery to install a plate device to stabilize plaintiff's spine was a transaction involving "services and labor with an incidental furnishing of equipment and materials" and, as such, not covered under the Uniform Commercial Code. McCombs v. Southern Regional Medical Ctr., Inc., 233 Ga. App. 676, 504 S.E.2d 747 (1998).

**Services of production and distribution.** — Services always play an important role in use of goods, whether it is service of transforming raw material into some usable product or service of distributing usable product to a point where it can easily be obtained by the consumer, and such services do not remove a contract from coverage under this article. Cleveland Lumber Co. v. Proctor & Schwartz, Inc., 397 F. Supp. 1088 (N.D. Ga. 1975).

**Oral agreement between manufacturer and distributor** for the manufacture of a special grade of fertilizer to be sold by the distributor was covered by the UCC whether it was classified as one for the sale of fertilizer or as a distributorship agreement. PCS Joint Venture, Ltd. v. Davis, 219 Ga. App. 519, 465 S.E.2d 713 (1995).

**Delivery of items in exchange for payment and release of claims.** — A letter agreement providing for delivery of certain items in exchange for some payment and the release of various claims was a transaction in goods within the U.C.C. Management Assistance, Inc. v. Computer Dimensions, Inc., 546 F. Supp. 666 (N.D. Ga. 1982), aff'd sub nom. Computer Dimensions v. Basic Four, 747 F.2d 708 (11th Cir. 1984).

**Action for commission due under agreement.** — Trial court properly denied lessor's motion to strike lessee's counterclaim for commission due under oral agreement to sell aircraft since a commission is earned by providing services and the Uniform Commercial Code statute of frauds is applicable

to transactions in goods. *Harris v. Clark*, 157 Ga. App. 549, 278 S.E.2d 132 (1981).

**Furnishing of blood by hospital in course of treatment.** — The furnishing of blood by a hospital in the course of treatment is not a sales transaction covered by an implied warranty under O.C.G.A. § 11-2-314. *Lovett v. Emory Univ., Inc.*, 116 Ga. App. 277, 156 S.E.2d 923 (1967).

**Sale of accounting firm.** — The Uniform Commercial Code did not apply to the sale of an accounting firm since the furnishing of services was the predominant element of the contract. *Crews v. Wahl*, 238 Ga. App. 892, 520 S.E.2d 727 (1999).

**Sale of windows.** — Where the predominant character of the transaction was the sale of windows, though a substantial amount of service was involved in installing the windows, the trial court erred in holding that the UCC did not apply. *J. Lee Gregory, Inc. v. Scandinavian House*, 209 Ga. App. 285, 433 S.E.2d 687 (1993).

The Uniform Commercial Code applied to a contract for the sale of windows, where the Contractor's bid did not segregate the total price of the windows from the total price of the services to be rendered; and where, even though a substantial amount of service was involved in installing the windows, the predominant character of the

transaction was the sale of goods. *D.N. Garner Co. v. Georgia Palm Beach Aluminum Window Corp.*, 233 Ga. App. 252, 504 S.E.2d 70 (1998).

**Sale of real estate.** — Sellers' claim of unconscionability based upon Article 2 failed for two reasons: first, the contract at issue was for the sale of realty, not kaolin; and, second, even if the contract was considered to be for the sale of minerals thereon, severance was to be by the buyer, not the seller. *Garbutt v. Southern Clays, Inc.*, 894 F. Supp. 456 (M.D. Ga. 1995).

**Cited in** *Wooden v. Michigan Nat'l Bank*, 117 Ga. App. 852, 162 S.E.2d 222 (1968); *First Nat'l Bank & Trust Co. v. Smithloff*, 119 Ga. App. 284, 167 S.E.2d 190 (1969); *Mitchell-Huntley Cotton Co. v. Lawson*, 377 F. Supp. 661 (M.D. Ga. 1973); *R.N. Kelly Cotton Merchant, Inc. v. York*, 379 F. Supp. 1075 (M.D. Ga. 1973); *R.N. Kelly Cotton Merchant, Inc. v. York*, 494 F.2d 41 (5th Cir. 1974); *Duval & Co. v. Malcom*, 233 Ga. 784, 214 S.E.2d 356 (1975); *Space Leasing Assocs. v. Atlantic Bldg. Sys.*, 144 Ga. App. 320, 241 S.E.2d 438 (1977); *Crider v. First Nat'l Bank*, 144 Ga. App. 536, 241 S.E.2d 638 (1978); *Cash v. Armco Steel Corp.*, 462 F. Supp. 272 (N.D. Ga. 1978); *Mail Concepts, Inc. v. Foote & Davies, Inc.*, 200 Ga. App. 778, 409 S.E.2d 567 (1991).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 67 Am. Jur. 2d, Sales, § 63.

**C.J.S.** — 77A C.J.S., Sales, § 1 et seq.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 2-102.

**ALR.** — Negotiability of title-retaining note, 28 ALR 699; 44 ALR 1397; 44 ALR2d 71.

What amounts to a conditional sale, 43 ALR 1247; 92 ALR 304; 175 ALR 1366.

Electricity, gas, or water furnished by public utility as "goods" within provisions of Uniform Commercial Code, Article 2 on sales, 48 ALR3d 1060.

Applicability of UCC Article 2 to mixed contracts for sale of goods and services, 5 ALR4th 501.

## 11-2-103. Definitions and index of definitions.

(1) In this article unless the context otherwise requires:

(a) "Buyer" means a person who buys or contracts to buy goods.

(b) "Good faith" in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.

(c) "Receipt" of goods means taking physical possession of them.



(d) "Seller" means a person who sells or contracts to sell goods.

(2) Other definitions applying to this article or to specified parts thereof, and the Code sections in which they appear are:

"Acceptance." Code Section 11-2-606.

"Banker's credit." Code Section 11-2-325.

"Between merchants." Code Section 11-2-104.

"Cancellation." Code Section 11-2-106(4).

"Commercial unit." Code Section 11-2-105.

"Confirmed credit." Code Section 11-2-325.

"Conforming to contract." Code Section 11-2-106.

"Contract for sale." Code Section 11-2-106.

"Cover." Code Section 11-2-712.

"Entrusting." Code Section 11-2-403.

"Financing agency." Code Section 11-2-104.

"Future goods." Code Section 11-2-105.

"Goods." Code Section 11-2-105.

"Identification." Code Section 11-2-501.

"Installment contract." Code Section 11-2-612.

"Letter of credit." Code Section 11-2-325.

"Lot." Code Section 11-2-105.

"Merchant." Code Section 11-2-104.

"Overseas." Code Section 11-2-323.

"Person in position of seller." Code Section 11-2-707.

"Present sale." Code Section 11-2-106.

"Sale." Code Section 11-2-106.

"Sale on approval." Code Section 11-2-326.

"Sale or return." Code Section 11-2-326.

"Termination." Code Section 11-2-106.

(3) The following definitions in other articles of this title apply to this article:

"Check." Code Section 11-3-104.



“Consignee.” Code Section 11-7-102.

“Consignor.” Code Section 11-7-102.

“Consumer goods.” Code Section 11-9-102.

“Dishonor.” Code Section 11-3-502.

“Draft.” Code Section 11-3-104.

(4) In addition Article 1 of this title contains general definitions and principles of construction and interpretation applicable throughout this article. (Code 1933, § 109A-2—103, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 2001, p. 362, § 4.)

**The 2001 amendment**, effective July 1, 2001, in subsection (3), substituted “Code Section 11-9-102” for “Code Section 11-9-109” in the paragraph relating to consumer goods and substituted “Code Section 11-3-502” for “Code Section 11-3-507” in the paragraph relating to dishonor.

**Law reviews.** — For article, “Contract

Litigation and the Elite Bar in New York City, 1960-1980,” see 39 Emory L.J. 413 (1990).

For comment on *Sherrock v. Commercial Credit Corp.*, 290 A.2d 648 (Del. S. Ct. 1972), see 10 Ga. St. B.J. 110 (1973). For comment, “Lender Liability for Breach of the Obligation of Good Faith Performance,” see 36 Emory L.J. 917 (1987).

## JUDICIAL DECISIONS

**Employee charging gasoline in employer’s name.** — Employee is not a “buyer,” but acts as agent of employer when employee charges gasoline in employer’s name and employer pays for it, even though the fuel is not delivered directly to employer but is instead consumed by employee’s operation of a truck. *Weaver v. Ralston Motor Hotel, Inc.*, 135 Ga. App. 536, 218 S.E.2d 260 (1975).

**“Good Faith.”** — The definition of “good faith” in O.C.G.A. § 11-2-103 applies only to merchants engaged in the sale of goods and

does not apply in an action involving the status of a bank as a “holder in due course” under UCC Article 3. *Choo Choo Tire Serv., Inc v. Union Planters Nat’l Bank*, 231 Ga. App. 346, 498 S.E.2d 799 (1998).

**Cited in** *Tennessee-Virginia Constr. Co. v. Willingham*, 117 Ga. App. 290, 160 S.E.2d 444 (1968); *Redfern Meats, Inc. v. Hertz Corp.*, 134 Ga. App. 381, 215 S.E.2d 10 (1975); *Fratelli Gardino v. Caribbean Lumber Co.*, 587 F.2d 204 (5th Cir. 1979); *Mail Concepts, Inc. v. Foote & Davies, Inc.*, 200 Ga. App. 778, 409 S.E.2d 567 (1991).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 15A Am. Jur. 2d, Commercial Code, §§ 36, 52. 67 Am. Jur. 2d, Sales, §§ 10-15.

**C.J.S.** — 77A C.J.S., Sales, § 1 et seq. 82 C.J.S., Statutes, § 309.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 2-103.

**ALR.** — What constitutes a transaction, a

contract for sale, or a sale within the scope of UCC Article 2, 4 ALR4th 85.

What constitutes “goods” within the scope of UCC Article 2, 4 ALR4th 912.

Applicability of UCC Article 2 to mixed contracts for sale of goods and services, 5 ALR4th 501.

### 11-2-104. Definitions: “merchant”; “between merchants”; “financing agency.”

(1) “Merchant” means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.

(2) “Financing agency” means a bank, finance company, or other person who in the ordinary course of business makes advances against goods or documents of title or who by arrangement with either the seller or the buyer intervenes in ordinary course to make or collect payment due or claimed under the contract for sale, as by purchasing or paying the seller’s draft or making advances against it or by merely taking it for collection whether or not documents of title accompany the draft. “Financing agency” includes also a bank or other person who similarly intervenes between persons who are in the position of seller and buyer in respect to the goods (Code Section 11-2-707).

(3) “Between merchants” means in any transaction with respect to which both parties are chargeable with the knowledge or skill of merchants. (Code 1933, § 109A-2—104, enacted by Ga. L. 1962, p. 156, § 1.)

**Law reviews.** — For article discussing the implied warranty of fitness for a particular purpose, see 9 Ga. L. Rev. 149 (1974). For article discussing modification of consumer warranty provisions of the U.C.C. by the Magnuson-Moss Act (15 U.S.C. §§ 2301-2312) with special emphasis on attempted disclaimers, see 27 Mercer L. Rev.

1111 (1976). For article surveying developments in Georgia commercial law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 33 (1981).

For comment on *Sherrock v. Commercial Credit Corp.*, 290 A.2d 648 (Del. S. Ct. 1972), see 10 Ga. St. B.J. 110 (1973).

### JUDICIAL DECISIONS

**Farming corporation as “merchant.”** — Evidence supported a finding that defendant farming corporation was a “merchant” bound by an oral agreement to sell 5,000 bushels of soybeans, which agreement was confirmed in writing to which the corporation made no response. *Thunderbird Farms, Inc. v. Abney*, 178 Ga. App. 335, 343 S.E.2d 127 (1986).

**“Merchants” as including farmers who orally “book” crops.** — Construing “merchants” in O.C.G.A. § 11-2-104(1) as not excluding as a matter of law farmers who orally “book” crops such as soybeans for sale protects them equally as well as the buyer. If the market price declines after the booking,

they are assured of the higher booking price; the buyer cannot renege, as O.C.G.A. § 11-2-201(2) would apply. *Goldkist, Inc. v. Brownlee*, 182 Ga. App. 287, 355 S.E.2d 773 (1987).

**Cited in** *Greater S. Distrib. Co. v. Usry*, 124 Ga. App. 525, 184 S.E.2d 486 (1971); *Trust Co. v. Montgomery*, 136 Ga. App. 742, 222 S.E.2d 196 (1975); *Blaylock v. Georgia Mut. Ins. Co.*, 239 Ga. 462, 238 S.E.2d 105 (1977); *Patron Aviation, Inc. v. Teledyne Indus., Inc.*, 154 Ga. App. 13, 267 S.E.2d 274 (1980); *Bicknell v. Joyce Sportswear Co.*, 173 Ga. App. 897, 328 S.E.2d 564 (1985); *Sweetapple Plastics, Inc. v. Philip Shuman & Sons*, 77 Bankr. 304 (Bankr. M.D. Ga. 1987); *Perime-*

ter Ford, Inc. v. Edwards, 197 Ga. App. 747,  
399 S.E.2d 520 (1990).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 67 Am. Jur. 2d, Sales, §§ 24, 25, 64-69.

**C.J.S.** — 77A C.J.S., Sales, § 1 et seq. 82 C.J.S., Statutes, § 309.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 2-104.

**ALR.** — Charging merchant with using false weights or measures as libel or slander, 13 ALR 1019; 106 ALR 437.

Liability of savings bank to depositor for

amounts withdrawn by depositor's agent without presentation of passbook, 139 ALR 835.

Who is "merchant" under UCC § 2-314(1) dealing with implied warranties of merchantability, 91 ALR3d 876.

Farmers as "merchants" within provisions of UCC Article 2, dealing with sales, 95 ALR3d 484.

### **11-2-105. Definitions: transferability; "goods"; "future" goods; "lot"; "commercial unit."**

(1) "Goods" means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Article 8 of this title), and things in action. "Goods" also includes the unborn young of animals and growing crops and other identified things attached to realty as described in the Code section on goods to be severed from realty (Code Section 11-2-107).

(2) Goods must be both existing and identified before any interest in them can pass. Goods which are not both existing and identified are "future" goods. A purported present sale of future goods or of any interest therein operates as a contract to sell.

(3) There may be a sale of a part interest in existing identified goods.

(4) An undivided share in an identified bulk of fungible goods is sufficiently identified to be sold although the quantity of the bulk is not determined. Any agreed proportion of such a bulk or any quantity thereof agreed upon by number, weight, or other measure may to the extent of the seller's interest in the bulk be sold to the buyer who then becomes an owner in common.

(5) "Lot" means a parcel or a single article which is the subject matter of a separate sale or delivery, whether or not it is sufficient to perform the contract.

(6) "Commercial unit" means such a unit of goods as by commercial usage is a single whole for purposes of sale and division of which materially impairs its character or value on the market or in use. A commercial unit may be a single article (as a machine) or a set of articles (as a suite of furniture or an assortment of sizes) or a quantity (as a bale, gross, or carload) or any other unit treated in use or in the relevant market as a single whole. (Code 1933, § 109A-2—105, enacted by Ga. L. 1962, p. 156, § 1.)



**Law reviews.** — For article discussing the applicability of warranty provisions under the Uniform Commercial Code to domestic solar energy devices, see 30 Mercer L. Rev. 547 (1979). For article, "Computer Software: Does Article 2 of the Uniform Com-

mercial Code Apply?," see 35 Emory L.J. 853 (1986).

For comment, "Damage Awards and Computer Systems — Trends," see 35 Emory L.J. 255 (1986).

## JUDICIAL DECISIONS

### ANALYSIS

#### GENERAL CONSIDERATION

##### GOODS

##### FUTURE GOODS

##### FUNGIBLE GOODS

#### General Consideration

**Cited** in *Lunsford v. Wilson*, 113 Ga. App. 602, 149 S.E.2d 515 (1966); *Reddick v. White Consol. Indus., Inc.*, 295 F. Supp. 243 (S.D. Ga. 1968); *R.N. Kelly Cotton Merchant, Inc. v. York*, 379 F. Supp. 1075 (M.D. Ga. 1973); *R.N. Kelly Cotton Merchant, Inc. v. York*, 494 F.2d 41 (5th Cir. 1974); *Duval & Co. v. Malcom*, 233 Ga. 784, 214 S.E.2d 356 (1975); *Cone Mills Corp. v. A.G. Estes, Inc.*, 399 F. Supp. 938 (N.D. Ga. 1975); *Space Leasing Assocs. v. Atlantic Bldg. Sys.*, 144 Ga. App. 320, 241 S.E.2d 438 (1977); *Lipson v. Hawthorne Indus., Inc.*, 148 Ga. App. 751, 252 S.E.2d 639 (1979); *Smith v. Dixon Ford Tractor Co.*, 160 Ga. App. 885, 288 S.E.2d 599 (1982); *Goldkist, Inc. v. Brownlee*, 182 Ga. App. 287, 355 S.E.2d 773 (1987); *ATG Aerospace, Inc. v. High-Line Aviation Ltd.*, 149 Bankr. 730 (Bankr. N.D. Ga. 1992); *Southern Tank Equip. Co. v. Zartic, Inc.*, 221 Ga. App. 503, 471 S.E.2d 587 (1996).

#### Goods

**Effect of services of production and distribution of goods.** — Services always play an important role in use of goods, whether it is service of transforming raw material into some usable product or service of distributing usable product to a point where it can easily be obtained by the consumer, and such services do not remove a contract from coverage under this article. *Cleveland Lumber Co. v. Proctor & Schwartz, Inc.*, 397 F. Supp. 1088 (N.D. Ga. 1975).

Items sold are still "goods" within the definition of O.C.G.A. § 11-2-105(1) even though service may play a role in their ultimate use. *Cleveland Lumber Co. v. Proc-*

*tor & Schwartz, Inc.*, 397 F. Supp. 1088 (N.D. Ga. 1975).

**Test for "goods."** — Whether a product is manufactured is not the test for the definition of "goods" under the commercial code, but rather whether the items are movable at the time of identification of the contract. *Willis Mining, Inc. v. Noggle*, 235 Ga. App. 747, 509 S.E.2d 731 (1998).

**Oral agreement between manufacturer and distributor** for the manufacture of a special grade of fertilizer to be sold by the distributor was covered by the UCC whether it was classified as one for the sale of fertilizer, or as a distributorship agreement. *PCS Joint Venture, Ltd. v. Davis*, 219 Ga. App. 519, 465 S.E.2d 713 (1995).

**Fact that contract involves substantial amounts of labor** does not remove it from definition of goods under O.C.G.A. § 11-2-105(1). *Cleveland Lumber Co. v. Proctor & Schwartz, Inc.*, 397 F. Supp. 1088 (N.D. Ga. 1975).

**Granite blocks.** — Because granite blocks were movable at the time of identification of the contract, they were "goods" under O.C.G.A. § 11-2-105, and an implied warranty of merchantability applied to their sale. *Willis Mining, Inc. v. Noggle*, 235 Ga. App. 747, 509 S.E.2d 731 (1998).

**Ships** are "goods" under the Uniform Commercial Code. *R.C. Craig, Ltd. v. Ships of Sea, Inc.*, 345 F. Supp. 1066 (S.D. Ga. 1972), later proceeding, 401 F. Supp. 1051 (S.D. Ga. 1975).

**Growing crops**, including cotton, are "goods" within contemplation of O.C.G.A. § 11-2-105. *Harris v. Hine*, 232 Ga. 183, 205 S.E.2d 847 (1974).

**Sale of horse for recreational use.** — Transaction for purchase of a horse, appar-



**Goods (Cont'd)**

ently for recreational use, while possibly a casual sale, nevertheless, is provided for in the Uniform Commercial Code and is a transaction in goods. *Key v. Bagen*, 136 Ga. App. 373, 221 S.E.2d 234 (1975).

**The sale of water** is the sale of goods whether delivery is made through a water-works system or in bottles. Hence, the sale of water by a municipality is the sale of goods and a transaction which is governed by Art. 2 of the UCC. *Zepp v. Mayor of Athens*, 180 Ga. App. 72, 348 S.E.2d 673 (1986).

**Future Goods**

**Contracts for future delivery** of commodities where parties contemplate actual delivery are valid. *Taunton v. Allenberg Cotton Co.*, 378 F. Supp. 34 (M.D. Ga. 1973).

**Contract to sell future crop** is sale of goods within scope of O.C.G.A. § 11-2-105. *R.N. Kelly Cotton Merchant, Inc. v. York*, 379 F. Supp. 1075 (M.D. Ga. 1973), *aff'd*, 494 F.2d 41 (5th Cir. 1974); *Seminole Peanut Co. v. Goodson*, 176 Ga. App. 42, 335 S.E.2d 157 (1985).

Contract for sale of crops is not invalid merely because contract was executed before crop in question was planted. *Mitchell-Huntley Cotton Co. v. Lawson*, 377 F. Supp. 661 (M.D. Ga. 1973).

**Contract for sale of goods not yet in existence.** — Although a contract may be invalid because its execution was fraudulently induced, it will not be inoperative because it involves goods which are nonexistent at the time of the execution of the contract. *Cone Mills Corp. v. A.G. Estes, Inc.*, 377 F. Supp. 222 (N.D. Ga. 1974).

A contract to sell, as distinguished from an actual sale, can relate to a commodity which is not in existence at the time the contract is executed. *Taunton v. Allenberg Cotton Co.*, 378 F. Supp. 34 (M.D. Ga. 1973).

**Fungible Goods**

**Sale of fungible goods without specific identification.** — O.C.G.A. § 11-2-105 does not forbid sale of fungible goods without specific identification. *Cone Mills Corp. v. A.G. Estes, Inc.*, 377 F. Supp. 222 (N.D. Ga. 1974).

**OPINIONS OF THE ATTORNEY GENERAL**

**Advertising transactions are not sales of goods, but rather contracts for work, labor, and materials.** — Descriptions of sales of goods in O.C.G.A. §§ 11-2-105 and 11-2-106 do not cover advertising transactions, which

are more like services intended to give public notice; as opposed to sales of goods, they are contracts for work, labor, and materials. 1972 Op. Att'y Gen. No. 72-96.

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 67 Am. Jur. 2d, Sales, §§ 45, 46.

**C.J.S.** — 77A C.J.S., Sales, § 1 et seq. 82 C.J.S., Statutes, § 309.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 2-105.

**ALR.** — Partition: division of building, 28 ALR 727.

Electricity, gas, or water furnished by public utility as "goods" within provisions of

Uniform Commercial Code, Article 2 on sales, 48 ALR3d 1060.

What constitutes "goods" within the scope of UCC Article 2, 4 ALR4th 912.

Applicability of UCC Article 2 to mixed contracts for sale of goods and services, 5 ALR4th 501.

Conveyance of land as including mature but unharvested crops, 51 ALR4th 1263.

**11-2-106. Definitions: "contract"; "agreement"; "contract for sale"; "sale"; "present sale"; "conforming" to contract; "termination"; "cancellation."**

(1) In this article unless the context otherwise requires "contract" and

“agreement” are limited to those relating to the present or future sale of goods. “Contract for sale” includes both a present sale of goods and a contract to sell goods at a future time. A “sale” consists in the passing of title from the seller to the buyer for a price (Code Section 11-2-401). A “present sale” means a sale which is accomplished by the making of the contract.

(2) Goods or conduct including any part of a performance are “conforming” or conform to the contract when they are in accordance with the obligations under the contract.

(3) “Termination” occurs when either party pursuant to a power created by agreement or law puts an end to the contract otherwise than for its breach. On “termination” all obligations which are still executory on both sides are discharged but any right based on prior breach or performance survives.

(4) “Cancellation” occurs when either party puts an end to the contract for breach by the other and its effect is the same as that of “termination” except that the canceling party also retains any remedy for breach of the whole contract or any unperformed balance. (Code 1933, § 109A-2—106, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 2002, p. 415, § 11.)

**The 2002 amendment**, effective April 18, 2002, part of an Act to revise, modernize, and correct the Code, substituted “canceling” for “cancelling” in subsection (4).

**Law reviews.** — For article, “Buyer’s Right of Rejection: A Quarter Century Under the Uniform Commercial Code, and Recent International Developments,” see 13 Ga. L.

Rev. 805 (1979). For article, “Computer Software: Does Article 2 of the Uniform Commercial Code Apply?,” see 35 Emory L.J. 853 (1986).

For comment on *Fender v. Colonial Stores, Inc.*, 138 Ga. App. 31, 225 S.E.2d 691 (1976), see 28 Mercer L. Rev. 751 (1977).

## JUDICIAL DECISIONS

### ANALYSIS

#### GENERAL CONSIDERATION

#### CONTRACT FOR SALE

#### CONFORMING TO CONTRACT

#### General Consideration

**Oral agreement between manufacturer and distributor** for the manufacture of a special grade of fertilizer to be sold by the distributor was covered by the UCC whether it was classified as one for the sale of fertilizer or as a distributorship agreement. *PCS Joint Venture, Ltd. v. Davis*, 219 Ga. App. 519, 465 S.E.2d 713 (1995).

**Contracts for future delivery** of commodities where parties contemplate actual delivery are valid. *Taunton v. Allenberg Cotton Co.*, 378 F. Supp. 34 (M.D. Ga. 1973).

**Sale of crops to be planted in future.** —

Contract for sale of crops is not invalid merely because it was executed before crop in question was planted. *Mitchell-Huntley Cotton Co. v. Lawson*, 377 F. Supp. 661 (M.D. Ga. 1973).

**Cited** in *Byrd v. Moore Ford Co.*, 116 Ga. App. 292, 157 S.E.2d 41 (1967); *R.N. Kelly Cotton Merchant, Inc. v. York*, 379 F. Supp. 1075 (M.D. Ga. 1973); *Sylvester Motor & Tractor Co. v. Farmers Bank*, 153 Ga. App. 614, 266 S.E.2d 293 (1980); *International Harvester Credit Corp. v. Associates Fin. Servs. Co.*, 133 Ga. App. 488, 211 S.E.2d 430 (1974); *Redfern Meats, Inc. v. Hertz Corp.*,

**General Consideration (Cont'd)**

134 Ga. App. 381, 215 S.E.2d 10 (1975); Cone Mills Corp. v. A.G. Estes, Inc., 399 F. Supp. 938 (N.D. Ga. 1975); Fender v. Colonial Stores, Inc., 138 Ga. App. 31, 225 S.E.2d 691 (1976); Sylvester Motor & Tractor Co. v. Farmers Bank, 153 Ga. App. 614, 266 S.E.2d 293 (1980); Johnson v. State, 154 Ga. App. 353, 268 S.E.2d 406 (1980); Madewell v. Marietta Dodge, Inc., 506 F. Supp. 286 (N.D. Ga. 1980); Freeman v. State, 163 Ga. App. 71, 292 S.E.2d 563 (1982); American Whse. & Moving Serv. of Atlanta, Inc. v. Floyd's Diesel Serv., Inc., 164 Ga. App. 106, 296 S.E.2d 64 (1982); Robinson v. State, 164 Ga. App. 652, 297 S.E.2d 751 (1982); Mail Concepts, Inc. v. Foote & Davies, Inc., 200 Ga. App. 778, 409 S.E.2d 567 (1991).

**Contract for Sale**

**Promises to buy and sell.** — Promise to buy certain goods is good consideration for promise to sell those goods. Mitchell-Huntley Cotton Co. v. Lawson, 377 F. Supp. 661 (M.D. Ga. 1973).

**Delivery of goods pursuant to offer to pay in future.** — Where defendant offered to pay in future for goods to be delivered presently, and seller agreed, delivered the merchandise to defendant, and did not retain any

security interest therein, there was a completed "sale" of the goods in question, and defendant had not only rightful possession of the items, but title to them as well. Elliott v. State, 149 Ga. App. 579, 254 S.E.2d 900 (1979).

**Auto lease agreement.** — Lease agreement for automobile, even though it places burden of repairs, taxes, insurance, etc., upon lessee is not a sale under O.C.G.A. § 11-2-106. Mays v. Citizens & S. Nat'l Bank, 132 Ga. App. 602, 208 S.E.2d 614 (1974), overruled on other grounds, Mock v. Canterbury Realty Co., 152 Ga. App. 872, 264 S.E.2d 489 (1980).

**An agreement for the installation and maintenance of a protective alarm system** was not a sale and, as a result, the implied warranty and other U.C.C. considerations were not applicable. D.L. Lee & Sons v. ADT Sec. Sys., 916 F. Supp. 1571 (S.D. Ga. 1995).

**Conforming to Contract**

**Encompasses totality of seller's contracts.** — Nonconformity cannot be viewed as a question of the quantity and quality of goods alone or of breaches of warranties, but of the performance of the totality of the seller's contractual undertaking. Esquire Mobile Homes, Inc. v. Arrendale, 182 Ga. App. 528, 356 S.E.2d 250 (1987).

**OPINIONS OF THE ATTORNEY GENERAL**

**Advertising transactions are not sales of goods but rather contracts for work, labor, and materials.** — Descriptions of sales of goods in O.C.G.A. §§ 11-2-105 and 11-2-106 do not cover advertising transactions, which

are more like sales intended to give public notice; as opposed to a sale of goods, it is a contract for work, labor, and materials. 1972 Op. Att'y Gen. No. 72-96.

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 67 Am. Jur. 2d, Sales, §§ 26, 27.

**C.J.S.** — 77A C.J.S., Sales, §§ 3, 4.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 2-106.

**ALR.** — What constitutes a contract for sale under Uniform Commercial Code § 2-314, 78 ALR3d 696.

What constitutes a transaction, a contract for sale, or a sale within the scope of UCC Article 2, 4 ALR4th 85.

What constitutes "goods" within the scope of UCC Article 2, 4 ALR4th 912.

Applicability of UCC Article 2 to mixed contracts for sale of goods and services, 5 ALR4th 501.



**11-2-107. Goods to be severed from realty; recording.**

(1) A contract for the sale of timber, minerals, or the like (including oil and gas) or a structure or its materials to be removed from realty is a contract for the sale of goods within this article if they are to be severed by the seller but until severance a purported present sale thereof which is not effective as a transfer of an interest in land is effective only as a contract to sell.

(2) A contract for the sale apart from the land of growing crops or other things attached to realty and capable of severance without material harm thereto but not described in subsection (1) of this Code section is a contract for the sale of goods within this article whether the subject matter is to be severed by the buyer or by the seller even though it forms part of the realty at the time of contracting, and the parties can by identification effect a present sale before severance.

(3) The provisions of this Code section are subject to any third party rights provided by the law relating to realty records, and the contract for sale may be executed and recorded as a document transferring an interest in land and shall then constitute notice to third parties of the buyer's rights under the contract for sale. (Code 1933, § 109A-2—107, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 1978, p. 1081, § 5.)

**JUDICIAL DECISIONS**

**Contract for sale of standing timber to be severed before title passes.** — A contract of sale for timber which is attached to the soil, but which is presently to be severed and converted into personalty before title passes to purchaser, is an executory sale of personalty, and not of an interest in land. *Pope v. Barnett*, 45 Ga. App. 59, 163 S.E. 517 (1932) (decided prior to adoption of Uniform Commercial Code).

**Contract for sale of milk.** — Although quantity was unknown at time seller agreed to sell, the contract was binding on seller where amount of "milk base" was determinable under standards set by federal government. The agreement was much like an offer

under O.C.G.A. § 11-2-107(2) to purchase a growing crop, for while the exact quantity is not known, it is ascertainable and determinable. *Hale v. Higginbotham*, 228 Ga. 823, 188 S.E.2d 515 (1972).

**Cited in** *Lunsford v. Wilson*, 113 Ga. App. 602, 149 S.E.2d 515 (1966); *Cone Mills Corp. v. A.G. Estes, Inc.*, 377 F. Supp. 222 (N.D. Ga. 1974); *Grant v. Bell*, 150 Ga. App. 141, 257 S.E.2d 12 (1979); *R.N. Kelly Cotton Merchant, Inc. v. York*, 379 F. Supp. 1075 (M.D. Ga. 1973); *R.N. Kelly Cotton Merchant, Inc. v. York*, 494 F.2d 41 (5th Cir. 1974); *Garbutt v. Southern Clays, Inc.*, 894 F. Supp. 456 (M.D. Ga. 1995).

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 67 Am. Jur. 2d, Sales, §§ 54 to 59.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 2-107.

**ALR.** — Pavement, flooring, platform,

walks, and the like as fixtures, 13 ALR 1454.

Rights of parties to a timber contract upon failure of purchaser to remove timber within time fixed or within a reasonable time, 42 ALR 641; 71 ALR 143; 164 ALR 423.



Storage tank or other apparatus of gasoline station as fixture, 52 ALR 798; 99 ALR 69.

Sale of standing timber as affecting judgment or other lien upon the land, 122 ALR 517.

Term "land" or "real property" employed in contract or conveyance as covering mineral interests constructively severed from the land, 123 ALR 848.

Right to partition in kind of mineral or oil and gas land, 143 ALR 1092.

Mistake as to existence, practicability of removal, or amount of minerals as ground for relief from mineral lease, 163 ALR 878.

Construction of deed of undivided interest in land, as to fractional interest in oil, gas, or other minerals, or in royalty, reserved or excepted, 163 ALR 1132.

Basis of computation of cotenant's accountability for minerals and timber removed from the property, 5 ALR2d 1368.

Sale or contract for sale of standing timber

as within provisions of statute of frauds respecting sale or contract of sale of real property, 7 ALR2d 517.

Revocation of license to cut and remove timber as affecting rights in respect of lumber cut but not removed, 26 ALR2d 1194.

Construction and effect of provision in timber deed or contract that lands shall be cut over only once, or the like, 57 ALR2d 827.

Size and kind of trees contemplated by contracts or deeds in relation to standing timber, 72 ALR2d 727.

Construction of oil and gas lease as to the lessee's right and duty of geophysical or seismograph exploration or survey, 28 ALR3d 1426.

What constitutes "goods" within the scope of UCC Article 2, 4 ALR4th 912.

Applicability of UCC Article 2 to mixed contracts for sale of goods and services, 5 ALR4th 501.

## PART 2

### FORM, FORMATION, AND READJUSTMENT OF CONTRACT

**Cross references.** — Rules for interpretation of contracts generally, § 13-2-2. Elements and formation of contracts generally, Ch. 3, T. 13.

#### 11-2-201. Formal requirements; statute of frauds.

(1) Except as otherwise provided in this Code section a contract for the sale of goods for the price of \$500.00 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.

(2) Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (1) of this Code section against such party unless written notice of objection to its contents is given within ten days after it is received.

(3) A contract which does not satisfy the requirements of subsection (1) of this Code section but which is valid in other respects is enforceable:

(a) If the goods are to be specially manufactured for the buyer and are

not suitable for sale to others in the ordinary course of the seller's business and the seller, before notice of repudiation is received and under circumstances which reasonably indicate that the goods are for the buyer, has made either a substantial beginning of their manufacture or commitments for their procurement; or

(b) If the party against whom enforcement is sought admits in his pleading, testimony, or otherwise in court that a contract for sale was made, but the contract is not enforceable under this provision beyond the quantity of goods admitted; or

(c) With respect to goods for which payment has been made and accepted or which have been received and accepted (Code Section 11-2-606). (Code 1933, § 109A-2—201, enacted by Ga. L. 1962, p. 156, § 1.)

**Cross references.** — Statute of frauds generally, § 13-5-30 et seq.

**Law reviews.** — For article discussing applicability of Uniform Commercial Code statute of frauds to construction contracts, see 28 Emory L.J. 335 (1979).

For note, “The Scope and Meaning of Waiver in Section 2-209 of the Uniform

Commercial Code,” see 5 Ga. L. Rev. 783 (1971).

For comment, “The Subcontractor’s Bid: An Option Contract Arising Through Promissory Estoppel,” see 34 Emory L.J. 421 (1985). For comment, “Boats Against the Current: the Courts and the Statute of Frauds,” see 47 Emory L.J. 253 (1998).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION  
REQUISITES OF WRITING  
MERCHANTS’ CONFIRMATIONS  
ACTIONS

General Consideration

**Editor’s notes.** — In light of the similarity of the provisions, decisions under former Code 1933, §§ 20-401(7) and 96-101 are included in the annotations for this section.

**Action for commission due under oral agreement.** — Trial court properly denied lessor’s motion to strike lessee’s counterclaim for commission due under oral agreement to sell aircraft since a commission is earned by providing services and Uniform Commercial Code statute of frauds is applicable to transactions in goods. *Harris v. Clark*, 157 Ga. App. 549, 278 S.E.2d 132 (1981).

**Oral authorization to agent to give lessee of personalty option to buy.** — Where owner of personal property orally authorizes agent

to lease it to another for a period of three months and orally authorizes the agent to give to sublessee option to buy, option price being more than \$5750.00, the option so given by agent is not binding on owner since the agent’s authority rested in parol, in absence of facts sufficient to work an estoppel or show ratification of a completed sale. *Collier v. Wilson-Weesner-Wilkinson Co.*, 58 Ga. App. 44, 197 S.E. 516 (1938) (decided under former Code 1933, § 20-401).

**No mention of personalty in deed or contract for sale of farm.** — Where deed to farm land was delivered in accordance with contract of sale and purchase price paid, and where no mention was made in either deed or contract of sale of personalty alleged to have gone with farm, there was no “sale” of personalty and subsequent delivery of such

**General Consideration (Cont'd)**

personalty to vendee upon vendee's representation that it was part of the transaction did not prevent its recovery by vendor. *Gostin v. Scott*, 80 Ga. App. 630, 56 S.E.2d 778 (1949) (decided under former Code 1933, § 96-101).

**"Letter of intent" stating terms for proposed sale of plant and equipment therein**, which sale was to be contingent on a future agreement as to an inventory of assets, involved a "package deal" for real estate and goods and was thus governed by (and failed under) O.C.G.A. § 13-5-30 rather than the less stringent standards of O.C.G.A. § 11-2-201. *Beaulieu of Am., Inc. v. Coronet Indus., Inc.*, 173 Ga. App. 556, 327 S.E.2d 508 (1985).

**Delivery and acceptance of goods removes transaction from statute of frauds.** — Where transfer of title to personal property is consummated by delivery and acceptance there is no requirement of law that it be in writing. *Jack Fred Co. v. Lago*, 96 Ga. App. 675, 101 S.E.2d 165 (1957) (decided under former § 20-401(7)).

**Cited** in *Evans Implement Co. v. Thomas Indus., Inc.*, 117 Ga. App. 279, 160 S.E.2d 462 (1968); *Hale v. Higginbotham*, 228 Ga. 823, 188 S.E.2d 515 (1972); *Kenimer v. Thompson*, 128 Ga. App. 253, 196 S.E.2d 363 (1973); *L.M. Berry & Co. v. Blackmon*, 129 Ga. App. 347, 199 S.E.2d 610 (1973); *Giant Peanut & Grain Co. v. Long Mfg. Co.*, 129 Ga. App. 685, 201 S.E.2d 26 (1973); *R.L. Kimsey Cotton Co. v. Ferguson*, 233 Ga. 962, 214 S.E.2d 360 (1975); *Hagan v. Jockers*, 138 Ga. App. 847, 228 S.E.2d 10 (1976); *Smith v. Hornbuckle*, 140 Ga. App. 871, 232 S.E.2d 149 (1977); *Whitehead v. Capital Auto. Co.*, 239 Ga. 460, 238 S.E.2d 104 (1977); *Hip Pocket, Inc. v. Levi Strauss & Co.*, 144 Ga. App. 792, 242 S.E.2d 305 (1978); *Hatley v. Frey*, 145 Ga. App. 658, 244 S.E.2d 604 (1978); *Custom Radio Whsles., Inc. v. Hamilton/Aynet Elecs.*, 147 Ga. App. 110, 248 S.E.2d 187 (1978); *Skyway Cycle Sales, Inc. v. Gordon*, 148 Ga. App. 150, 251 S.E.2d 118 (1978); *Jem Patents, Inc. v. Frost*, 156 Ga. App. 311, 274 S.E.2d 707 (1980); *Madewell v. Marietta Dodge, Inc.*, 506 F. Supp. 286 (N.D. Ga. 1980); *David J. Joseph Co. v. S & M Scrap Metal Co.*, 163 Ga. App. 685, 295 S.E.2d 860 (1982); *Integrated Mi-*

*cro Sys. v. NEC Home Elec. (USA), Inc.*, 174 Ga. App. 197, 329 S.E.2d 554 (1985); *Seminole Peanut Co. v. Goodson*, 176 Ga. App. 42, 335 S.E.2d 157 (1985); *Atlanta Dairies Coop. v. Grindle*, 182 Ga. App. 409, 356 S.E.2d 42 (1987); *Kal-O-Mine Indus., Inc. v. Camp (In re Lumpkin Sand & Gravel, Inc.)*, 104 Bankr. 529 (Bankr. M.D. Ga. 1989).

**Requisites of Writing****Requirements for writing to be sufficient.**

— Three definite and invariable requirements as to a writing are made by O.C.G.A. § 11-2-201(1): first, it must evidence a contract for the sale of goods; second, it must be "signed," which includes any authentication which identifies the party to be charged; and third, it must specify a quantity. *Jinright v. Russell*, 123 Ga. App. 706, 182 S.E.2d 328 (1971); *Harris v. Hine*, 232 Ga. 183, 205 S.E.2d 847 (1974); *O.N. Jonas Co. v. Badische Corp.*, 706 F.2d 1161 (11th Cir. 1983).

**Written contract enforceable if showing agreement, basis for relief, and signed by party charged.** — Written agreement signed by party against whom enforcement is sought constitutes valid, enforceable contract if it shows that a contract has been agreed to and there is a reasonably certain basis for granting relief. *Mitchell-Huntley Cotton Co. v. Lawson*, 377 F. Supp. 661 (M.D. Ga. 1973).

**A series of writings** may properly be considered to prove the existence of a contract for the sale of goods for the price of \$500 or more. *Roboserve, Ltd. v. Tom's Foods, Inc.*, 940 F.2d 1441 (11th Cir. 1991).

**Required writing need not contain all material terms** of contract and material terms stated need not be precise. All that is required is that the writing afford a basis for believing that the offered oral evidence rests on a real transaction. *Harris v. Hine*, 232 Ga. 183, 205 S.E.2d 847 (1974); *O.N. Jonas Co. v. Badische Corp.*, 706 F.2d 1161 (11th Cir. 1983); *Lipsey Motors v. Karp Motors, Inc.*, 194 Ga. App. 15, 389 S.E.2d 537 (1989); *Roboserve, Ltd. v. Tom's Foods, Inc.*, 940 F.2d 1441 (11th Cir. 1991).

**Only term which must appear in writing is the quantity term** which need not be accurately stated, but recovery is limited to amount stated. The price, time, and place of payment or delivery, general quality of the



goods, or any particular warranties may all be omitted. *Alice v. Robett Mfg. Co.*, 328 F. Supp. 1377 (N.D. Ga. 1970), *aff'd*, 445 F.2d 316 (5th Cir. 1971).

**Unsigned invoice** is not a writing in confirmation of a contract under O.C.G.A. § 11-2-201. *Jackson v. Meadows*, 153 Ga. App. 1, 264 S.E.2d 503 (1980).

**Invoices on printed forms bearing sender's name and address.** — Invoices which are sent on printed forms bearing a party's name and address are "sufficient against the sender" and thus may be considered a written confirmation of an alleged contract within meaning of O.C.G.A. § 11-2-201. *Jem Patents, Inc. v. Frost*, 147 Ga. App. 839, 250 S.E.2d 547 (1978).

**Complete signature of seller is not necessary** to constitute authentication. *Troutt v. Nash AMC/Jeep, Inc.*, 157 Ga. App. 399, 278 S.E.2d 54 (1981).

**Where the seller does not sign the sales contract**, that fact would not render its provisions unenforceable against the buyer as there is no question that the buyer signed it and that it in fact constitutes the agreement under which the sale was made. *Frick Forest Prods., Inc. v. International Hardwoods, Inc.*, 161 Ga. App. 359, 288 S.E.2d 625 (1982).

**Purchase orders of the buyer** which were not signed by any employee or authorized agent of the manufacturer did not satisfy the requirements of O.C.G.A. § 11-2-201(1). *Entertainment Sales Co. v. SNK, Inc.*, 232 Ga. App. 669, 502 S.E.2d 263 (1998).

**Signature may be printed and may be on any part of document**, including billhead or letterhead. *Troutt v. Nash AMC/Jeep, Inc.*, 157 Ga. App. 399, 278 S.E.2d 54 (1981).

**A writing is "signed"** if it bears any authentication which identifies the party to be charged on the contract. *Roboserve, Ltd. v. Tom's Foods, Inc.*, 940 F.2d 1441 (11th Cir. 1991).

**Writing insufficient to evidence contract for the sale of goods.** See *Alice v. Robett Mfg. Co.*, 328 F. Supp. 1377 (N.D. Ga. 1970), *aff'd*, 445 F.2d 316 (5th Cir. 1971).

**Letter stating buyer's willingness to purchase seller's output where seller had not begun producing goods.** — Letter outlining nature of buyer's operations, seller's efforts and expertise, and stating that buyer had informed seller of buyer's being "willing and

able to purchase" all seller's output at a cost no greater than buyer's own cost of production is, as a matter of law, insufficient as a writing under O.C.G.A. § 11-2-201, because at time the letter was written, seller had taken no action to begin producing goods referred to in the letter. Accordingly, no contract could have existed at the time the letter was written. *Maderas Tropicales v. Southern Crate & Veneer Co.*, 588 F.2d 971 (5th Cir. 1979).

**Signed check used as down payment on store, with notation "For Binder on Store,"** meets all requirements of a writing sufficient to indicate that contract for sale was made between parties. The check does not prove a contract, but would authorize introduction of oral evidence toward that end. *Jinright v. Russell*, 123 Ga. App. 706, 182 S.E.2d 328 (1971).

### Merchants' Confirmations

**One party signing written confirmation.** — O.C.G.A. § 11-2-201 allows formation of enforceable contract even though only one party signs written confirmation. *Edwards v. Wilbur-Ellis Co.*, 379 F. Supp. 1404 (N.D. Ga. 1974).

**Effect of failure to answer written confirmation within 10 days of receipt.** — Between merchants, failure to answer written confirmation of contract within 10 days of receipt is tantamount to a writing under O.C.G.A. § 11-2-201(2) and is sufficient against both parties under O.C.G.A. § 11-2-201(1). The only effect, however, is to take away from the party who fails to answer the defense of the statute of frauds; burden of persuading trier of fact that a contract was in fact made orally prior to written confirmation is unaffected. *Edwards v. Wilbur-Ellis Co.*, 379 F. Supp. 1404 (N.D. Ga. 1974).

**Written confirmation between merchants enforceable only as to quantity specified.** — Between merchants, requirement of a writing is satisfied by a writing in confirmation of contract which is received within a reasonable time by party against whom enforcement is sought and which is sufficient to bind the sender, but is enforceable only with respect to quantity of goods shown in the writing. *Maderas Tropicales v. Southern Crate & Veneer Co.*, 588 F.2d 971 (5th Cir. 1979).



**Merchants' Confirmations (Cont'd)**

**Invoices held to be written confirmation of the contract** between merchants within the meaning of O.C.G.A. § 11-2-201(2). *Dalosso v. Reliable-Triple Cee of N. Jersey, Inc.*, 167 Ga. App. 372, 306 S.E.2d 415 (1983).

Where the sale of goods involves two parties who are merchants, the invoices for the sale constitute written confirmation of the agreement; in addition, buyer's acceptance of the delivered goods takes the agreement out of the statute of frauds due to partial performance. *Bicknell v. Joyce Sportswear Co.*, 173 Ga. App. 897, 328 S.E.2d 564 (1985).

**Farming corporation as "merchant."** — Evidence supported a finding that defendant farming corporation was a "merchant" bound by an oral agreement to sell 5,000 bushels of soybeans, which agreement was confirmed in writing to which the corporation made no response. *Thunderbird Farms, Inc. v. Abney*, 178 Ga. App. 335, 343 S.E.2d 127 (1986).

**"Merchants" as including farmers who orally "book" crops.** — Construing "merchants" in O.C.G.A. § 11-2-104(1) as not excluding as a matter of law farmers who orally "book" crops such as soybeans for sale protects them equally as well as the buyer. If the market price declines after the booking, they are assured of the higher booking price; the buyer cannot renege as O.C.G.A. § 11-2-201 would apply. *Goldkist, Inc. v. Brownlee*, 182 Ga. App. 287, 355 S.E.2d 773 (1987).

**Actions**

**When insufficient contract enforceable.** — A contract which is otherwise insufficient may still be enforceable if party against whom enforcement is sought admits by pleading or testimony that a contract of sale was in fact made. *Jackson v. Meadows*, 153 Ga. App. 1, 264 S.E.2d 503 (1980).

A contract which is within statute of frauds at time of filing petition or cross action can become enforceable by admissions in the case itself by party charged, but not by admissions made outside the case prior to filing of petition or cross action. *Garrison v. Piatt*, 113 Ga. App. 94, 147 S.E.2d 374 (1966).

**Party admitting contract may not claim benefit of statute of frauds.** — Party charged cannot admit fact of parol contract and at same time claim benefit of statute of frauds. *Garrison v. Piatt*, 113 Ga. App. 94, 147 S.E.2d 374 (1966).

O.C.G.A. § 11-2-201(3)(b) was designed to prevent the statute of frauds itself from becoming an aid to fraud, by prohibiting one claiming the benefit of the statute who admits in the case the oral contract sued upon. *Garrison v. Piatt*, 113 Ga. App. 94, 147 S.E.2d 374 (1966).

**Petition for enforcement of contract otherwise valid not demurrable.** — Because it is clearly the intent of the legislature that enforceability of contract, which on its face may be within statute of frauds, is tested by answer, testimony, or plea of party charged, and not merely by allegations in the petition or cross action brought to enforce the contract, it follows that a petition upon such a contract which is valid in other respects is not demurrable because it shows on its face that it is within the statute of frauds. *Garrison v. Piatt*, 113 Ga. App. 94, 147 S.E.2d 374 (1966).

**Agreement found outside of statute of frauds due to partial performance.** See *Dan Gurney Indus., Inc. v. Southeastern Wheels, Inc.*, 168 Ga. App. 504, 308 S.E.2d 637 (1983).

**Parol defense.** — In action on account by seller, O.C.G.A. § 11-2-201 does not prohibit setting up by parol evidence a defense based upon term of contract of sale as to when payments on account become due. *Giant Peanut Co. v. Carolina Chems., Inc.*, 129 Ga. App. 718, 200 S.E.2d 918 (1973).

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 15A Am. Jur. 2d, Commercial Code, § 94. 67 Am. Jur. 2d, Sales, §§ 180-207. 73 Am. Jur. 2d, Statute of Frauds, §§ 427, 428, 497 et seq.

**C.J.S.** — 77A C.J.S., Sales, § 68 et seq.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 2-201.

**ALR.** — Acceptance of checks by tele-

graph or telephone, 2 ALR 1146; 13 ALR 989.

Admissibility of parol evidence to vary or explain the contract implied from the regular endorsement of a bill or note, 4 ALR 764; 11 ALR 637; 22 ALR 527; 35 ALR 1120; 54 ALR 999; 92 ALR 721.

When goods remaining in custody of seller or some third person deemed to have been received by buyer, within exception to statute of frauds, 4 ALR 902.

Installation of fixtures as part performance which will take parol lease out of statute of frauds, 10 ALR 1495.

Effect of the statute of frauds upon the right to modify, by subsequent parol agreement, a written contract required by the statute to be in writing, 17 ALR 10; 29 ALR 1095; 80 ALR 539; 118 ALR 1511.

Statute of frauds: warranty or guaranty in respect of the subject-matter of a contract between third persons, which does in terms embrace such an obligation, 19 ALR 1033.

Admission by pleading of a parol contract as preventing pleader from taking advantage of the statute of frauds, 22 ALR 723.

Pleadings, depositions, testimony, or statements in court as constituting a sufficient writing within the statute of frauds, 22 ALR 735.

Effect of statute of frauds upon the right to modify by subsequent parol agreement, a written contract required by the statute to be in writing, 29 ALR 1095; 80 ALR 539; 118 ALR 1511.

Trade custom or usage to explain or supply essential terms in writing required by statute of frauds (or Sales Act) in sale of goods, 29 ALR 1218.

Necessity of statement in writing of consideration or price for sale of goods or choses in action in order to satisfy statute of frauds, 30 ALR 1163; 59 ALR 1422.

Oral contract to enter into written contract as within statute of frauds, 58 ALR 1015.

Contracts relating to corporate stock as within provisions of statute of frauds dealing with sales of goods, etc., 59 ALR 597.

Doctrine of part performance as sustaining action at law based on contract within statute of frauds, 59 ALR 1305.

Necessity and sufficiency of statement in writing of consideration or price for sale of goods or choses in action in order to satisfy statute of frauds, 59 ALR 1422.

Oral agreement between joint obligors as to extent of liability inter se, 65 ALR 822.

Statute of frauds: sufficiency of identification of vendor or purchaser in memorandum, 70 ALR 196.

Failure to comply with statute of frauds as to a part of a contract within the statute as affecting the enforceability of another part not covered by the statute, 71 ALR 479.

Reformation of memorandum relied upon to take an oral contract out of the statute of frauds, 73 ALR 99.

Extrinsic writing referred to in written agreement as part thereof for purposes of statute of frauds, 73 ALR 1383.

Oral promise of officer, director, or stockholder in relation to bank deposit as within statute of frauds, 95 ALR 1137.

Requirement of written contract as condition to mechanic's lien as affected by an oral modification, or a modification partly oral and partly written, of a written contract, or a subsequent modification in writing not registered or filed as required by statute, 108 ALR 434.

Acceptance which will take oral sale or contract for sale of goods out of statute of frauds as affected by cancellation of order or repudiation of contract before goods were shipped or delivered to buyer, 113 ALR 810.

Effect of statute of frauds upon the right to modify by subsequent parol agreement a written contract required by the statute to be in writing, 118 ALR 1511.

Statute of frauds as applied to agreements of repurchase or repayment on sale of corporate stock or other personal property, 121 ALR 312.

Provision in sale contract to effect that only conditions incorporated therein shall be binding, 127 ALR 132; 133 ALR 1360.

Terms "bags," "bales," "cars," or other terms indefinite as to quantity or weight, as satisfying statute of frauds, 129 ALR 1230.

Statute of frauds as applicable to a contract to be responsible for another's funeral expenses, 134 ALR 633.

Contract to fill in land as one for sale of goods within statute of frauds, 161 ALR 1158.

Printed, stamped, or typewritten name as satisfying requirement of statute of frauds as regards signature, 171 ALR 334.

Deposit in mail or notice of claim required as condition of action against, or

liability of, governmental body, as a giving of notice within required period, 175 ALR 299.

Memorandum which will satisfy statute of frauds, as predicable in whole or part upon writings prior to the oral agreement, 1 ALR2d 841; 30 ALR2d 972.

Undelivered lease or contract (other than for sale of land), or undelivered memorandum thereof, as satisfying statute of frauds, 12 ALR2d 508.

Effect of attempted cancelation or erasure in memorandum otherwise sufficient to satisfy statute of frauds, 31 ALR2d 1112.

Buyer's note as payment within contemplation of statute of frauds, 81 ALR2d 1355.

Applicability of parol evidence rule in favor of or against one not a party to contract of release, 13 ALR3d 313.

Construction and application of UCC § 2-201(3)(b) rendering contract of sale enforceable notwithstanding statute of frauds,

to extent it is admitted in pleading, testimony, or otherwise in court, 88 ALR3d 416.

Farmers as "merchants" within provisions of UCC Article 2, dealing with sales, 95 ALR3d 484.

Construction and application of UCC § 2-201(3)(c) rendering contract of sale enforceable notwithstanding statute of frauds with respect to goods for which payment has been made and accepted or which have been received and accepted, 97 ALR3d 908.

Promissory estoppel as basis for avoidance of UCC statute of frauds (UCC § 2-201), 29 ALR4th 1006.

Sales: "specially manufactured goods" statute of frauds exception in UCC § 2-201(3)(a), 45 ALR4th 1126.

Sales: construction of statute of frauds exception under UCC § 2-201(2) for confirmatory writing between merchants, 82 ALR4th 709; 38 ALR5th 191.

## 11-2-202. Final written expression; parol or extrinsic evidence.

Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented:

(a) By course of dealing or usage of trade (Code Section 11-1-205) or by course of performance (Code Section 11-2-208); and

(b) By evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement. (Code 1933, § 109A-2—202, enacted by Ga. L. 1962, p. 156, § 1.)

**Law reviews.** — For article, "Consumer Protection Against Sellers Misrepresentations," see 20 Mercer L. Rev. 414 (1969). For article, "Impracticability As Risk Allocation:

The Effect of Changed Circumstances upon Contract Obligations for the Sale of Goods," see 22 Ga. L. Rev. 503 (1988).

## JUDICIAL DECISIONS

### ANALYSIS

GENERAL CONSIDERATION

LEGISLATIVE INTENT

CONSTRUCTION AND APPLICATION

USAGE OF TRADE, COURSE OF DEALING, AND COURSE OF PERFORMANCE

COMPLETE AND EXCLUSIVE AGREEMENTS

FRAUD

PROCEDURE



### General Consideration

**No other construction of contract allowed.** — Where the language of the contract is plain, unambiguous, and capable of only one reasonable interpretation, no other construction is permissible. *Golden Peanut Co. v. Hunt*, 203 Ga. App. 469, 416 S.E.2d 896 (1992).

**Parol evidence of prior agreement not effective to vary terms of writing.** — Parol evidence as to terms of agreement made prior to execution of document is not effective to vary terms of written contract. *Romines v. Wagstaff Motor Co.*, 120 Ga. App. 608, 171 S.E.2d 752 (1969); *Hill Aircraft & Leasing Corp. v. Planes, Inc.*, 158 Ga. App. 151, 279 S.E.2d 250 (1981).

Express terms of written contract generally may not be materially varied by parol evidence of prior agreement or of contemporaneous oral agreement between parties. *Cone Mills Corp. v. A.G. Estes, Inc.*, 399 F. Supp. 938 (N.D. Ga. 1975).

**Parties bound by writing.** — In dispute over meaning of contract and subsequent acts of parties to it during execution thereof which is not over language of the contract, a party is bound by what has been reduced to writing. *R.S. Helms, Inc. v. GST Dev. Co.*, 135 Ga. App. 845, 219 S.E.2d 458 (1975).

**O.C.G.A. § 11-2-306(1) precludes a finding that a contract for requirements is too indefinite,** since the quantity is determined by the actual good faith requirements of the particular party. *O.N. Jonas Co. v. Badische Corp.*, 706 F.2d 1161 (11th Cir. 1983).

**Cited in** *Economy Forms Corp. v. Kandy, Inc.*, 391 F. Supp. 944 (N.D. Ga. 1974); *Redfern Meats, Inc. v. Hertz Corp.*, 134 Ga. App. 381, 215 S.E.2d 10 (1975); *Richards & Assocs. v. Fidelity Sound, Inc.*, 137 Ga. App. 752, 224 S.E.2d 832 (1976); *Atlanta Army & Navy Store, Inc. v. Stuckman*, 143 Ga. App. 850, 240 S.E.2d 220 (1977); *Corbett v. North Fla. Clarklift, Inc.*, 155 Ga. App. 701, 272 S.E.2d 563 (1980); *Troutt v. Nash AMC/Jeep, Inc.*, 157 Ga. App. 399, 278 S.E.2d 54 (1981); *Chatham v. Southern Ry.*, 157 Ga. App. 831, 278 S.E.2d 717 (1981); *David J. Joseph Co. v. S & M Scrap Metal Co.*, 163 Ga. App. 685, 295 S.E.2d 860 (1982); *W. Linton Howard, Inc. v. Gibbs Mach., Inc.*, 169 Ga. App. 627, 314 S.E.2d 259 (1984).

### Legislative Intent

**Oral contracts enforceable.** — Existence of O.C.G.A. § 11-2-202 indicates that terms of oral contracts are enforceable under Uniform Commercial Code. *Edwards v. Wilbur-Ellis Co.*, 379 F. Supp. 1404 (N.D. Ga. 1974).

**O.C.G.A. § 11-2-202 requires courts to apply to contracts the meaning intended by parties.** See *R.N. Kelly Cotton Merchant, Inc. v. York*, 379 F. Supp. 1075 (M.D. Ga. 1973), *aff'd*, 494 F.2d 41 (5th Cir. 1974).

**Section intended to prevent false claims of oral warranties.** — O.C.G.A. § 11-2-202 was intended to allow sellers to prevent buyers from making false claims of oral warranties in contract actions. *City Dodge, Inc. v. Gardner*, 232 Ga. 766, 208 S.E.2d 794 (1974).

**Liberalization of parole evidence rule.** — O.C.G.A. § 11-2-202 was intended to liberalize common-law parole evidence rule to allow evidence of agreements outside contract without a prerequisite finding that contract was ambiguous. *Southern Concrete Servs., Inc. v. Mableton Contractors*, 407 F. Supp. 581 (N.D. Ga. 1975), *aff'd*, 569 F.2d 1154 (5th Cir. 1978).

**Admission of evidence contradicting express terms of contract ignores purpose of section.** — To admit evidence of agreement contradicting express terms of contract would clearly eviscerate purpose of O.C.G.A. § 11-2-202. *Southern Concrete Servs., Inc. v. Mableton Contractors*, 407 F. Supp. 581 (N.D. Ga. 1975), *aff'd*, 569 F.2d 1154 (5th Cir. 1978).

### Construction and Application

**Consideration given to official comments.** — O.C.G.A. § 11-2-202 was adopted verbatim from § 2-202 of the Uniform Commercial Code and therefore, in its application by Georgia courts, intentions of drafters of the Uniform Commercial Code as evidenced in official comments to it should be given due consideration. *Warren's Kiddie Shoppe, Inc. v. Casual Slacks, Inc.*, 120 Ga. App. 578, 171 S.E.2d 643 (1969).

**Effect of allowing challenges to specific agreements by extrinsic evidence.** — In contracts which set out fairly specific quantity, price, and time specifications, to allow such specific agreements to be challenged by ex-

**Construction and Application (Cont'd)**

trinsic evidence might jeopardize certainty of contractual duties which parties have right to rely on. *Southern Concrete Servs., Inc. v. Mableton Contractors*, 407 F. Supp. 581 (N.D. Ga. 1975), *aff'd*, 569 F.2d 1154 (5th Cir. 1978).

**Unreasonable construction of contract.** — Construction of contract which negates its express terms, allowing unilateral abandonment of specifications, is patently unreasonable. *Southern Concrete Servs., Inc. v. Mableton Contractors*, 407 F. Supp. 581 (N.D. Ga. 1975), *aff'd*, 569 F.2d 1154 (5th Cir. 1978).

**Contracts to be interpreted in light of commercial setting.** — O.C.G.A. § 11-2-202 requires that contracts be interpreted in light of commercial context in which they were written and not by rules of legal construction. *Southern Concrete Servs., Inc. v. Mableton Contractors*, 407 F. Supp. 581 (N.D. Ga. 1975), *aff'd*, 569 F.2d 1154 (5th Cir. 1978).

**Evidence admissible to show written confirmation incorrectly stated terms of prior oral agreement.** — Recognizing extensive use of oral contracts in securities and commodities markets it is clear that if use of oral contracts is to be fostered, party seeking to enforce oral contract should not be prevented from doing so merely because an alleged written confirmation incorrectly stated terms of prior oral contract. If the law was construed differently, a party to an oral contract could easily elude enforcement by sending a confirmatory memorandum which incorrectly stated all terms of prior oral contract. *Edwards v. Wilbur-Ellis Co.*, 379 F. Supp. 1404 (N.D. Ga. 1974).

**Contract established by memorandum, correspondence, and agreement despite indefinite quantity term.** — Where the evidence demonstrated that both parties intended a requirements contract based on purchaser's good faith needs for the trademarked yarns and the existence of this contract was established by a memorandum, the correspondence between the parties, and a trademark licensing agreement which was to remain in effect subject to cancellation by either party on 90 days' notice, the indefiniteness of the written quantity term did not invalidate the contract. *O.N. Jonas Co. v.*

*Badische Corp.*, 706 F.2d 1161 (11th Cir. 1983).

**Where parties disagree on terms, evidence of prior oral agreement admissible.** — O.C.G.A. § 11-2-202 forbids use of evidence of prior agreements only with respect to terms in confirmatory memoranda to which parties agree, and where parties disagree on every term in alleged confirmatory memorandum, this section will not prohibit use of evidence of any prior agreement. *Edwards v. Wilbur-Ellis Co.*, 379 F. Supp. 1404 (N.D. Ga. 1974).

**Where implied warranties are properly excluded, evidence of prior or contemporaneous parol agreements not admissible.** — Where provisions of contract meet requirements of O.C.G.A. § 11-2-316 and no implied warranty arises out of the transaction, either as to merchantability or as to fitness for a particular purpose, evidence of a contradictory prior or contemporaneous parol agreement is prohibited. *Avery v. Aladdin Prods. Division, Nat'l Serv. Indus., Inc.*, 128 Ga. App. 266, 196 S.E.2d 357 (1973).

**Evidence of samples admitted to support claim of breach of express warranty by sample.** — Because there was no indication that the written contract was a complete and exclusive statement of the agreement between the parties, and because the terms expressed by the sample did not contradict those in the written contract, the parol evidence rule did not prevent the admission of evidence of peanut samples sent by the seller to describe what the buyer would receive in bulk shipment to provide a foundation for the claim against the seller for breach of express warranty by sample. *Alimenta (U.S.A.), Inc. v. Anheuser-Busch Cos.*, 803 F.2d 1160 (11th Cir. 1986).

**Unambiguous agreement cannot be modified.** — Where the clear intention of the parties was that if they could not agree upon a price, seller could then entertain bona fide purchase offers from any third party, buyer cannot modify that unambiguous agreement by use of parol evidence to additionally require the bona fide offer to come from a federally registered peanut handler. *Golden Peanut Co. v. Hunt*, 203 Ga. App. 469, 416 S.E.2d 896 (1992).

**The phrase "local taxes,"** as used in contracts which excluded local taxes from the lump sum purchase price for advertising



signs, did not include state sales taxes, where the phrase was at best an ambiguous phrase, admitting of no single, reasonable meaning, without resort to construction. *Outdoor Displays Welding & Fabrication, Inc. v. United States Enters., Inc.*, 84 Bankr. 260 (Bankr. S.D. Ga. 1988).

### **Usage of Trade, Course of Dealing, and Course of Performance**

**Customs of trade considered in interpreting contract terms.** — Customs of trade should be relevant to interpretation of certain terms of contract, and should be considered in determining what variation in specifications is considered acceptable. *Southern Concrete Servs., Inc. v. Mableton Contractors*, 407 F. Supp. 581 (N.D. Ga. 1975), aff'd, 569 F.2d 1154 (5th Cir. 1978).

Contracts are to be interpreted with assumption that usages of trade were taken for granted when document was phrased. Unless carefully negated they become an element of meaning of words used. *Southern Concrete Servs., Inc. v. Mableton Contractors*, 407 F. Supp. 581 (N.D. Ga. 1975), aff'd, 569 F.2d 1154 (5th Cir. 1978).

**Modification need not be in writing.** — Modification or restitution of the remedy available for breach of warranty need not be in writing. Parole evidence to show the usage of the trade to explain or supplement the available remedies for breach of warranty was improperly excluded. *Topeka Mach. Exch., Inc. v. Stoler Indus., Inc.*, 220 Ga. App. 799, 470 S.E.2d 250 (1996).

**When contract terms and trade usage construed as consistent.** — The express terms of a contract and trade usage shall be construed as consistent with each other only when such construction is reasonable and a construction which negates the express terms of the contract by allowing unilateral abandonment of its specifications is patently unreasonable. *Golden Peanut Co. v. Hunt*, 203 Ga. App. 469, 416 S.E.2d 896 (1992).

**Assumption that parties intend specific price and quantity terms observed.** — Though courts are free to apply custom and trade usage in interpreting terms, it should be assumed that specifications in contract as to quantity and price are intended to be observed by parties and unilateral right to make major departure from such specifications must be expressly agreed to in written

contract. *Southern Concrete Servs., Inc. v. Mableton Contractors*, 407 F. Supp. 581 (N.D. Ga. 1975), aff'd, 569 F.2d 1154 (5th Cir. 1978).

**No need to negate applicability of trade usage to preserve written price and quantity terms.** — If clause expressly negating applicability of trade usage is necessary to preserve specified price and quantity terms of a contract, the purposes of the Uniform Commercial Code will be quickly frustrated, for while consideration of commercial custom is an important aid in interpretation of terms of a contract, parties will have no choice but to foreclose use of such an aid if inevitable result of such consideration is to have explicit contracts negated by an evidentiary free-for-all. *Southern Concrete Servs., Inc. v. Mableton Contractors*, 407 F. Supp. 581 (N.D. Ga. 1975), aff'd, 589 F.2d 1154 (5th Cir. 1978).

### **Complete and Exclusive Agreements**

**Effect of merger and disclaimer clauses.** — In contract actions, effect of merger and disclaimer clauses must be determined under provisions of Uniform Commercial Code. *City Dodge, Inc. v. Gardner*, 232 Ga. 766, 208 S.E.2d 794 (1974).

**Contract clause specifying that conditions not incorporated in contract will not be recognized** indicates that writing was intended to be complete and exclusive statement of terms of agreement. *Southern Concrete Servs., Inc. v. Mableton Contractors*, 407 F. Supp. 581 (N.D. Ga. 1975), aff'd, 569 F.2d 1154 (5th Cir. 1978).

**Where writing appears to be complete and certain agreement** and there is no evidence or allegation of fraud or accident, contract will be presumed to contain entire agreement, and parole evidence of prior or contemporaneous representations or statements will not be considered to add to, take from, or vary written instruments involved. *R.S. Helms, Inc. v. GST Dev. Co.*, 135 Ga. App. 845, 219 S.E.2d 458 (1975).

**"Consistent additional terms" refers to matters not dealt with in written contract.** — Evidence which may be admitted under O.C.G.A. § 11-2-202(b) pertains to agreements covering matters not dealt with in the written contract. *Southern Concrete Servs., Inc. v. Mableton Contractors*, 407 F. Supp.



### Complete and Exclusive Agreements (Cont'd)

581 (N.D. Ga. 1975), *aff'd*, 569 F.2d 1154 (5th Cir. 1978).

**O.C.G.A. § 11-2-202(b) cannot be used merely as an alternative means of introducing evidence of trade usage.** See *Southern Concrete Servs., Inc. v. Mableton Contractors*, 407 F. Supp. 581 (N.D. Ga. 1975), *aff'd*, 569 F.2d 1154 (5th Cir. 1978).

### Fraud

**Charge of fraud, if adequately alleged, may be established by parol evidence.** See *Cone Mills Corp. v. A.G. Estes, Inc.*, 377 F. Supp. 222 (N.D. Ga. 1974).

Even though contract is in writing, fact that it was induced by false representations may be shown by parol or extrinsic evidence as a sheer matter of necessity. *Cone Mills Corp. v. A.G. Estes, Inc.*, 377 F. Supp. 222 (N.D. Ga. 1974).

**Evidence of fraud in procurement of contract.** — Though terms of agreement may indicate existence of valid contract, it will not stand in face of proof evidencing fraud in its procurement. *Cone Mills Corp. v. A.G. Estes, Inc.*, 377 F. Supp. 222 (N.D. Ga. 1974).

**Evidence that material term was founded on misrepresentations or was inserted or omitted fraudulently.** — Fact that contract is in writing does not preclude introduction of

evidence to show that material stipulation therein was founded on misrepresentations and fraud of one party, or was inserted or omitted by fraudulent means. *Cone Mills Corp. v. A.G. Estes, Inc.*, 377 F. Supp. 222 (N.D. Ga. 1974).

**Tort action for fraudulent misrepresentation not precluded.** — The Uniform Commercial Code does not preclude an action in tort based upon fraudulent misrepresentation inducing sale where plaintiff proves by preponderance of evidence the elements of fraud and deceit recognized under Georgia law, and such a tort action cannot be controlled by the terms of the contract itself. *City Dodge, Inc. v. Gardner*, 232 Ga. 766, 208 S.E.2d 794 (1974).

### Procedure

**Jury questions.** — Evidence of trade usage of terms is admissible to construe a contract, and whether delivery terms of contract have been breached presents issue of fact for jury. *Warren's Kiddie Shoppe, Inc. v. Casual Slacks, Inc.*, 120 Ga. App. 578, 171 S.E.2d 643 (1969).

Question of reliance on alleged fraudulent misrepresentation in tort cases cannot be determined by provisions of contract sought to be rescinded but is a question of fact for jury. *City Dodge, Inc. v. Gardner*, 232 Ga. 766, 208 S.E.2d 794 (1974).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 15A Am. Jur. 2d, Commercial Code, § 69. 29A Am. Jur. 2d, Evidence, § 1095. 67 Am. Jur. 2d, Sales, §§ 317-347. 68A Am. Jur. 2d, Secured Transactions, § 164. 72 Am. Jur. 2d, Statute of Frauds, §§ 216, 260.

**C.J.S.** — 32A C.J.S., Evidence, §§ 1168 et seq., 1183.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 2-202.

**ALR.** — Admissibility of parol evidence to show that a bill or note was conditional, or given for a special purpose, 20 ALR 421; 54 ALR 702; 75 ALR 1519; 105 ALR 1346.

Oral agreement between joint obligors as to extent of liability inter se, 65 ALR 822.

Parol-evidence rule: evidence of agreements as to manner or medium of payment of bill or note, or as to credit, setoff, or

counterclaim with respect to the same, 71 ALR 548.

Effect of statute of frauds upon the right to modify by subsequent parol agreement, a written contract required by the statute to be in writing, 80 ALR 539; 118 ALR 1511.

Parol evidence rule as affecting extrinsic evidence to show or to negative usury, 104 ALR 1261.

Requirement of written contract as condition of mechanic's lien as affected by an oral modification, or a modification partly oral and partly written, of a written contract, or a subsequent modification in writing not registered or filed as required by statute, 108 ALR 434.

Provision in sale contract to effect that only conditions incorporated therein shall be binding, 133 ALR 1360.

Conflict of laws as to usage and custom, with respect to interpretation or performance of a contract, 60 ALR2d 467.

Admissibility of oral evidence to show that a writing was a sham agreement not intended to create legal relations, 71 ALR2d 382.

Application of parol evidence rule of UCC § 2-202 where fraud or misrepresentation is

claimed in sale of goods, 71 ALR3d 1059.

Modern status of rules governing legal effect of failure to object to admission of extrinsic evidence violative of parol evidence rule, 81 ALR3d 249.

Affirmations or representations made after the sale is closed as basis of warranty under UCC § 2-313(1)(a), 47 ALR4th 189.

### 11-2-203. Seals inoperative.

The affixing of a seal to a writing evidencing a contract for sale or an offer to buy or sell goods does not constitute the writing a sealed instrument and the law with respect to sealed instruments does not apply to such a contract or offer. (Code 1933, § 109A-2—203, enacted by Ga. L. 1962, p. 156, § 1.)

**Cross references.** — Legal status of contracts under seal generally, § 13-1-4.

## JUDICIAL DECISIONS

**Cited in** McLean v. Gray, 180 Ga. App. 794, 350 S.E.2d 815 (1986).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 17A Am. Jur. 2d, Contracts, § 116. 67 Am. Jur. 2d, Sales, §§ 106, 107.

**C.J.S.** — 77A C.J.S., Sales, § 1 et seq. 78A C.J.S., Seals, §§ 1, 2.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 2-203.

**ALR.** — Necessity of consideration to support option under seal, 2 ALR 631; 21 ALR 137.

### 11-2-204. Formation in general.

(1) A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.

(2) An agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined.

(3) Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy. (Code 1933, § 109A-2—204, enacted by Ga. L. 1962, p. 156, § 1.)

**Law reviews.** — For comment on Fender v. Colonial Stores, Inc., 138 Ga. App. 31, 225 S.E.2d 691 (1976), see 28 Mercer L. Rev. 751 (1977).

## JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Code 1933, § 96-101 are included in the annotations for this section.

**Common-law rule not abrogated.** — The so called "gap filler" provision in O.C.G.A. § 11-2-204(3) does not obliterate the common law rule that the first requirement of law of a valid contract is that there must be a meeting of the minds of the parties and mutuality, and the agreement must be expressed plainly and explicitly enough to show what the parties agree upon; a contract cannot be enforced if its terms are incomplete or incomprehensible. *Drug Line v. Sero-Immuno Diagnostics, Inc.*, 217 Ga. App. 530, 458 S.E.2d 170 (1995).

**Formalities required for contract formation reduced.** — The Uniform Commercial Code makes contracts easier to form and imposes a wider range of options than before; parties may form a contract through conduct rather than merely through the exchange of communications constituting "offer and acceptance." *D.N. Garner Co. v. Georgia Palm Beach Aluminum Window Corp.*, 233 Ga. App. 252, 504 S.E.2d 70 (1998).

**Valid, enforceable contract.** — Written agreement signed by party against whom enforcement is sought constitutes valid, enforceable contract if the writing shows that a contract has been agreed to and there is a reasonably certain basis for granting relief. *Mitchell-Huntley Cotton Co. v. Lawson*, 377 F. Supp. 661 (M.D. Ga. 1973).

**Acceptance letter manifested contractual intent.** See *J. Lee Gregory, Inc. v. Scandinavian House*, 209 Ga. App. 285, 433 S.E.2d 687 (1993).

**Price may be left for ascertainment by certain and exact method.** — If price of goods is fixed and delivery is perfect a contract is executed. Fact that price is to be ascertained by a certain and exact method

subsequent to contract does not affect validity or completeness of the sale, nor does fact that sale is on credit. *Comstock v. Tarbush*, 73 Ga. App. 724, 37 S.E.2d 925 (1946) (decided under former Code 1933, § 96-101).

**Where parties consented as to goods to be sold, price, and delivery,** sale was completed. *Cordell v. Macon Coca-Cola Bottling Co.*, 56 Ga. App. 117, 192 S.E. 228 (1937) (decided under former Code 1933, § 96-101).

**Contract for cotton was binding, though cotton not planted at time.** — Where written contracts, on their face, show clearly that parties intended to enter into contracts for sale of cotton, and testimony of all of parties indicated that each intended to make a binding contract for sale of cotton at time contracts were executed, then it is clear that contracts were formed regardless of whether the cotton had in fact been planted at time of execution. *R.N. Kelly Cotton Merchant, Inc. v. York*, 379 F. Supp. 1075 (M.D. Ga. 1973), *aff'd*, 494 F.2d 41 (5th Cir. 1974).

**Evidentiary issues.** — Summary judgment was precluded where material issues of fact existed as to whether there was an acceptance of a written offer of a manufacturer to furnish and install windows for a project and whether the offer was for a particular window model or for windows meeting project specifications. *D.N. Garner Co. v. Georgia Palm Beach Aluminum Window Corp.*, 233 Ga. App. 252, 504 S.E.2d 70 (1998).

**Cited in** *Taunton v. Allenberg Cotton Co.*, 378 F. Supp. 34 (M.D. Ga. 1973); *Promech Corp. v. Brodhead-Garrett Co.*, 131 Ga. App. 314, 205 S.E.2d 511 (1974); *Duval & Co. v. Malcom*, 233 Ga. 784, 214 S.E.2d 356 (1975); *Deck House, Inc. v. Scarborough, Sheffield & Gaston, Inc.*, 139 Ga. App. 173, 228 S.E.2d 142 (1976); *Unique Designs, Inc. v. Pittard Mach. Co.*, 200 Ga. App. 647, 409 S.E.2d 241 (1991).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 15A Am. Jur. 2d, Commercial Code, § 69. 67 Am. Jur. 2d, Sales, §§ 102, 103.

**C.J.S.** — 77A C.J.S., Sales, § 29 et seq.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 2-204.

**ALR.** — Acting on order for goods as an acceptance thereof, 29 ALR 1352.



Nature, construction, and effect of "lay away" or "will call" plan or system, 10 ALR3d 456.

Output contracts under § 2-306(1) of Uniform Commercial Code, 30 ALR4th 396. "And/or," 154 ALR 866.

### 11-2-205. Firm offers.

An offer by a merchant to buy or sell goods in a signed writing which by its terms gives assurance that it will be held open is not revocable, for lack of consideration, during the time stated or if no time is stated for a reasonable time, but in no event may such period of irrevocability exceed three months; but any such term of assurance on a form supplied by the offeree must be separately signed by the offeror. (Code 1933, § 109A-2—205, enacted by Ga. L. 1962, p. 156, § 1.)

### JUDICIAL DECISIONS

**Cited** in R.N. Kelly Cotton Merchant, Inc. v. York, 379 F. Supp. 1075 (M.D. Ga. 1973); Southern Concrete Servs., Inc. v. Mableton Contractors, 407 F. Supp. 581 (N.D. Ga.

1975); Western Publishing Co. v. International Horizons, Inc., 21 Bankr. 414 (N.D. Ga. 1982).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 67 Am. Jur. 2d, Sales, §§ 138, 139.

**C.J.S.** — 77A C.J.S., Sales, § 32 et seq.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 2-205.

### 11-2-206. Offer and acceptance in formation of contract.

(1) Unless otherwise unambiguously indicated by the language or circumstances:

(a) An offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances;

(b) An order or other offer to buy goods for prompt or current shipment shall be construed as inviting acceptance either by a prompt promise to ship or by the prompt or current shipment of conforming or nonconforming goods, but such a shipment of nonconforming goods does not constitute an acceptance if the seller seasonably notifies the buyer that the shipment is offered only as an accommodation to the buyer.

(2) Where the beginning of a requested performance is a reasonable mode of acceptance an offeror who is not notified of acceptance within a reasonable time may treat the offer as having lapsed before acceptance. (Code 1933, § 109A-2—206, enacted by Ga. L. 1962, p. 156, § 1.)

**Law reviews.** — For comment on Fender v. Colonial Stores, Inc., 138 Ga. App. 31, 225

S.E.2d 691 (1976), see 28 Mercer L. Rev. 751 (1977). For comment, "Boats Against the

Current: the Courts and the Statute of Frauds," see 47 Emory L.J. 253 (1998).

### JUDICIAL DECISIONS

**Cited in** Duval & Co. v. Malcom, 233 Ga. 784, 214 S.E.2d 356 (1975); Fender v. Colonial Stores, Inc., 138 Ga. App. 31, 225 S.E.2d 691 (1976); Marvin L. Walker & Assocs. v. A.L. Buschman, Inc., 147 Ga. App. 851, 250 S.E.2d 532 (1978).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 67 Am. Jur. 2d, Sales, §§ 140-152.

**C.J.S.** — 77A C.J.S., Sales, § 29 et seq.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 2-206.

**ALR.** — Acceptance of offer with condition which law would imply, 1 ALR 1508.

Acknowledging receipt of order for goods as an acceptance completing the contract, 10 ALR 683.

Acting on order for goods as an acceptance thereof, 19 ALR 476; 29 ALR 1352.

Time when offer or proposition is mailed,

or when it is received through mail, as commencement of period allowed for acceptance, 72 ALR 1214.

Silence when offer is made or failure to reject it as an acceptance which will consummate a bilateral contract, 77 ALR 1141.

Construction and application of UCC § 2-201(3)(c) rendering contract of sale enforceable notwithstanding statute of frauds with respect to goods for which payment has been made and accepted or which have been received and accepted, 97 ALR3d 908.

### 11-2-207. Additional terms in acceptance or confirmation.

(1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

(2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:

(a) The offer expressly limits acceptance to the terms of the offer;

(b) They materially alter it; or

(c) Notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

(3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this title. (Code 1933, § 109A-2—207, enacted by Ga. L. 1962, p. 156, § 1.)

**Law reviews.** — For article, “Impracticability As Risk Allocation: The Effect of Changed Circumstances upon Contract Obligations for the Sale of Goods,” see 22 Ga. L. Rev. 503 (1988).

For note, “Enforcing Manufacturers’ Warranty Exclusions Against Non-Privy Commercial Purchasers: The Need for Uniform Guidelines,” see 20 Ga. L. Rev. 461 (1986).

### JUDICIAL DECISIONS

**When section applicable.** — Only where all traditional criteria are met showing that contract was made does O.C.G.A. § 11-2-207 become applicable. *Duval & Co. v. Malcom*, 233 Ga. 784, 214 S.E.2d 356 (1975).

**Material alteration.** — A jurisdiction clause making the law of New York applicable to the transaction constitutes a material alteration and does not become part of the contract. *Sweetapple Plastics, Inc. v. Philip Shuman & Sons*, 77 Bankr. 304 (Bankr. M.D. Ga. 1987).

**Purchase order as contract.** — Where the purchase order from a general contractor contained terms at variance with the initial proposal from the subcontractor, and following receipt of the purchase order, the subcontractor lodged no objection to its terms, but proceeded to manufacture the parts ordered and sent a supervisor to the job site, the trial court did not err in finding that the

purchase order (including the plans and specs), rather than the proposal, constituted the contract between the parties. *American Aluminum Prods. Co. v. Binswanger Glass Co.*, 194 Ga. App. 703, 391 S.E.2d 688 (1990).

**Options incorporated into contract.** — Where the options reserved in the letter of intent did not expressly make the acceptance of plaintiff’s offer conditional and did not demonstrate a lack of contractual intent, they became a part of the contract. *J. Lee Gregory, Inc. v. Scandinavian House*, 209 Ga. App. 285, 433 S.E.2d 687 (1993).

**Cited in** *Frey v. Friendly Motors, Inc.*, 129 Ga. App. 636, 200 S.E.2d 467 (1973); *Pirrone v. Monarch Wine Co.*, 497 F.2d 25 (5th Cir. 1974); *Ewing Bros. v. Ball Computer Prods., Inc.*, 148 Ga. App. 410, 251 S.E.2d 347 (1978).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 67 Am. Jur. 2d, Sales, §§ 153-174.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 2-207.

**ALR.** — Circumstances supporting inference of original offerer’s acceptance of counteroffer or assent to conditions attached by offeree to his acceptance, 135 ALR 821.

Difference between offer and acceptance as regards place of payment or of delivery as variance preventing consummation of contract, 3 ALR2d 256.

What are additional terms materially altering contract within meaning of UCC § 2-207(2)(b), 72 ALR3d 479.

Farmers as “merchants” within provisions of UCC Article 2, dealing with sales, 95 ALR3d 484.

What constitutes acceptance “expressly made conditional” converting it to rejection and counteroffer under UCC § 2-207 (1), 22 ALR4th 939.

### 11-2-208. Course of performance or practical construction.

(1) Where the contract for sale involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement.



(2) The express terms of the agreement and any such course of performance, as well as any course of dealing and usage of trade, shall be construed whenever reasonable as consistent with each other; but when such construction is unreasonable, express terms shall control course of performance and course of performance shall control both course of dealing and usage of trade (Code Section 11-1-205).

(3) Subject to the provisions of Code Section 11-2-209 on modification and waiver, such course of performance shall be relevant to show a waiver or modification of any term inconsistent with such course of performance. (Code 1933, § 109A-2—208, enacted by Ga. L. 1962, p. 156, § 1.)

**Cross references.** — Effect of mutual departure from contract terms, § 13-4-4.

**Law reviews.** — For article, "Impracticability As Risk Allocation: The Effect of Changed Circumstances upon Contract Ob-

ligations for the Sale of Goods," see 22 Ga. L. Rev. 503 (1988).

For note, "The Law of Evidence in the Uniform Commercial Code," see 1 Ga. L. Rev. 44 (1966).

### JUDICIAL DECISIONS

**Cited in** Tri-County Livestock Auction Co. v. Bank of Madison, 228 Ga. 325, 185 S.E.2d 393 (1971); R.N. Kelly Cotton Merchant, Inc. v. York, 379 F. Supp. 1075 (M.D. Ga.

1973); Pirrone v. Monarch Wine Co., 497 F.2d 25 (5th Cir. 1974); Trust Co. v. Montgomery, 136 Ga. App. 742, 222 S.E.2d 196 (1975).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 15A Am. Jur. 2d, Commercial Code, § 7 et seq.

**C.J.S.** — 77A C.J.S., Sales, §§ 82 et seq., 152, 153.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 2-208.

**ALR.** — Divisibility of contract to furnish material for a specific construction, 2 ALR 687.

Motive as affecting the exercise of a contractual right, as between parties to the contract, 25 ALR 977.

Promise of additional compensation for completing building or construction contract, 25 ALR 1450; 55 ALR 1333; 138 ALR 136.

Proceeding under executory contract after discovering fraud as waiver of right to recover damages for the fraud, 13 ALR2d 807.

Construction and effect of contract for sale of commodity or goods wherein quantity is described as "about" or "more or less" than an amount specified, 58 ALR2d 377.

### 11-2-209. Modification, rescission, and waiver.

(1) An agreement modifying a contract within this article needs no consideration to be binding.

(2) A signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded, but except as between merchants such a requirement on a form supplied by the merchant must be separately signed by the other party.

(3) The requirements of the statute of frauds section of this article (Code Section 11-2-201) must be satisfied if the contract as modified is within its provisions.

(4) Although an attempt at modification or rescission does not satisfy the requirements of subsection (2) or (3) of this Code section it can operate as a waiver.

(5) A party who has made a waiver affecting an executory portion of the contract may retract the waiver by reasonable notification received by the other party that strict performance will be required of any term waived, unless the retraction would be unjust in view of a material change of position in reliance on the waiver. (Code 1933, § 109A-2—209, enacted by Ga. L. 1962, p. 156, § 1.)

**Cross references.** — Effect of mutual departure from contract terms, § 13-4-4.

**Law reviews.** — For article discussing exclusion or modification of warranties under the U.C.C., see 1 Ga. St. B.J. 191 (1964). For article, "Impracticability As Risk Allocation: The Effect of Changed Circumstances upon

Contract Obligations for the Sale of Goods," see 22 Ga. L. Rev. 503 (1988).

For note, "The Scope and Meaning of Waiver in Section 2-209 of the Uniform Commercial Code," see 5 Ga. L. Rev. 783 (1971).

## JUDICIAL DECISIONS

**Test of good faith for modifications.** — Effective use of bad faith to escape performance on original contract terms is barred, and extortion of "modification" without legitimate commercial reason is ineffective as a violation of duty of good faith. *Fratelli Gardino v. Caribbean Lumber Co.*, 587 F.2d 204 (5th Cir. 1979).

**Waiver of breach.** — One having accepted benefits arising under contract after being notified of anticipated breach, and not having given notice of intention to rely on its exact terms, but having continued to accept benefits thereunder, may not recover for such alleged breach or failure to perform fully under the complete terms of the original agreement. Acceptance of such benefits after notice of an alleged breach will consti-

tute waiver of breach. *B-Lee's Sales Co. v. Shelton*, 141 Ga. App. 870, 234 S.E.2d 702 (1977).

**Cited in** *Lunsford v. Wilson*, 113 Ga. App. 602, 149 S.E.2d 515 (1966); *Ryder Truck Lines v. Scott*, 129 Ga. App. 871, 201 S.E.2d 672 (1973); *Pirrone v. Monarch Wine Co.*, 497 F.2d 25 (5th Cir. 1974); *Cook-Davis Furn. Co. v. Duskin*, 134 Ga. App. 264, 214 S.E.2d 565 (1975); *Trust Co. v. Montgomery*, 136 Ga. App. 742, 222 S.E.2d 196 (1975); *Fratelli Gardino v. Caribbean Lumber Co.*, 447 F. Supp. 1337 (S.D. Ga. 1978); *Dan Gurney Indus., Inc. v. Southeastern Wheels, Inc.*, 168 Ga. App. 504, 308 S.E.2d 637 (1983); *Integrated Micro Sys. v. NEC Home Elec. (USA), Inc.*, 174 Ga. App. 197, 329 S.E.2d 554 (1985).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 15A Am. Jur. 2d, Commercial Code, § 4. 67 Am. Jur. 2d, Sales, §§ 348-374.

**C.J.S.** — 37 C.J.S., Frauds, Statute of, § 232. 77A C.J.S., Sales, § 109 et seq. 78 C.J.S., Sales, § 565.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 2-209.

**ALR.** — Promise of additional compensation for completing building or construction contract, 25 ALR 1450; 55 ALR 1333; 138 ALR 136.

Necessity of independent consideration to support a modification of the price in a contract of sale, 34 ALR 511.

Consideration for modification of terms of existing tenancy, 43 ALR 1451; 93 ALR 1404.

Duty to minimize damages by accepting offer modified by party who has breached contract of sale, 46 ALR 1192.

Action involving rescission or right to rescind contract and to recover amount paid thereunder as one at law or in equity, 95 ALR 1000.

Action based on rescission of contract as one arising on contract, express or implied, within the meaning of attachment statute, 95 ALR 1028.

Pecuniary damage as essential to rescission of contract for purchase of real or personal property, 106 ALR 125.

Repossession of chattels by seller upon their return or abandonment by buyer as effecting a mutual rescission or as evidence thereof, 106 ALR 703.

Requirement of written contract as condition of mechanic's lien as affected by an oral modification, or a modification partly oral and partly written, of a written contract, or a subsequent modification in writing not registered or filed as required by statute, 108 ALR 434.

Timeliness of tender or offer of return of consideration for release or compromise, required as a condition of setting it aside, 53 ALR2d 757.

Validity and effect of provision in contract against mechanic's lien, 76 ALR2d 1087; 75 ALR3d 505.

Enforceability of voluntary promise of additional compensation because of unforeseen difficulties in performance of existing contract, 85 ALR3d 259.

Affirmations or representations made after the sale is closed as basis of warranty under UCC § 2-313(1)(a), 47 ALR4th 189.

### **11-2-210. Delegation of performance; assignment of rights.**

(1) A party may perform his duty through a delegate unless otherwise agreed or unless the other party has a substantial interest in having his original promisor perform or control the acts required by the contract. No delegation of performance relieves the party delegating of any duty to perform or any liability for breach.

(2) Except as otherwise provided in Code Section 11-9-406, unless otherwise agreed all rights of either seller or buyer can be assigned except where the assignment would materially change the duty of the other party, or increase materially the burden or risk imposed on the other party by the contract, or impair materially the other party's chance of obtaining return performance. A right to damages for breach of the whole contract or a right arising out of the assignor's due performance of the assignor's entire obligation can be assigned despite agreement otherwise.

(3) The creation, attachment, perfection, or enforcement of a security interest in the seller's interest under a contract is not a transfer that materially changes the duty of or increases materially the burden or risk imposed on the buyer or impairs materially the buyer's chance of obtaining return performance within the purview of subsection (2) of this Code section unless, and then only to the extent that, enforcement actually results in a delegation of material performance of the seller. Even in that event, the creation, attachment, perfection, and enforcement of the security interest remain effective, but (i) the seller is liable to the buyer for damages caused



by the delegation to the extent that the damages could not reasonably be prevented by the buyer, and (ii) a court having jurisdiction may grant other appropriate relief, including cancellation of the contract for sale or an injunction against enforcement of the security interest or consummation of the enforcement.

(4) Unless the circumstances indicate the contrary a prohibition of assignment of “the contract” is to be construed as barring only the delegation to the assignee of the assignor’s performance.

(5) An assignment of “the contract” or of “all my rights under the contract” or an assignment in similar general terms is an assignment of rights and unless the language or the circumstances (as in an assignment for security) indicate the contrary, it is a delegation of performance of the duties of the assignor and its acceptance by the assignee constitutes a promise by the assignee to perform those duties. This promise is enforceable by either the assignor or the other party to the original contract.

(6) The other party may treat any assignment which delegates performance as creating reasonable grounds for insecurity and may without prejudice to his or her rights against the assignor demand assurances from the assignee (Code Section 11-2-609). (Code 1933, § 109A-2—210, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 2001, p. 362, § 5.)

**The 2001 amendment**, effective July 1, 2001, in subsection (2), in the first sentence, substituted “Except as otherwise provided in Code Section 11-9-406, unless” for “Unless” at the beginning, substituted “the other party by the contract” for “him by his contract”, and substituted “the other party’s” for “his”, and substituted “the assignor’s” for “his” in the second sentence; added

subsection (3); redesignated former subsections (3) through (5) as present subsections (4) through (6), respectively; substituted “the assignee” for “him” in subsection (5); and inserted “or her” in subsection (6).

**Cross references.** — Substitution of party obligated to perform under contract, § 13-4-20.

## JUDICIAL DECISIONS

**Claim for breach of warranty is assignable.** — An assignment of a claim for an existing breach of warranty is specifically authorized by O.C.G.A. § 11-2-210(2). *Irvin v. Lowe’s of Gainesville, Inc.*, 165 Ga. App. 828, 302 S.E.2d 734 (1983).

**Warranty is not assignable.** — The case of *Stewart v. Gainesville Glass Co.*, 131 Ga. App. 747, 206 S.E.2d 857 (1974), *aff’d*, 233 Ga. 578, 212 S.E.2d 377 (1975), does not hold that a claim for breach of warranty may not be assigned but holds merely that the warranty itself may not be assigned. *Irvin v. Lowe’s of Gainesville, Inc.*, 165 Ga. App. 828, 302 S.E.2d 734 (1983).

**In sale of personal property, warranty is not negotiable or assignable** and does not run with article sold. *Kaiser Aluminum & Chem. Corp. v. Ingersoll-Rand Co.*, 519 F. Supp. 60 (S.D. Ga. 1981).

**Any assignment of warranties materially changes risks and burdens of original seller** under terms of O.C.G.A. § 11-2-210. *Kaiser Aluminum & Chem. Corp. v. Ingersoll-Rand Co.*, 519 F. Supp. 60 (S.D. Ga. 1981).

**Assignment of joint savings account.** — Once savings account has been assigned to third party, joint owners cannot withdraw funds from said account without permission of assignee unless one waives or releases

assignment. *Copeland v. Peachtree Bank & Trust Co.*, 150 Ga. App. 262, 257 S.E.2d 353 (1979).

**Cited in** *Mingledorff's, Inc. v. Hicks*, 133

Ga. App. 27, 209 S.E.2d 661 (1974); *Greene v. Citizens & S. Bank*, 134 Ga. App. 73, 213 S.E.2d 175 (1975); *Crider v. First Nat'l Bank*, 144 Ga. App. 536, 241 S.E.2d 638 (1978).

RESEARCH REFERENCES

**Am. Jur. 2d.** — 6 Am. Jur. 2d, Assignments, §§ 21 et seq., 113 et seq., 133, 161, 162. 67 Am. Jur. 2d, Sales, §§ 375-386. 68A Am. Jur. 2d, Secured Transactions, §§ 434 et seq., 569 et seq.

**C.J.S.** — 77A C.J.S., Sales, §§ 88, 89.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 2-210.

**ALR.** — Assignability of contract to furnish all of buyer's requirement or to take all

of seller's output, 39 ALR 1192.

Rights and duties in respect of property as between seller and seller's assignee on conditional sale of property, 65 ALR 783.

Agreement or order to pay obligations out of the proceeds of any sale or mortgage of property that may be made, as creating an equitable assignment of such proceeds, 101 ALR 81.

PART 3

GENERAL OBLIGATION AND CONSTRUCTION OF CONTRACT

**Cross references.** — Rules for interpretation of contracts generally, § 13-2-2.

**Law reviews.** — For article critically analyzing the distinction in theories of recovery of damages caused by defective products between personal injury cases and economic losses and suggesting a policy basis for deciding the latter, see 29 Mercer L. Rev. 493 (1978).

For note, "Products Liability in Georgia," see 12 Ga. L. Rev. 83 (1977). For note, "Enforcing Manufacturers' Warranty Exclusions Against Non-Privy Commercial Purchasers: The Need for Uniform Guidelines," see 20 Ga. L. Rev. 461 (1986).

RESEARCH REFERENCES

**ALR.** — Validity, construction, and application of computer software licensing agreements, 38 ALR5th 1.

Products liability: computer hardware and software, 59 ALR5th 461.

11-2-301. General obligations of parties.

The obligation of the seller is to transfer and deliver and that of the buyer is to accept and pay in accordance with the contract. (Code 1933, § 109A-2—301, enacted by Ga. L. 1962, p. 156, § 1.)

**Law reviews.** — For article, "Impracticability As Risk Allocation: The Effect of Changed Circumstances upon Contract Ob-

ligations for the Sale of Goods," see 22 Ga. L. Rev. 503 (1988).

JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, decisions under former

Code 1933, § 96-107 are included in the annotations for this section.

**Unexplained failure to deliver.** — While delivery of property is not essential to passage of title to grantee, such delivery usually accompanies a transfer of title and absence of delivery calls for explanation. Failure to deliver property sold, when unexplained, is a badge of fraud, and a circumstance tending, when taken in connection with other circumstances, to show that title did not pass. *Wallis v. Bellah*, 59 Ga. App. 633, 1 S.E.2d 773 (1939) (decided under former Code 1933, § 96-107).

**Where plaintiff purchases machinery already in husband's possession.** — Where plaintiff purchased from defendant certain farm machinery which had theretofore been purchased by her husband, to be used by him in operating a farm belonging to plaintiff, which machinery was in possession of her husband on farm, and parties did not

contemplate that machinery was to be delivered to wife at any other place, there was no merit to contention that before plaintiff could be held liable on such contract of purchase it had to appear that defendant actually repossessed machinery from husband and thereafter made actual physical delivery to wife. *Johnson v. Hinson*, 188 Ga. 639, 4 S.E.2d 561 (1939) (decided under former Code 1933, § 96-107).

**Cited in** *Undercofler v. Eastern Air Lines*, 221 Ga. 824, 147 S.E.2d 436 (1966); *Mitchell-Huntley Cotton Co. v. Lawson*, 377 F. Supp. 661 (M.D. Ga. 1973); *Promech Corp. v. Brodhead-Garrett Co.*, 131 Ga. App. 314, 205 S.E.2d 511 (1974); *Cone Mills Corp. v. A.G. Estes, Inc.*, 377 F. Supp. 222 (N.D. Ga. 1974); *Amatulli Imports, Inc. v. House of Persia, Inc.*, 191 Ga. App. 827, 383 S.E.2d 192 (1989).

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 67 Am. Jur. 2d, Sales, §§ 123-128.

**C.J.S.** — 77A C.J.S., Sales, §§ 158 et seq., 189, 197, 208 et seq.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 2-301.

**ALR.** — Duty of principal to fill orders under sales-agency contract, 52 ALR 557.

Inability of a seller of a commodity manufactured or produced by a third person to obtain the same from the latter as a defense

to an action by the buyer for breach of the contract, 80 ALR 1177.

Mutuality and enforceability of contract to furnish another with his needs, wants, desires, requirements and the like, of certain commodities, 26 ALR2d 1139.

Repossession by secured seller as affecting his right to recover on note or other obligation given as a down payment, 49 ALR3d 364.

#### 11-2-302. Unconscionable contract or clause.

(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose, and effect to aid the court in making the determination. (Code 1933, § 109A-2—302, enacted by Ga. L. 1962, p. 156, § 1.)

**Law reviews.** — For article, "Consumer Protection Against Sellers Misrepresentations," see 20 Mercer L. Rev. 414 (1969). For article, "The Unconscionability Offense,"

see 4 Ga. L. Rev. 469 (1970). For article discussing interpretation in Georgia of insurance policies containing evidentiary conditions, see 12 Ga. L. Rev. 783 (1978). For



article discussing the anachronistic nature of the Georgia contracts code as dramatized by comparing the doctrine of consideration as it is formulated in the restatements of contracts and in Title 20 of the Georgia Code of 1933, and the interpretative approach Georgia courts have taken in dealing with such code, see 13 Ga. L. Rev. 499 (1979). For article, "The Future Use of

Unconscionability and Impracticability as Contract Doctrines," see 40 Mercer L. Rev. 937 (1989). For article, "Contract Litigation and the Elite Bar in New York City, 1960-1980," see 39 Emory L.J. 413 (1990).

For note, "Pyramid Marketing Plans and Consumer Protection: State and Federal Regulation," see 21 J. of Pub. L. 445 (1972).

## JUDICIAL DECISIONS

### ANALYSIS

#### GENERAL CONSIDERATION APPLICATION

##### General Consideration

**"Unconscionable" defined.** — "Unconscionable" under O.C.G.A. § 11-2-302 means "one-sided contracts." R.C. Craig, Ltd. v. Ships of Sea, Inc., 345 F. Supp. 1066 (S.D. Ga. 1972), later proceeding, 401 F. Supp. 1051 (S.D. Ga. 1975).

An unconscionable contract is such an agreement as no sane man not acting under a delusion would make, and that no honest man would take advantage of. R.L. Kimsey Cotton Co. v. Ferguson, 233 Ga. 962, 214 S.E.2d 360 (1975); Stefan Jewelers, Inc. v. Electro-Protective Corp., 161 Ga. App. 385, 288 S.E.2d 667 (1982).

**Section not intended merely to relieve party from bad bargain.** — If court determines as a matter of law that provision of a contract is unconscionable when made, it may, among other things, so limit the application of any unconscionable provision to avoid an unconscionable result, but O.C.G.A. § 11-2-302 is not designed merely to relieve a party of a bad bargain. Romine, Inc. v. Savannah Steel Co., 117 Ga. App. 353, 160 S.E.2d 659 (1968).

**Limitation of warranty held unconscionable.** — A general limitation of warranty, if construed so as to limit remedy in all events, would be unconscionable under O.C.G.A. § 11-2-302. Jacobs v. Metro Chrysler-Plymouth, Inc., 125 Ga. App. 462, 188 S.E.2d 250 (1972).

**Cited in** Holcomb v. Approved Bancredit Corp., 225 Ga. 271, 167 S.E.2d 655 (1969); Avery v. Aladdin Prods. Div., Nat'l Serv. Indus., Inc., 128 Ga. App. 266, 196 S.E.2d 357 (1973); Westinghouse Credit Corp. v.

Chapman, 129 Ga. App. 830, 201 S.E.2d 686 (1973); Mitchell-Huntley Cotton Co. v. Lawson, 377 F. Supp. 661 (M.D. Ga. 1973); F.N. Roberts Pest Control Co. v. McDonald, 132 Ga. App. 257, 208 S.E.2d 13 (1974); R.C. Craig, Ltd. v. Ships of Sea, Inc., 401 F. Supp. 1051 (S.D. Ga. 1975); Fratelli Gardino v. Caribbean Lumber Co., 447 F. Supp. 1337 (S.D. Ga. 1978); Holman Motor Co. v. Evans, 169 Ga. App. 610, 314 S.E.2d 453 (1984).

##### Application

**O.C.G.A. § 11-2-302 does not by its terms apply to transactions not involving a sale.** Interstate Security Police, Inc. v. Citizens & S. Emory Bank, 237 Ga. 37, 226 S.E.2d 583 (1976).

**Discretion of courts over enforcement of sales contracts.** — While it is a general rule in this state that parties may contract as they please subject to the exceptions of O.C.G.A. § 13-8-1 et seq., O.C.G.A. § 11-2-302 modifies this general rule that parties are free to make whatever contracts they please so long as there is no fraud or illegality by giving the courts discretion to refuse to enforce sales contracts under Georgia Uniform Commercial Code, in whole or in part, which they find to be "unconscionable." Chrysler Corp. v. Wilson Plumbing Co., 132 Ga. App. 435, 208 S.E.2d 321 (1974).

**Exclusion or modification of warranty.** — Although a seller may exclude or modify warranties, a court may refuse to enforce an exclusion or modification on the basis of unconscionability. Mullis v. Speight Seed Farms, Inc., 234 Ga. App. 27, 505 S.E.2d 818 (1998).

**Test for unconscionability.** — The basic test is whether, in light of general commercial background and commercial needs of particular trade or case, clauses involved are so one-sided as to be unconscionable under circumstances existing at the time of making of contract. *R.L. Kimsey Cotton Co. v. Ferguson*, 233 Ga. 962, 214 S.E.2d 360 (1975).

**Deletion of unconscionable clauses.** — O.C.G.A. § 11-2-302 allows a court to determine whether any clause in a contract is unconscionable at the time it was made and, if so, to allow the contract to be construed with the offending clause deleted. *Jacobs v. Metro Chrysler-Plymouth, Inc.*, 125 Ga. App. 462, 188 S.E.2d 250 (1972).

**A limitation of remedies in a commercial setting** is not considered unconscionable. *Hall v. Fruehauf Corp.*, 179 Ga. App. 362, 346 S.E.2d 582 (1986).

**Nonresidents not allowed to assert that city water fees were unconscionable.** — Non-resident plaintiffs, having no enforceable right to be supplied with water from a city at any price, were not allowed to assert that it was “unconscionable” that they were not being supplied with water for a fee that was less than that assessed by the authorities legally authorized to determine the rate to be charged. *Zepp v. Mayor of Athens*, 180 Ga. App. 72, 348 S.E.2d 673 (1986).

**Contract provision not unconscionable.** — Contract provision that provider of burglar alarm service “shall not be liable for” and jeweler “waives any rights against [provider] on account of any loss” was not unconscionable, particularly with reference to a theft by a third party, seemingly performed by professionals, in cutting the phone lines on which the service was based, thereafter cut-

ting into the roof of the building, bypassing this protective barrier and then cutting the wire to the outside alarm bell. *Stefan Jewelers, Inc. v. Electro-Protective Corp.*, 161 Ga. App. 385, 288 S.E.2d 667 (1982).

**Warranty excluding consequential damages not unconscionable.** — A warranty on a television set which excluded all incidental and consequential damages was not unconscionable under both a procedural and substantive analysis. *NEC Technologies, Inc. v. Nelson*, 267 Ga. 390, 478 S.E.2d 769 (1996).

**Provision in California lender's contract allowing repossession of automobile if removed from California** more than 30 days was not unconscionable. *Francis v. Union Bank*, 183 Ga. App. 84, 357 S.E.2d 837, cert. denied, 183 Ga. App. 906, 357 S.E.2d 837 (1987).

**Motor vehicle title pawn transaction.** — Although O.C.G.A. § 11-2-302 by its terms applies to transactions involving a sale, there is nothing unconscionable about a pawn ticket that authorizes the pawnbroker to sell the pawned vehicle following the debtor's default. *Hooks v. Cobb Ctr. Pawn & Jewelry Brokers, Inc.*, 241 Ga. App. 305, 527 S.E.2d 566 (1999).

**Liability limited to purchase price.** — A disclaimer of liability for breach of warranty by a tobacco seed manufacturer, which stated that liability would be limited to the purchase price, was unconscionable and would not be enforced; an absence of liability on the part of the manufacturer would leave farmers with no recourse for a loss caused by a crop failure, and the allocation of risk for ineffective seeds is better shouldered by the manufacturer than the consumer. *Mullis v. Speight Seed Farms, Inc.*, 234 Ga. App. 27, 505 S.E.2d 818 (1998).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 17A Am. Jur. 2d, Contracts, § 295. 67 Am. Jur. 2d, Sales, §§ 233-239.

**C.J.S.** — 77A C.J.S., Sales, § 79. 81 C.J.S., Specific Performance, §§ 48, 49.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 2-302.

**ALR.** — Incontestable clause as excluding a defense based upon public policy, 35 ALR 1491; 170 ALR 1040.

Enforceability of transaction entered into

pursuant to referral sales arrangement, 14 ALR3d 1420.

“Unconscionability” as ground for refusing enforcement of contract for sale of goods or agreement collateral thereto, 18 ALR3d 1305.

Punitive damages for wrongful seizure of chattel by one claiming security interest, 35 ALR3d 1016.

Validity of disclaimer of warranty clauses

in sale of new automobile, 54 ALR3d 1217.

Enforceability, insofar as restrictions would be unreasonable, of contract containing unreasonable restrictions on competition, 61 ALR3d 397.

Validity and construction of "no damage" clause with respect to delay in building or construction contract, 74 ALR3d 187.

Practices forbidden by state deceptive trade practice and consumer protection acts, 89 ALR3d 449.

Construction and effect of new motor

vehicle warranty limiting manufacturer's liability to repair or replacement of defective parts, 2 ALR4th 576.

Unconscionability, under UCC § 2-302 or § 2-719(3), of disclaimer of warranties or limitation or exclusion of damages in contract subject to UCC Article 2 (Sales), 38 ALR4th 25.

"Unconscionability," under UCC § 2-302, of bank's letter of credit or other financing arrangements, 15 ALR5th 365.

### 11-2-303. Allocation or division of risks.

Where this article allocates a risk or a burden as between the parties "unless otherwise agreed," the agreement may not only shift the allocation but may also divide the risk or burden. (Code 1933, § 109A-2 — 303, enacted by Ga. L. 1962, p. 156, § 1.)

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 67 Am. Jur. 2d, Sales, §§ 425-427.

**C.J.S.** — 77A C.J.S., Sales, § 79.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 2-303.

**ALR.** — Right of buyer and seller inter se as affected by invalidity of, or subsequent changes or developments with respect to, tax, 132 ALR 706.

### 11-2-304. Price payable in money, goods, realty, or otherwise.

(1) The price can be made payable in money or otherwise. If it is payable in whole or in part in goods each party is a seller of the goods which he is to transfer.

(2) Even though all or part of the price is payable in an interest in realty the transfer of the goods and the seller's obligations with reference to them are subject to this article, but not the transfer of the interest in realty or the transferor's obligations in connection therewith. (Code 1933, § 109A-2—304, enacted by Ga. L. 1962, p. 156, § 1.)

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 67 Am. Jur. 2d, Sales, §§ 208-212.

**C.J.S.** — 33 C.J.S., Exchange of Property, § 1 et seq. 77A C.J.S., Sales, §§ 94 et seq., 208 et seq.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 2-304.

**ALR.** — Right of purchaser to opportunity to pay in cash where tender has been made

in other medium, 23 ALR 630; 46 ALR 914.

Validity and effect of provision of sale contract making price dependent on tariff duties or changes in tariff, 70 ALR 1444.

Contracts for payment in gold or silver, or in gold or silver coin ("gold coin" clauses), 84 ALR 1499; 86 ALR 1172; 88 ALR 1532; 92 ALR 1525; 95 ALR 1383; 101 ALR 1318; 114 ALR 820.



**11-2-305. Open price term.**

(1) The parties if they so intend can conclude a contract for sale even though the price is not settled. In such a case the price is a reasonable price at the time for delivery if:

(a) Nothing is said as to price; or

(b) The price is left to be agreed by the parties and they fail to agree; or

(c) The price is to be fixed in terms of some agreed market or other standard as set or recorded by a third person or agency and it is not so set or recorded.

(2) A price to be fixed by the seller or by the buyer means a price for him to fix in good faith.

(3) When a price left to be fixed otherwise than by agreement of the parties fails to be fixed through fault of one party the other may at his option treat the contract as canceled or himself fix a reasonable price.

(4) Where, however, the parties intend not to be bound unless the price be fixed or agreed and it is not fixed or agreed there is no contract. In such a case the buyer must return any goods already received or if unable so to do must pay their reasonable value at the time of delivery and the seller must return any portion of the price paid on account. (Code 1933, § 109A-2—305, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 2002, p. 415, § 11.)

**The 2002 amendment**, effective April 18, 2002, part of an Act to revise, modernize, and correct the Code, substituted “canceled” for “cancelled” in subsection (3).

**Law reviews.** — For article, “Contract Litigation and the Elite Bar in New York City, 1960-1980,” see 39 Emory L.J. 413 (1990).

**JUDICIAL DECISIONS**

**Editor’s notes.** — In light of the similarity between the provisions, decisions under former Code 1933, § 96-101 are included in the annotations for this section.

**Necessity to show agreement on price.** — Contract, if otherwise sufficient, need not show that there has been an agreement on price. *Jackson v. Meadows*, 153 Ga. App. 1, 264 S.E.2d 503 (1980).

**If contracts do not specify price, O.C.G.A. § 11-2-305 requires that price be “reasonable.”** *Spartan Grain & Mill Co. v. Ayers*, 517 F.2d 214 (5th Cir. 1975).

**Price is not absolutely essential in contract for sale of goods.** *Peach State Meat Co. v.*

*Excel Corp.*, 860 F. Supp. 849 (M.D. Ga. 1994).

**Contract to sell water at fixed price.** — O.C.G.A. § 11-2-305 comes into play only where a contract for sale is concluded with an open-price term. Where water is offered for sale by a city at a fixed price and nonresident plaintiffs accept the offer at that fixed price, it cannot be said that the city sells water to plaintiffs pursuant to an open price term contract. *Zepp v. Mayor of Athens*, 180 Ga. App. 72, 348 S.E.2d 673 (1986).

**Proof of price necessary to prove case concerning indebtedness.** — Price was one essential of contract for sale of goods giving

rise to alleged indebtedness, which was denied by defendant in its answer, and proof of price, as amount sued for, was necessary to prove case as alleged; where evidence was insufficient to establish that defendant owed plaintiff any definite amount, as contract price of goods or as market value of goods, nonsuit was proper. *Wolfe v. Brown-Wright Hotel Supply Corp.*, 87 Ga. App. 12, 73 S.E.2d 82 (1952) (decided under former Code 1933, § 96-101).

**Cited** in *First Nat'l Bank & Trust Co. v. Olivetti Corp. of Am.*, 130 Ga. App. 896, 204 S.E.2d 781 (1974); *Deck House, Inc. v. Scarborough, Sheffield & Gaston, Inc.*, 139 Ga. App. 173, 228 S.E.2d 142 (1976); *Spartan Grain & Mill Co. v. Ayers*, 581 F.2d 419 (5th Cir. 1978); *Robinson v. Stevens Indus., Inc.*, 162 Ga. App. 132, 290 S.E.2d 336 (1982); *Billings Cottonseed, Inc. v. Albany Oil Mill, Inc.*, 173 Ga. App. 825, 328 S.E.2d 426 (1985).

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 67 Am. Jur. 2d, Sales, §§ 213-223.

**C.J.S.** — 77A C.J.S., Sales, § 94 et seq.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 2-305.

**ALR.** — Construction of “cost plus” contracts, 2 ALR 126; 27 ALR 48.

Validity and enforceability of contract which expressly leaves open terms of payment for future negotiation, 49 ALR 1464.

Sale agreement fixing price at resale price less specified per cent as indefinite, 57 ALR 747.

Validity of contract which leaves amount to be paid in performance thereof to promisor's determination, 92 ALR 1396.

Validity of sales contract as affected by provision therein giving buyer power to control price to be paid for goods, 49 ALR2d 508.

Construction and application of UCC § 2-305 dealing with open price term contracts, 91 ALR3d 1237.

### 11-2-306. Output, requirements, and exclusive dealings.

(1) A term which measures the quantity by the output of the seller or the requirements of the buyer means such actual output or requirements as may occur in good faith, except that no quantity unreasonably disproportionate to any stated estimate or in the absence of a stated estimate to any normal or otherwise comparable prior output or requirements may be tendered or demanded.

(2) A lawful agreement by either the seller or the buyer for exclusive dealing in the kind of goods concerned imposes unless otherwise agreed an obligation by the seller to use best efforts to supply the goods and by the buyer to use best efforts to promote their sale. (Code 1933, § 109A-2—306, enacted by Ga. L. 1962, p. 156, § 1.)

#### JUDICIAL DECISIONS

**O.C.G.A. § 11-2-306 is applicable regardless of character of seller or buyer.** *Romine, Inc. v. Savannah Steel Co.*, 117 Ga. App. 353, 160 S.E.2d 659 (1968).

**O.C.G.A. § 11-2-306(1) precludes a finding that a contract for requirements is too indefinite, since the quantity is determined**

by the actual good faith requirements of the particular party. *O.N. Jonas Co. v. Badische Corp.*, 706 F.2d 1161 (11th Cir. 1983).

**Contract established by memorandum, correspondence, and agreement despite indefinite quantity term.** — Where the evidence demonstrated that both parties in-

tended a requirements contract based on purchaser's good faith needs for the trademarked yarns and the existence of this contract was established by a memorandum, the correspondence between the parties, and a trademark licensing agreement which was to remain in effect subject to cancellation by either party on 90 days' notice, the indefiniteness of the written quantity term did not invalidate the contract. *O.N. Jonas Co. v. Badische Corp.*, 706 F.2d 1161 (11th Cir. 1983).

**Actual requirements disproportionate to estimation.** — Where quantity actually delivered and accepted to meet requirements of the buyer is unreasonably disproportionate to estimated requirements, the lot price for estimated total requirements is not a lot price for actual requirements, although it may serve to establish a unit price therefor. *Romine, Inc. v. Savannah Steel Co.*, 117 Ga. App. 353, 160 S.E.2d 659 (1968).

**Good faith duty to perform.** — Where plaintiffs entered into a three-year "Output and Requirements Contract and Security Agreement" with defendant, under which defendant was to furnish all the supplies, materials, labor, advice, etc., needed to produce and harvest pecans from pecan groves owned and leased by plaintiffs and to market all the pecans produced from the groves, regardless of whether this contract fell under O.C.G.A. §§ 11-2-306 or 13-4-20, defendant had a duty to perform in good faith. *Flynn v. Gold Kist, Inc.*, 181 Ga. App. 637, 353 S.E.2d 537 (1987).

Where under a contract to produce, harvest and market pecans from plaintiffs' groves, plaintiffs claimed that they were overcharged for oil and lubricants, while defendant was not required under the contract to purchase these products at the lowest possible price, it was required to exercise good faith in making these purchases. *Flynn v.*

*Gold Kist, Inc.*, 181 Ga. App. 637, 353 S.E.2d 537 (1987).

**Contract promising to purchase "seed which, from time to time, [buyer] reasonably requires"** was not promise to purchase exclusively from seller and did not support seller's reciprocal promise to supply all of buyer's needs for seed; thus, no valid "requirements contract" was created. *Billings Cottonseed, Inc. v. Albany Oil Mill, Inc.*, 173 Ga. App. 825, 328 S.E.2d 426 (1985).

**Supply contract clause of a real estate sales contract** providing that the parties would enter into a supply contract, whereby the buyer would purchase gasoline from the seller for 10 years at a cost of one cent per gallon above the seller's cost, could not be considered a valid "requirements" contract because it did not provide that the buyer would obtain gasoline from the seller exclusively. *Smith Serv. Oil Co. v. Parker*, 250 Ga. App. 270, 549 S.E.2d 485 (2001).

**Contract in restraint of trade unenforceable.** — Oral agreement between a manufacturer and distributor for the manufacture and sale of fertilizer was unenforceable because it did not contain any territorial limitations on the distributor's exclusive sales rights. *PCS Joint Venture, Ltd. v. Davis*, 219 Ga. App. 519, 465 S.E.2d 713 (1995).

**Cited in** *Harris v. Hine*, 232 Ga. 183, 205 S.E.2d 847 (1974); *Duval & Co. v. Malcom*, 233 Ga. 784, 214 S.E.2d 356 (1975); *R.L. Kimsey Cotton Co. v. Ferguson*, 233 Ga. 962, 214 S.E.2d 360 (1975); *Cox Caulking & Insulating Co. v. Brockett Distrib. Co.*, 150 Ga. App. 424, 258 S.E.2d 51 (1979); *Integrated Micro Sys. v. NEC Home Elec. (USA), Inc.*, 174 Ga. App. 197, 329 S.E.2d 554 (1985); *Halley v. Harden Oil Co.*, 182 Ga. App. 784, 357 S.E.2d 138 (1987); *Roboserve, Ltd. v. Tom's Foods, Inc.*, 940 F.2d 1441 (11th Cir. 1991); *Peach State Meat Co. v. Excel Corp.*, 860 F. Supp. 849 (M.D. Ga. 1994).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 67 Am. Jur. 2d, Sales, §§ 288, 289.

**C.J.S.** — 77A C.J.S., Sales, §§ 178, 179.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 2-306.

**ALR.** — Divisibility of contract to furnish

material for a specific construction, 2 ALR 687.

Rights and remedies upon cancelation of sales agency, 32 ALR 209; 52 ALR 546; 89 ALR 252.

Duty of principal to fill orders under



sales-agency contract, 52 ALR 557.

Restrictive agreements or covenants in respect of purchase or handling of petroleum products by operator of filling station, 26 ALR2d 219.

Construction and effect of contract for sale of commodity to fill buyer's requirements, 26 ALR2d 1099.

Mutuality and enforceability of contract to

furnish another with his needs, wants, desires, requirements and the like, of certain commodities, 26 ALR2d 1139.

Requirements contracts under § 2-306(1) of Uniform Commercial Code, 96 ALR3d 1275.

Output contracts under § 2-306(1) of Uniform Commercial Code, 30 ALR4th 396.

### 11-2-307. Delivery in single lot or several lots.

Unless otherwise agreed all goods called for by a contract for sale must be tendered in a single delivery and payment is due only on such tender but where the circumstances give either party the right to make or demand delivery in lots the price if it can be apportioned may be demanded for each lot. (Code 1933, § 109A-2—307, enacted by Ga. L. 1962, p. 156, § 1.)

#### JUDICIAL DECISIONS

**Cited** in *Deck House, Inc. v. Scarborough, Sheffield & Gaston, Inc.*, 139 Ga. App. 173, 228 S.E.2d 142 (1976).

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 67 Am. Jur. 2d, Sales, § 535.

**C.J.S.** — 77A C.J.S., Sales, §§ 181, 208 et seq.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 2-307.

**ALR.** — Divisibility of contract to furnish material for a specific construction, 2 ALR 687.

### 11-2-308. Absence of specified place for delivery.

Unless otherwise agreed:

(a) The place for delivery of goods is the seller's place of business or if he has none his residence; but

(b) In a contract for sale of identified goods which to the knowledge of the parties at the time of contracting are in some other place, that place is the place for their delivery; and

(c) Documents of title may be delivered through customary banking channels. (Code 1933, § 109A-2—308, enacted by Ga. L. 1962, p. 156, § 1.)

#### JUDICIAL DECISIONS

**Cited** in *Taunton v. Allenberg Cotton Co., Corp. v. A.G. Estes, Inc.*, 377 F. Supp. 222 378 F. Supp. 34 (M.D. Ga. 1973); *Cone Mills* (N.D. Ga. 1974); *Deck House, Inc. v.*

Scarborough, Sheffield & Gaston, Inc., 139 Ga. App. 173, 228 S.E.2d 142 (1976).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 15A Am. Jur. 2d, Commercial Code, § 27 et seq. 67 Am. Jur. 2d, Sales, § 299.

**C.J.S.** — 77A C.J.S., Sales, § 168.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 2-308.

**ALR.** — When instrument deemed payable at a “special place” within the provision

of the Uniform Negotiable Instruments Law making ability and willingness to pay at such place equivalent to tender, 24 ALR 1050.

Buyer’s duty to give seller instructions to ship where former has not exercised his option under contract to require shipment before time specified, 119 ALR 1495.

### 11-2-309. Absence of specific time provisions; notice of termination.

(1) The time for shipment or delivery or any other action under a contract if not provided in this article or agreed upon shall be a reasonable time.

(2) Where the contract provides for successive performances but is indefinite in duration it is valid for a reasonable time but unless otherwise agreed may be terminated at any time by either party.

(3) Termination of a contract by one party except on the happening of an agreed event requires that reasonable notification be received by the other party and an agreement dispensing with notification is invalid if its operation would be unconscionable. (Code 1933, § 109A-2—309, enacted by Ga. L. 1962, p. 156, § 1.)

**Cross references.** — Effect of absence of specific time provision in contract, § 13-4-20.

### JUDICIAL DECISIONS

**Cited** in Taunton v. Allenberg Cotton Co., 378 F. Supp. 34 (M.D. Ga. 1973); Deck House, Inc. v. Scarborough, Sheffield & Gaston, Inc., 139 Ga. App. 173, 228 S.E.2d 142 (1976); Maderas Tropicales v. Southern Crate & Veneer Co., 588 F.2d 971 (5th Cir.

1979); Jeff Goolsby Homes Corp. v. Smith, 168 Ga. App. 218, 308 S.E.2d 564 (1983); Lundy v. Low, 200 Ga. App. 332, 408 S.E.2d 144 (1991); Drug Line v. Sero-Immuno Diagnostics, Inc., 217 Ga. App. 530, 458 S.E.2d 170 (1995).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 67 Am. Jur. 2d, Sales, §§ 295, 296.

**C.J.S.** — 77A C.J.S., Sales, §§ 139, 140.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 2-309.

**ALR.** — Vendor’s acceptance of payment tendered after time specified as waiver of

provision making time of essence of contract, 9 ALR 996.

Rights and remedies upon cancelation of sales agency, 32 ALR 209; 52 ALR 546; 89 ALR 252.

Buyer’s duty to give seller instructions to ship where former has not exercised his

option under contract to require shipment before time specified, 119 ALR 1495.

ship contract containing no express provision for termination, 19 ALR3d 196.

Termination by principal of distributor-

### 11-2-310. Open time for payment or running of credit; authority to ship under reservation.

Unless otherwise agreed:

(a) Payment is due at the time and place at which the buyer is to receive the goods even though the place of shipment is the place of delivery; and

(b) If the seller is authorized to send the goods he may ship them under reservation, and may tender the documents of title, but the buyer may inspect the goods after their arrival before payment is due unless such inspection is inconsistent with the terms of the contract (Code Section 11-2-513); and

(c) If delivery is authorized and made by way of documents of title otherwise than by subsection (b) of this Code section then payment is due at the time and place at which the buyer is to receive the documents regardless of where the goods are to be received; and

(d) Where the seller is required or authorized to ship the goods on credit the credit period runs from the time of shipment but postdating the invoice or delaying its dispatch will correspondingly delay the starting of the credit period. (Code 1933, § 109A-2—310, enacted by Ga. L. 1962, p. 156, § 1.)

### JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity between the provisions, decisions under former Code 1933, § 96-106 are included in the annotations of this section.

**Where time for second installment payment is left open, it is due immediately.** — Where contract extends definite credit for first payment, leaving time of payment of second installment in abeyance, rule is that

unless additional credit for second payment should be agreed on, it would be due immediately. *Irvin v. Locke*, 200 Ga. 675, 38 S.E.2d 289 (1946) (decided under former Code 1933, § 96-106).

**Cited in** *Deck House, Inc. v. Scarborough, Sheffield & Gaston, Inc.*, 139 Ga. App. 173, 228 S.E.2d 142 (1976).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 67 Am. Jur. 2d, Sales, §§ 309-311.

**C.J.S.** — 77A C.J.S., Sales, § 208 et seq.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 2-310.

**ALR.** — When payment is due under contract to render services silent as to time of payment, 2 ALR 522.

Buyer's right to inspect at destination where goods are delivered to carrier, 27 ALR 524.

Place, in absence of written provision in sales contract, where cash consideration for goods purchased is payable, 49 ALR2d 1350.



**11-2-311. Options and cooperation respecting performance.**

(1) An agreement for sale which is otherwise sufficiently definite (subsection (3) of Code Section 11-2-204) to be a contract is not made invalid by the fact that it leaves particulars of performance to be specified by one of the parties. Any such specification must be made in good faith and within limits set by commercial reasonableness.

(2) Unless otherwise agreed specifications relating to assortment of goods are at the buyer's option and except as otherwise provided in subsections (1)(c) and (3) of Code Section 11-2-319 specifications or arrangements relating to shipment are at the seller's option.

(3) Where such specification would materially affect the other party's performance but is not seasonably made or where one party's cooperation is necessary to the agreed performance of the other but is not seasonably forthcoming, the other party in addition to all other remedies:

(a) Is excused for any resulting delay in his own performance; and

(b) May also either proceed to perform in any reasonable manner or after the time for a material part of his own performance treat the failure to specify or to cooperate as a breach by failure to deliver or accept the goods. (Code 1933, § 109A-2—311, enacted by Ga. L. 1962, p. 156, § 1.)

**JUDICIAL DECISIONS**

**Cited** in *R.C. Graig, Ltd. v. Ships of Sea, Inc.*, 401 F. Supp. 1051 (S.D. Ga. 1975).

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 67 Am. Jur. 2d, Sales, § 509.

**C.J.S.** — 77A C.J.S., Sales, §§ 74, 75.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 2-311.

**ALR.** — Means of transportation contemplated by provision relating to "freight rates" in contract, 83 ALR 1306.

Validity and enforceability of agreement by seller to repurchase on buyer's demand as affected by failure to fix time for demand, 88 ALR 842.

Contract of sale which calls for a definite quantity but leaves the quality, grade, or assortment optional with one of the parties as subject to objection of indefiniteness, 106 ALR 1284.

When optionee's delay in exercising option excused, 157 ALR 1311.

Provision of partnership agreement giving one partner option to buy out the other, 160 ALR 523.

Necessity for payment or tender of purchase money within option period in order to exercise option, in absence of specific time requirement for payment, 71 ALR3d 1201.

Construction and effect of options to purchase at specified price and at price offered by third person, included in same instrument, 22 ALR4th 1293.

## 11-2-312. Warranty of title and against infringement; buyer's obligation against infringement.

(1) Subject to subsection (2) of this Code section there is in a contract for sale a warranty by the seller that:

(a) The title conveyed shall be good, and its transfer rightful; and

(b) The goods shall be delivered free from any security interest or other lien or encumbrance of which the buyer at the time of contracting has no knowledge.

(2) A warranty under subsection (1) of this Code section will be excluded or modified only by specific language or by circumstances which give the buyer reason to know that the person selling does not claim title in himself or that he is purporting to sell only such right or title as he or a third person may have.

(3) Unless otherwise agreed a seller who is a merchant regularly dealing in goods of the kind warrants that the goods shall be delivered free of the rightful claim of any third person by way of infringement or the like but a buyer who furnishes specifications to the seller must hold the seller harmless against any such claim which arises out of compliance with the specifications. (Code 1933, § 109A-2—312, enacted by Ga. L. 1962, p. 156, § 1.)

**Law reviews.** — For article, "Sales Warranties Under Georgia's Uniform Commercial Code," see 1 Ga. St. B.J. 191 (1964). For article discussing interpretation of warranties under the Uniform Commercial Code, see 4 Ga. L. Rev. 469 (1970). For article discussing the implied warranty of fitness for a particular purpose, see 9 Ga. L. Rev. 149 (1974). For article, "Products Liability Law

in Georgia: Is Change Coming?" see 10 Ga. St. B.J. 353 (1974). For article, "Buyer's Right of Rejection: A Quarter Century Under the Uniform Commercial Code, and Recent International Developments," see 13 Ga. L. Rev. 805 (1979).

For note, "Allowance of Punitive Damages in Products Liability Claims," see 6 Ga. L. Rev. 613 (1972).

## JUDICIAL DECISIONS

### ANALYSIS

#### GENERAL CONSIDERATION BREACH OF WARRANTY

##### General Consideration

**Editor's notes.** — In light of the similarity in the provisions, cases decided under former Civil Code 1910, § 4139 and former Code 1933, § 96-301 are included in the annotations for this section.

**Warranty by seller.** — If there is no express covenant of warranty, purchaser must exercise caution in detecting defects, but seller in all cases, unless expressed or from nature of

the transaction excepted, warrants title and right to sell, that article sold is merchantable and reasonably suited to use intended, and that seller knows of no latent defects undisclosed. *Jones v. Knightstown Body Co.*, 52 Ga. 667, 184 S.E. 427 (1936); *Wilkinson v. Rich's, Inc.*, 77 Ga. App. 239, 48 S.E.2d 552 (1948) (decided under former Code 1933, § 96-301).

Where plaintiff purchaser in affidavit de-

nies that plaintiff had actual knowledge that automobile had prior lien lodged against it at time of purchase transaction, and lack of prior actual knowledge has not been controverted in any manner by defendant, warranty that goods shall be delivered free of any lien is included in contract of sale. *Christopher v. McGehee*, 124 Ga. App. 310, 183 S.E.2d 624, aff'd, 228 Ga. 466, 186 S.E.2d 97 (1971).

**Implied warranty in sale of personalty.** — In every sale of personalty there is implied full warranty of title by vendor, unless such a warranty is negated or restricted by express contract. *Cook v. Pollard*, 50 Ga. App. 752, 179 S.E. 264 (1935) (decided under former Civil Code 1910, § 4135).

**How warranties raised.** — Implied warranty is raised by statute, while express warranty is by contract. *Stewart v. Gainesville Glass Co.*, 131 Ga. App. 747, 206 S.E.2d 857 (1974), aff'd, 233 Ga. 578, 212 S.E.2d 377 (1975).

**Buyer is entitled to transfer of good, clean title** in rightful manner so that buyer will not be exposed to a law suit in order to protect it. *R.C. Craig, Ltd. v. Ships of Sea, Inc.*, 345 F. Supp. 1066 (S.D. Ga. 1972), later proceeding, 401 F. Supp. 1051 (S.D. Ga. 1975).

**Mere fact that another name appears as the owner of a motor vehicle** on the certificate of title does not negate a seller's warranty of title, particularly in the face of the seller's alleged representation that the seller owns the vehicle. *Spoon v. Herndon*, 167 Ga. App. 794, 307 S.E.2d 693 (1983).

**The issuance of certificates of title pursuant to O.C.G.A. § 40-3-28** of the motor vehicles law does not, as a matter of law, negate the existence of express or implied

warranties of title which the seller gives the purchaser in the course of their dealings. *Hudson v. Gaines*, 199 Ga. App. 70, 403 S.E.2d 852 (1991).

**Cited in** *Bell v. Menzies*, 110 Ga. App. 436, 138 S.E.2d 731 (1964); *Cochran v. Horner*, 121 Ga. App. 297, 173 S.E.2d 448 (1970); *Moister v. National Bank (In re Guaranteed Muffler Supply Co.)*, 1 Bankr. 324 (Bankr. N.D. Ga. 1979); *Fritts v. Mid-Coast Trading Corp.*, 166 Ga. App. 31, 303 S.E.2d 148 (1983).

### Breach of Warranty

**Elements of action for breach of implied warranty** are invalidity of seller's title and loss to buyer. A petition which by its allegations makes both of these elements appear is not subject to demurrer. *Welfare Fin. Corp. v. Waters*, 98 Ga. App. 20, 104 S.E.2d 669 (1958) (decided under former Code 1933, § 96-301).

**Breach of warranty shown.** — Where petition alleges that through failure of warranty in sale of personalty vendee became liable to pay sum of money and discharged the liability by paying the money, then petition shows breach of warranty and loss to plaintiff appears from its allegations. *Welfare Fin. Corp. v. Waters*, 98 Ga. App. 20, 104 S.E.2d 669 (1958) (decided under former Code 1933, § 96-301).

**Notice of breach.** — A condition precedent to a contract action for breach of warranty of title is that the plaintiff must have notified the defendant of the breach within a reasonable time thereof as provided in O.C.G.A. § 11-2-607(3)(a). *Oden & Sims Used Cars, Inc. v. Thurman*, 165 Ga. App. 500, 301 S.E.2d 673 (1983).

## OPINIONS OF THE ATTORNEY GENERAL

**Responsibility for ad valorem taxes.** — Where purchaser of automobile purchases it after January 1 of that year, the seller is responsible for ad valorem taxes on it; however, since license plates cannot be purchased for motor vehicle until ad valorem

taxes have been paid, and since there is a lien against the vehicle which could be enforced by taxing authority, if seller has not paid taxes, buyer may desire to pay taxes and then proceed against seller. 1967 Op. Att'y Gen. No. 67-309.

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 38 Am. Jur. 2d, Guaranty, § 10. 63 Am. Jur. 2d, Products Liability,

§§ 659et seq., 875 et seq. 67A Am. Jur. 2d, Sales, §§ 794-821.



**C.J.S.** — 77A C.J.S., Sales, § 258 et seq.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 2-312.

**ALR.** — Loss of profits as elements of damages for fraud of seller, as to quality of goods purchased for resale, 28 ALR 354.

Warranty of title by seller in conditional sale contract, 132 ALR 338.

Construction and application of provision in conditional sale contract regarding implied warranties, 139 ALR 1276.

Law of sales and liability in respect thereof as applied to transactions in self-service stores, 163 ALR 238.

Assignability of warranty of goods and chattels, 17 ALR2d 1196.

Liability of auctioneer or clerk to buyer as to title, condition, or quality of property sold, 80 ALR2d 1237.

Elements and measure of damages for breach of warranty in sale of horse, 91 ALR3d 419.

### 11-2-313. Express warranties by affirmation, promise, description, sample.

(1) Express warranties by the seller are created as follows:

(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

(c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

(2) It is not necessary to the creation of an express warranty that the seller use formal words such as “warrant” or “guarantee” or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller’s opinion or commendation of the goods does not create a warranty. (Code 1933, § 109A-2—313, enacted by Ga. L. 1962, p. 156, § 1.)

**Cross references.** — Misbranding of pesticides, § 2-7-53. Labeling of fertilizer, § 2-12-6. False or misleading statements or claims made in regard to agricultural liming materials, § 2-12-45. Misrepresentations made in regard to soil amendments, § 2-12-77. Misbranding of commercial feed, § 2-13-9. Standards for, labeling of, etc., food generally, Ch. 2, T. 26. Civil action for knowing or negligent selling of unwholesome provisions, drugs, alcoholic beverages, etc., to another person by use of which damage results to purchaser or his family, § 51-1-23 et seq.

**Law reviews.** — For article, “Sales Warranties Under Georgia’s Uniform Commercial Code,” see 1 Ga. St. B.J. 191 (1964). For

article discussing aspects of third party practice (impleader) under the Georgia Civil Practice Act, see 4 Ga. St. B. J. 355 (1968). For article, “Consumer Protection Against Sellers Misrepresentations,” see 20 Mercer L. Rev. 414 (1969). For article discussing interpretation of warranties under the Uniform Commercial Code, see 4 Ga. L. Rev. 469 (1970). For article discussing the implied warranty of fitness for a particular purpose, see 9 Ga. L. Rev. 149 (1974). For article, “Products Liability Law in Georgia: Is Change Coming?” see 10 Ga. St. B.J. 353 (1974). For article explaining the Unfair Trade Practices and Consumer Protection Act, proposed in Georgia in 1973, see 10 Ga. St. B.J. 409 (1974). For article discussing ex

parte rescission of sales contract for fraud and suit for fraud and deceit, in light of *City Dodge, Inc. v. Gardner*, 232 Ga. 766, 208 S.E.2d 794 (1974), see 11 Ga. St. B.J. 172 (1975). For article discussing modification of consumer warranty provisions of the U.C.C. by the Magnuson-Moss Act (15 U.S.C. §§ 2301-2312) with special emphasis on attempted disclaimers, see 27 Mercer L. Rev. 1111 (1976). For article, "Buyer's Right of Rejection: A Quarter Century Under the Uniform Commercial Code, and Recent International Developments," see 13 Ga. L. Rev. 805 (1979). For article discussing the applicability of warranty provisions under the Uniform Commercial Code to domestic

solar energy devices, see 30 Mercer L. Rev. 547 (1979). For article, "Contractual Limitations of Remedy and the Failure of Essential Purpose Doctrine," see 26 Ga. St. B.J. 113 (1990). For article, "Products Liability Law in Georgia Including Recent Developments," see 43 Mercer L. Rev. 27 (1991). For annual survey article discussing developments in construction law, see 51 Mercer L. Rev. 181 (1999).

For note, "The Law of Evidence in the Uniform Commercial Code," see 1 Ga. L. Rev. 44 (1966).

For comment on *Redfern Meats, Inc. v. Hertz Corp.*, 134 Ga. App. 381, 215 S.E.2d 10 (1975), see 27 Mercer L. Rev. 347 (1975).

## JUDICIAL DECISIONS

### ANALYSIS

#### GENERAL CONSIDERATION

#### APPLICABILITY

#### EVIDENCE

### General Consideration

**How warranties raised.** — Implied warranty is raised by statute, while express warranty is by contract. *Stewart v. Gainesville Glass Co.*, 131 Ga. App. 747, 206 S.E.2d 857 (1974), *aff'd*, 233 Ga. 578, 212 S.E.2d 377 (1975).

**A warranty is a statement of representation** made by the seller of goods contemporaneously with and as a part of the contract of sale, though collateral to the express object of it, having reference to the character, quality, or title to the goods and by which the seller promises or undertakes to insure that certain facts are or shall be as the seller then represents them. *North Ga. Ready Mix Concrete Co. v. L & L Constr., Inc.*, 235 Ga. App. 68, 508 S.E.2d 722 (1998).

**Representation as to quality, character, or title.** — An express warranty is a representation or statement made by seller at time of sale and as a part thereof, having reference to quality, character, or title to goods, and is part of the transaction between seller and purchaser. *Stewart v. Gainesville Glass Co.*, 131 Ga. App. 747, 206 S.E.2d 857 (1974), *aff'd*, 233 Ga. 578, 212 S.E.2d 377 (1975).

**Test.** — Decisive test in determining whether language used is mere expression of opinion or warranty, is whether it purported

to state fact upon which it may fairly be presumed seller expected buyer to rely, and upon which buyer would ordinarily rely. If language used is of that character, fact of reliance on part of buyer and presumption of intent on part of seller which the law would raise in such case would operate to create warranty. *Bell v. Menzies*, 110 Ga. App. 436, 138 S.E.2d 731 (1964); *Moore v. Berry*, 217 Ga. App. 697, 458 S.E.2d 879 (1995).

**Failure to limit warranty** made or to exclude any implied warranties may give rise to liability under either O.C.G.A. §§ 11-2-313 or 11-2-314. *Jones v. Cranman's Sporting Goods*, 142 Ga. App. 838, 237 S.E.2d 402 (1977).

**Express and implied warranties.** — A warranty may be express or implied; it is the former when created by the apt and explicit statements of the seller; it is the latter when the law derives it by implication or inference from the nature of the transaction or the relative situation or circumstances of the parties. *North Ga. Ready Mix Concrete Co. v. L & L Constr., Inc.*, 235 Ga. App. 68, 508 S.E.2d 722 (1998).

**Description of vehicle as new created express warranty.** *Horne v. Claude Ray Ford Sales, Inc.*, 162 Ga. App. 329, 290 S.E.2d 497 (1982).

**General Consideration (Cont'd)**

Contract for sale of car describing it as new created express warranty to that effect, which was not negated by disclaimer of express warranties in same contract. *Century Dodge, Inc. v. Mobley*, 155 Ga. App. 712, 272 S.E.2d 502 (1980); *Thompson v. Huckabee Auto Co.*, 190 Ga. App. 540, 379 S.E.2d 411 (1989).

Where a retail sales contract described a car as new, neither specific disclaimer of express or implied warranties nor "sold as is" language could negate the express warranty that the car was new. *Rivers v. BMW of N. Am., Inc.*, 214 Ga. App. 880, 449 S.E.2d 337 (1994).

**Error as to actual mileage of automobile.**

— The defendant did not breach any express warranty concerning the actual mileage of an automobile where, at the time it made a statement regarding an odometer reading, it had no knowledge or any reason to believe that the true mileage differed from the mileage shown on the odometer. *Charles Evans Nissan, Inc. v. Trussell Ford-Mazda, Inc.*, 200 Ga. App. 432, 408 S.E.2d 419, cert. denied, 200 Ga. App. 895, 408 S.E.2d 419 (1991).

**Disclaimer in same contract.** — It is unreasonable to allow express warranty to be negated by disclaimer in same contract. *Century Dodge, Inc. v. Mobley*, 155 Ga. App. 712, 272 S.E.2d 502 (1980).

**The issuance of certificates of title pursuant to O.C.G.A. § 40-3-28** of the motor vehicles law does not, as a matter of law, negate the existence of express or implied warranties of title which the seller gives the purchaser in the course of their dealings. *Hudson v. Gaines*, 199 Ga. App. 70, 403 S.E.2d 852 (1991).

**No wrongful death action arises from breach of warranties** absent negligence or criminal conduct. *Miles v. Bell Helicopter Co.*, 385 F. Supp. 1029 (N.D. Ga. 1974).

**Cited in** *Jacobs Pharmacy Co. v. Gipson*, 116 Ga. App. 760, 159 S.E.2d 171 (1967); *Whitaker v. Harvell-Kilgore Corp.*, 418 F.2d 1010 (5th Cir. 1969); *Hill Aircraft & Leasing Corp. v. Simon*, 122 Ga. App. 524, 177 S.E.2d 803 (1970); *Smith v. Bruce*, 129 Ga. App. 97, 198 S.E.2d 697 (1973); *City Dodge, Inc. v. Gardner*, 232 Ga. 766, 208 S.E.2d 794 (1974); *Weaver v. Ralston Motor Hotel, Inc.*,

135 Ga. App. 536, 218 S.E.2d 260 (1975); *Key v. Bagen*, 136 Ga. App. 373, 221 S.E.2d 234 (1975); *Lancaster v. Eberhardt*, 141 Ga. App. 534, 233 S.E.2d 880 (1977); *Hutchinson Homes, Inc. v. Guerdon Indus., Inc.*, 143 Ga. App. 664, 239 S.E.2d 553 (1977); *Tillman & Deal Farm Supply, Inc. v. Deal*, 146 Ga. App. 232, 246 S.E.2d 138 (1978); *Transart Indus., Inc. v. Gaines-American Moulding Corp.*, 148 Ga. App. 363, 251 S.E.2d 384 (1978); *Solomon Refrigeration, Inc. v. Osburn*, 148 Ga. App. 772, 252 S.E.2d 686 (1979); *Ramsey Brick Sales Co. v. Outlaw*, 152 Ga. App. 37, 262 S.E.2d 227 (1979); *Patron Aviation, Inc. v. Teledyne Indus., Inc.*, 154 Ga. App. 13, 267 S.E.2d 274 (1980); *Preiser v. Jim Letts Oldsmobile, Inc.*, 160 Ga. App. 658, 288 S.E.2d 219 (1981); *Rigdon v. Walker Sales & Serv., Inc.*, 161 Ga. App. 459, 288 S.E.2d 711 (1982); *Sires v. Luke*, 544 F. Supp. 1155 (S.D. Ga. 1982); *GMC v. Green*, 173 Ga. App. 188, 325 S.E.2d 794 (1984).

**Applicability**

**Chattel leases.** — Provisions of O.C.G.A. § 11-2-313 are not applicable to all commercial chattel leases. *Redfern Meats, Inc. v. Hertz Corp.*, 134 Ga. App. 381, 215 S.E.2d 10 (1975).

Warranty provisions of Uniform Commercial Code are applicable to chattel leases where transaction is analogous to sale. *Redfern Meats, Inc. v. Hertz Corp.*, 134 Ga. App. 381, 215 S.E.2d 10 (1975).

**Defect in instruction manual.** — O.C.G.A. § 11-2-313 does not go beyond physical goods to include freedom from defect in manual of instructions accompanying appliance. *Reddick v. White Consol. Indus., Inc.*, 295 F. Supp. 243 (S.D. Ga. 1968).

**Statements deemed not mere sales talk or opinion.** — Statements by defendant's sales clerk that a product was "probably the safest one on the market" and that there was "no way you [could] fall" from it were sufficient to create an express warranty. *Moore v. Berry*, 217 Ga. App. 697, 458 S.E.2d 879 (1995).

**Statements deemed opinion or commendation.** — Sellers' statement that a horse would be a good show horse was a mere opinion, commendation, or puffing. *Sheffield v. Darby*, 244 Ga. App. 437, 535 S.E.2d 776 (2000).



### Evidence

**Admission of evidence of samples.** — Because there was no indication that the written contract was a complete and exclusive statement of the agreement between the parties, and because the terms expressed by the sample did not contradict those in the written contract, the parol evidence rule did not prevent the admission of evidence of the peanut samples sent by the seller to describe what the buyer would receive in bulk shipment to provide a foundation for the claim against the seller for breach of express war-

ranty by sample. *Alimenta (U.S.A.), Inc. v. Anheuser-Busch Cos.*, 803 F.2d 1160 (11th Cir. 1986).

**Parol evidence.** — A disclaimer of warranty in an equipment purchase contract barred any claim that the dealer made an express warranty that the equipment would be sold in “working” condition based on oral representations where the contract required that any warranty be contained in a separate writing. *Stephens v. Crittenden Tractor Co.*, 187 Ga. App. 545, 370 S.E.2d 757 (1988).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 63 Am. Jur. 2d, Products Liability, § 675 et seq. 67A Am. Jur. 2d, Sales, §§ 723-742.

**C.J.S.** — 77A C.J.S., Sales, § 242 et seq.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 2-313.

**ALR.** — Warranties and conditions upon sale of seeds, nursery stock, etc., 16 ALR 859; 32 ALR 1241; 62 ALR 451; 117 ALR 470; 168 ALR 581.

Right of dealer against his vendor in case of breach of warranty as to article purchased for resale and resold, 22 ALR 133; 64 ALR 883.

Resale by buyer where seller has refused to receive the property rejected for breach of warranty, 24 ALR 1445.

Loss of profits as elements of damages for fraud of seller, as to quality of goods purchased for resale, 28 ALR 354.

Validity and effect of provision in contract of sale which, in effect, guarantees the buyer against decline in prices, 29 ALR 112.

Express or implied warranty on sale for accommodation of buyer, 32 ALR 1150; 59 ALR 1541.

Warranty or condition as to kind or quality implied by sale under trade term which by use has become generic, 35 ALR 249.

Express or implied warranty of quality, condition, or fitness of automobile or truck sold by retail dealer, 43 ALR 648.

Implied warranty or condition as to quality of timber or lumber, 52 ALR 1536.

Right of retailer to rely upon express or implied warranty by wholesaler or manufacturer where there is an express warranty to the consumer, 59 ALR 1239.

Construction and effect of express or implied warranty on sale of an article intended for use as an explosive, 62 ALR 1510.

Liability of manufacturer or packer of defective article for injury to person or property of ultimate consumer who purchased from middleman, 105 ALR 1502; 111 ALR 1239; 140 ALR 191; 142 ALR 1490.

Warranty of title by seller in conditional sale contract, 132 ALR 338.

Implied warranty of quality, condition, or fitness on sale of secondhand article, 151 ALR 446.

Seller's advertisements as affecting rights of parties to sale of personal property, 158 ALR 1413.

Law of sales and liability in respect thereof as applied to transactions in self-service stores, 163 ALR 238.

Intervening purchaser's knowledge of defects in or danger of article, or failure to inspect therefor, as affecting liability of manufacturer or dealer for personal injury or property damage to subsequent purchaser or other third person, 164 ALR 371.

Express warranty as excluding implied warranty of fitness, 164 ALR 1321.

Assignability of warranty of goods and chattels, 17 ALR2d 1196.

Recovery by contractor or artisan, suing for breach of warranty, of damages for loss of good will occasioned by use in his business of unfit materials, 28 ALR2d 591.

Measure and elements of recovery of buyer rescinding sale of domestic animal for seller's breach of warranty, 35 ALR2d 1273.

Statute of frauds as applicable to seller's oral warranty as to quality or condition of chattel, 40 ALR2d 760.

Form and substance of notice which buyer of goods must give in order to recover damages for seller's breach of warranty, 53 ALR2d 270.

Statements in advertisements as affecting manufacturer's or seller's liability for injury caused by product sold, 75 ALR2d 112.

Liability of manufacturer or seller for injury caused by food or food product sold, 77 ALR2d 7.

Liability of manufacturer or seller for injury caused by beverage sold, 77 ALR2d 215.

Liability of manufacturer or seller for injury caused by automobile or other vehicle, aircraft, boat, or their parts, supplies, or equipment, 78 ALR2d 460; 81 ALR3d 318; 97 ALR3d 627; 1 ALR4th 411; 3 ALR4th 489; 5 ALR4th 483.

Liability of manufacturer or seller for injury caused by industrial, business, or farm machinery, tools, equipment, or materials, 78 ALR2d 594; 2 ALR4th 262.

Liability of manufacturer or seller for injury caused by paint, cement, lumber, building supplies, ladders, small tools, and like products, 78 ALR2d 696; 84 ALR3d 877.

Liability of manufacturer or seller for injury caused by toys, games, athletic or sports equipment, or like products, 78 ALR2d 738; 95 ALR3d 390.

Liability of manufacturer or seller for injury caused by firearms, explosives, and flammables, 80 ALR2d 488; 94 ALR3d 291; 15 ALR4th 909; 18 ALR4th 206.

Liability of manufacturer or seller for injury caused by household and domestic machinery, appliances, furnishings, and equipment, 80 ALR2d 598; 89 ALR3d 210; 93 ALR3d 99; 1 ALR4th 748.

Liability of manufacturer or seller for injury caused by clothing, shoes, combs, and similar products, 80 ALR2d 702.

Liability of auctioneer or clerk to buyer as to title, condition, or quality of property sold, 80 ALR2d 1237.

Construction and effect of standard new motor vehicle warranty, 99 ALR2d 1419.

Seller's duty to test or inspect as affecting his liability for product-caused injury, 6 ALR3d 12.

Liability for representations and express warranties in connection with sale of used motor vehicle, 36 ALR3d 125.

Sales: liability for warranty or representation that article, other than motor vehicle, is new, 36 ALR3d 237.

Application of warranty provisions of Uniform Commercial Code to bailments, 48 ALR3d 668.

Necessity and propriety of instructing on alternative theories of negligence or breach of warranty, where instruction on strict liability in tort is given in products liability case, 52 ALR3d 101.

Liability of builder or subcontractor for insufficiency of building resulting from latent defects in materials used, 61 ALR3d 792.

Contracts for artificial insemination of cattle, 61 ALR3d 811.

Statements on container that enclosed toy, game, sports equipment, or the like, is safe as affecting manufacturer's liability for injury caused by product sold, 74 ALR3d 1298.

Products liability: liability for injury or death allegedly caused by defective tires, 81 ALR3d 318.

Products liability: liability for injury or death allegedly caused by defect in snowmobile or other recreational-purpose vehicle, 81 ALR3d 394; 66 ALR4th 622.

Products liability: liability for injury or death allegedly caused by defect in mobile home or trailer, 81 ALR3d 421.

Liability of manufacturer, seller, or installer for personal injury caused by door glass, 84 ALR3d 877.

Liability of manufacturer or seller for personal injury or property damage caused by television set, 89 ALR3d 210.

Practices forbidden by state deceptive trade practice and consumer protection acts, 89 ALR3d 449.

Elements and measure of damages for breach of warranty in sale of horse, 91 ALR3d 419.

Products liability: stoves, 93 ALR3d 99.

What constitutes "affirmation of fact" giving rise to express warranty under UCC § 2-313(1)(a), 94 ALR3d 729.

Liability of packer, foodstore, or restaurant for causing trichinosis, 96 ALR3d 451.

Products liability: personal injury or death allegedly caused by defect in aircraft or its parts, supplies, or equipment, 97 ALR3d 627.

Products liability: liability of manufacturer or seller for injury or death caused by defect in boat or its parts, supplies, or equipment, 1 ALR4th 411.

Products liability: defective heating equipment, 1 ALR4th 748.



Products liability: industrial accidents involving conveyor belts or systems, 2 ALR4th 262.

Construction and effect of new motor vehicle warranty limiting manufacturer's liability to repair or replacement of defective parts, 2 ALR4th 576.

Products liability: defective vehicular windows, 3 ALR4th 489.

Products liability: farm machinery, 4 ALR4th 13.

Products liability: glue and other adhesive products, 7 ALR4th 155.

Products liability: elevators, 7 ALR4th 852.

Products liability: industrial presses, 8 ALR4th 70.

Products liability: transformer and other electrical equipment, 10 ALR4th 854.

Products liability: fertilizers, insecticides, pesticides, fungicides, weedkillers, and the like, or articles used in application thereof, 12 ALR4th 462.

Products liability: cranes and other lifting apparatuses, 13 ALR4th 476.

Products liability: cement and concrete, 15 ALR4th 1186.

Products liability: tire rims and wheels, 16 ALR4th 137.

Products liability: firefighting equipment, 19 ALR4th 326.

Products liability: stud guns, staple guns, or parts thereof, 33 ALR4th 1189.

Products liability: household appliances relating to cleaning, washing, personal care, and water supply, quality, and disposal, 34 ALR4th 95.

Products liability: household equipment relating to storage, preparation, cooking, and disposal of food, 35 ALR4th 663.

Products liability: home and office furnishings, 36 ALR4th 170.

Computer sales and leases: breach of warranty, misrepresentation, or failure of consideration as defense or ground for affirmative relief, 37 ALR4th 110.

Affirmations or representations made after the sale is closed as basis of warranty under UCC § 2-313(1)(a), 47 ALR4th 189.

Products liability: personal soap, 54 ALR4th 574.

Liability of successor corporation for punitive damages for injury caused by predecessor's product, 55 ALR4th 166.

Products liability: sufficiency of evidence to support product misuse defense in actions concerning lawnmowers, 55 ALR4th 1062.

Products liability: building and construction lumber, 61 ALR4th 121.

Liability of manufacturer of oral live polio (Sabin) vaccine for injury or death from its administration, 66 ALR4th 83.

Liability for injury incurred in operation of power golf cart, 66 ALR4th 622.

Products liability: industrial refrigerator equipment, 72 ALR4th 90.

Products liability: scaffolds and scaffolding equipment, 74 ALR4th 904.

Products liability: tractors, 75 ALR4th 312.

Products liability: bicycles and accessories, 76 ALR4th 117.

Products liability: exercise and related equipment, 76 ALR4th 145.

Products liability: trampolines and similar devices, 76 ALR4th 171.

Products liability: competitive sports equipment, 76 ALR4th 201.

Products liability: skiing equipment, 76 ALR4th 256.

Products liability: general recreational equipment, 77 ALR4th 1121.

Products liability: mechanical amusement rides and devices, 77 ALR4th 1152.

Products liability: lubricating products and systems, 80 ALR4th 972.

Liability for injury or death allegedly caused by spoilage or contamination of beverage, 87 ALR4th 804.

Liability for injury or death allegedly caused by foreign substance in beverage, 90 ALR4th 12.

Liability for injury or death allegedly caused by foreign object in food or food product, 1 ALR5th 1.

Liability for injury or death allegedly caused by spoilage, contamination, or other deleterious condition of food or food product, 2 ALR5th 1.

Liability for injury or death allegedly caused by food product containing object related to, but not intended to be present in, product, 2 ALR5th 189.

Products liability: roofs and roofing materials, 3 ALR5th 851.

Products liability: prefabricated buildings, 4 ALR5th 667.

Purchaser's disbelief in, or nonreliance upon, express warranties made by seller in contract for sale of business as precluding action for breach of express warranties, 7 ALR5th 841.

Products liability: cigarettes and other tobacco products, 36 ALR5th 541.



Products liability: theatrical equipment and props, 42 ALR5th 699.

Breach of warranty in sale, installation,

repair, design, or inspection of septic or sewage disposal systems, 50 ALR5th 417.

Products liability: ladders, 81 ALR5th 245.

### 11-2-314. Implied warranty: merchantability; usage of trade.

(1) Unless excluded or modified (Code Section 11-2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this Code section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.

(2) Goods to be merchantable must be at least such as:

(a) Pass without objection in the trade under the contract description; and

(b) In the case of fungible goods, are of fair average quality within the description; and

(c) Are fit for the ordinary purposes for which such goods are used; and

(d) Run, within the variations permitted by the agreement, of even kind, quality, and quantity within each unit and among all units involved; and

(e) Are adequately contained, packaged, and labeled as the agreement may require; and

(f) Conform to the promises or affirmations of fact made on the container or label if any.

(3) Unless excluded or modified (Code Section 11-2-316) other implied warranties may arise from course of dealing or usage of trade. (Code 1933, § 109A-2—314, enacted by Ga. L. 1962, p. 156, § 1.)

**Cross references.** — Misbranding of pesticides, § 2-7-53. Labeling of fertilizer, § 2-12-6. Misbranding of commercial feed, § 2-13-9. Nonapplicability of implied warranties to blood transfusions, organ transplants, etc., §§ 11-2-316, 51-1-28. Standards for, labeling of, etc., food generally, Ch. 2, T. 26. Products liability actions, § 51-1-11. Civil action for knowing or negligent selling of unwholesome provisions, drugs, alcoholic beverages, etc., to another person by use of which damage results to purchaser or his family, § 51-1-23 et seq.

**Law reviews.** — For article discussing manufacturer's warranty of merchantability and fitness under former § 96-307, see 10 Mercer L. Rev. 272 (1959). For article, "Sales

Warranties Under Georgia's Uniform Commercial Code," see 1 Ga. St. B.J. 191 (1964). For article, "Georgia's New Statutory Liability for Manufacturers: An Inadequate Legislative Response," see 2 Ga. L. Rev. 538 (1968). For article discussing aspects of third party practice (impleader) under the Georgia Civil Practice Act, see 4 Ga. St. B.J. 355 (1968). For article, "Consumer Protection Against Sellers Misrepresentations," see 20 Mercer L. Rev. 414 (1969). For article discussing interpretation of warranties under the Uniform Commercial Code, see 4 Ga. L. Rev. 469 (1970). For article discussing the implied warranty of fitness for a particular purpose, see 9 Ga. L. Rev. 149 (1974). For article, "Products Liability Law in Georgia: Is

Change Coming?” see 10 Ga. St. B.J. 353 (1974). For article explaining the Unfair Trade Practices and Consumer Protection Act, proposed in Georgia in 1973, see 10 Ga. St. B.J. 409 (1974). For article discussing modification of consumer warranty provisions of the U.C.C. by the Magnuson-Moss Act (15 U.S.C. §§ 2301-2312) with special emphasis on attempted disclaimers, see 27 Mercer L. Rev. 1111 (1976). For article discussing strict liability for defective products in Georgia, see 13 Ga. St. B.J. 142 (1977). For article, “Buyer’s Right of Rejection: A Quarter Century Under the Uniform Commercial Code, and Recent International Developments,” see 13 Ga. L. Rev. 805 (1979). For article discussing applicability of implied warranty provisions of the Uniform Commercial Code to construction contracts, see 28 Emory L.J. 335 (1979). For article discussing the applicability of warranty provisions under the Uniform Commercial Code to domestic solar energy devices, see 30 Mercer L. Rev. 547 (1979). For article surveying recent judicial developments in commercial law, see 31 Mercer L. Rev. 13 (1979). For article surveying developments in Georgia commercial law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 33 (1981). For article, “Contractual Limitations of Remedy and the Failure of Essential Purpose Doctrine,” see 26 Ga. St. B.J. 113 (1990). For article, “Products Liability Law in Georgia Including Recent Developments,” see 43 Mercer L. Rev. 27 (1991).

For note discussing implied warranties in

the sale of second-hand goods, see 17 Mercer L. Rev. 455 (1966). For note discussing products liability actions based on breach of implied warranty under the Uniform Commercial Code, see 4 Ga. L. Rev. 164 (1969). For note, “Allowance of Punitive Damages in Products Liability Claims,” see 6 Ga. L. Rev. 613 (1972). For note, “Buyer’s Right to Revoke Acceptance Against the Automobile Manufacturer for Breach of its Continuing Warranty of Repair or Replacement,” see 7 Ga. L. Rev. 711 (1973).

For comment on *Felder v. Neeves*, 36 Ga. App. 41, 135 S.E. 219 (1926), see 1 Ga. L. Rev. No. 1 P. 51 (1927). For comment on *Davis v. Williams*, 58 Ga. App. 274, 198 S.E. 357 (1938), see 1 Ga. B.J. 41 (1939). For comment on *Revlon, Inc. v. Murdock*, 103 Ga. App. 842, 120 S.E.2d 912 (1961), see 24 Ga. B.J. 271 (1961). For comment discussing evolution of the implied warranty of habitability in sales of new homes in light of *Humber v. Morton*, 426 S.W.2d 554 (Tex. 1968), and criticizing absence of this doctrine in Georgia law, see 20 Mercer L. Rev. 464 (1969). For comment on *Redfern Meats, Inc. v. Hertz Corp.*, 134 Ga. App. 381, 215 S.E.2d 10 (1975), see 27 Mercer L. Rev. 347 (1975). For comment on *Fender v. Colonial Stores, Inc.*, 138 Ga. App. 31, 225 S.E.2d 691 (1976), see 28 Mercer L. Rev. 751 (1977). For comment discussing the prohibition of wrongful death suits under Georgia’s strict liability in *Ford Motor Co. v. Carter*, 239 Ga. 657, 238 S.E.2d 361 (1977), see 29 Mercer L. Rev. 649 (1978).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

LEASES

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EXCLUSION OR WAIVER

EVIDENTIARY ISSUES

PRIVITY

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General Consideration

**Editor’s notes.** — In light of the similarity between the provisions, decisions under former Code 1910, § 4135 and former Code 1933, §§ 96-301 and 96-307 are included in the annotations to this section. Since this

section does not expressly exclude manufacturers from its coverage, cases decided under former Code 1933, § 96-307 have been included here. See Official Comment 2 to Uniform Commercial Code § 2-314.

**Purpose of former Code 1933, § 96-307 to distribute losses.** — Purpose of former

**General Consideration (Cont'd)**

Code 1933, § 96-307 was that enterprise which causes losses should lift them from the individual victims and distribute them widely among those who benefit from activities of the enterprise. *Wood v. Hub Motor Co.*, 110 Ga. App. 101, 137 S.E.2d 674 (1964) (decided under former Code 1933, § 96-307).

**Implied warranty is raised by statute**, while express warranty is by contract. *Stewart v. Gainesville Glass Co.*, 131 Ga. App. 747, 206 S.E.2d 857 (1974), *aff'd*, 233 Ga. 578, 212 S.E.2d 377 (1975).

Statutory implied warranty is an obligation that the law places upon a party as a result of some transaction entered into; it is not a contractual obligation. *Wood v. Hub Motor Co.*, 110 Ga. App. 101, 137 S.E.2d 674 (1964) (decided under former Code 1933, § 96-307).

Because granite blocks were movable at the time of identification of the contract, they were “goods” under O.C.G.A. § 11-2-314, and an implied warranty of merchantability applied to their sale. *Willis Mining, Inc. v. Noggle*, 235 Ga. App. 747, 509 S.E.2d 731 (1998).

**Warranties exist unless excepted.** — Implied warranties exist unless expressly or from nature of transaction excepted. *Wilson v. Eargle*, 98 Ga. App. 241, 105 S.E.2d 474 (1958) (decided under former Code 1933, § 96-301).

If there is no express covenant of warranty, purchaser must exercise caution in detecting defects, but seller in all cases, unless expressed or from the nature of the transaction excepted, warrants it has title and right to sell, that article sold is merchantable and reasonably suited to use intended, and that seller knows of no latent defects undisclosed. *Jones v. Knightstown Body Co.*, 52 Ga. App. 667, 184 S.E. 427 (1936); *Wilkinson v. Rich's, Inc.*, 77 Ga. App. 239, 48 S.E.2d 552 (1948) (decided under former Code 1933, § 96-301).

**Implied warranty remains effective for a reasonable time.** *Wood v. Hub Motor Co.*, 110 Ga. 101, 137 S.E.2d 674 (1964) (decided under former Code 1933, § 96-307).

**Implied warranties warrant against defects or conditions existing at the time of sale**, but do not provide a warranty of continuing serviceability. *Jones v. Marcus*, 217

Ga. App. 372, 457 S.E.2d 271 (1995).

**Parties may expressly broaden or narrow warranty.** — Parties may expressly agree on provisions of contract and extent of warranty, which may be more limited or more extensive than implied warranty of law. *Jones v. Knightstown Body Co.*, 52 Ga. App. 667, 184 S.E. 427 (1936) (decided under former Code 1933, § 96-301).

**Vendor may act in good faith in transaction, and yet violate O.C.G.A. § 11-2-314.** *A.D.L. Sales Co. v. Gailey*, 48 Ga. App. 798, 173 S.E. 734 (1934) (decided under former Code 1910, § 4135).

**Patent, discoverable, or disclosed latent defects.** — Implied warranty is a guaranty against loss only from latent defects. The law of implied warranty will not avail against patent defects, nor against latent defects which are either disclosed or are discoverable by exercise of caution on part of purchaser. Where property is brought under an implied warranty that it is reasonably suited to the use intended, an acceptance by the purchaser waives all defects discovered by the purchaser, or which by exercise of ordinary care and prudence, the purchaser might have discovered before delivery. *Jones v. Knightstown Body Co.*, 52 Ga. App. 667, 184 S.E. 427 (1936); *Wilkinson v. Rich's, Inc.*, 77 Ga. App. 239, 48 S.E.2d 552 (1948); *Smith v. Northeast Ga. Fair Ass'n*, 85 Ga. App. 32, 67 S.E.2d 836 (1951) (decided under former Code 1933, § 96-301); *Moore v. Berry*, 217 Ga. App. 697, 458 S.E.2d 879 (1995).

Implied warranty of fitness of thing sold for ordinary use, does not embrace defects discoverable by ordinary prudence and care. *Smith v. Northeast Ga. Fair Ass'n*, 85 Ga. App. 32, 67 S.E.2d 836 (1951) (decided under former Code 1933, § 96-301).

In an action by a customer against a drugstore for burns suffered when bleach spilled from a bottle as the customer removed it from a shelf, the customer's claim was not defeated by failure to exercise care for the customer's own safety since the bleach was located at a height above the customer's eye level and there was no patent or obvious defect; reversing *A.B.C. Drug Co. v. Monroe*, 214 Ga. App. 136, 447 S.E.2d 315 (1994). *Keaton v. A.B.C. Drug Co.*, 266 Ga. 385, 467 S.E.2d 558 (1996).

**Defects not ascertainable by examination of property.** — The law imposes upon



vendee the duty of exercising caution in detecting defects, and hence it is a well-established rule that where defect is patent, or could have been ascertained by exercise of diligence, there can be no recovery upon ground of an implied warranty and in all such cases the doctrine of caveat emptor applies; but in cases of latent defects, the existence of which cannot be ascertained by an examination of the property, the law protects a purchaser by imposing upon vendor an implied warranty, whenever the defect is of such a nature as to render article sold unsuited to use intended, and in cases of latent defects, therefore, the doctrine of caveat venditor applies. *Williams v. Ballenger*, 87 Ga. App. 255, 73 S.E.2d 509 (1952) (decided under former Code 1933, § 96-301).

While the seller's argument that no warranty existed because the buyer inspected the blocks the buyer was buying and used own judgment in selecting purchases was relevant to an implied warranty of fitness for a particular purpose, it was not applicable to the warranty of merchantability at issue. Since the implied warranty of merchantability was not clearly disclaimed, it applied to this sale of goods absent one of the exceptions enumerated in O.C.G.A. § 11-2-316(3). *Willis Mining, Inc. v. Noggle*, 235 Ga. App. 747, 509 S.E.2d 731 (1998).

**Sale of common article.** — In sale of common article there is always an implied warranty that it is made of good material and reasonably fit to be employed in use for which it is designed by maker. *Jones v. Knightstown Body Co.*, 52 Ga. App. 667, 184 S.E. 427 (1936) (decided under former Code 1933, § 96-301).

**Defective container or packaging.** — In an action by a customer against a drugstore for burns suffered when bleach spilled from a bottle as she removed it from a shelf, the jury was authorized to find a breach of implied warranty because, as a merchant of bleach, the store was required to adequately contain and package the bleach that it sold and bleach which spills from a loose cap is not adequately contained or packaged; reversing *A.B.C. Drug Co. v. Monroe*, 214 Ga. App. 136, 447 S.E.2d 315 (1994). *Keaton v. A.B.C. Drug Co.*, 266 Ga. 385, 467 S.E.2d 558 (1996).

**Adaption of machine to uses for which it is made** is always warranted. *A.D.L. Sales Co. v.*

*Gailey*, 48 Ga. App. 798, 173 S.E. 734 (1934) (decided under former Code 1910, § 4135(2)).

**Used or second-hand goods.** — When the article even though used or second-hand is sold by one who "is a merchant with respect to goods of that kind," an implied warranty of merchantability attaches to the sale under O.C.G.A. § 11-2-314 unless excluded or modified by O.C.G.A. § 11-2-316. *Georgia Timberlands, Inc. v. Southern Airways Co.*, 125 Ga. App. 404, 188 S.E.2d 108 (1972).

Implied warranty of merchantability does not base distinctions upon whether or not goods are sold in original packages. *Pierce v. Liberty Furn. Co.*, 141 Ga. App. 175, 233 S.E.2d 33 (1977).

**Instruction manual accompanying product.** — Under warranty provisions of Uniform Commercial Code, where a product is sold which is to be installed by the consumer, written instructions that accompany it create an implied warranty that it will be fit for ordinary purpose for which it is used and will be safely operable when installed in accordance with such directions. *Reddick v. White Consol. Indus., Inc.*, 295 F. Supp. 243 (S.D. Ga. 1968).

**Restaurateur serving unwholesome food.** — O.C.G.A. § 11-2-314 evinces legislative intent to abrogate and repeal substantive rule of law that a restaurateur who furnishes unwholesome food is not liable upon theory of implied warranty. *Ray v. Deas*, 112 Ga. App. 191, 144 S.E.2d 468 (1965).

**When contract originates in self-service store.** — Where defendant self-service store offered soft drinks for sale by placing them on its shelf, contract for sale of goods came into being when plaintiff accepted offer by taking physical possession thereof with intent to pay for them; and from that moment forward implied warranties of O.C.G.A. § 11-2-314 were applicable. *Fender v. Colonial Stores, Inc.*, 138 Ga. App. 31, 225 S.E.2d 691 (1976).

**Blood furnished by hospital in course of treatment** is not a sales transaction covered by implied warranty under O.C.G.A. § 11-2-314. *Lovett v. Emory Univ., Inc.*, 116 Ga. App. 277, 156 S.E.2d 923 (1967).

**Medical center's furnishing of facility for use in connection with surgery** to install a plate device to stabilize plaintiff's spine was a transaction involving "services and labor

**General Consideration (Cont'd)**

with an incidental furnishing of equipment and materials” and, as such, the Uniform Commercial Code had no application. *McCombs v. Southern Regional Medical Ctr., Inc.*, 233 Ga. App. 676, 504 S.E.2d 747 (1998).

**Distributor of anti-psychotic drug.** — The distributor of an anti-psychotic drug could not be held liable for the suicide of a patient based on warranty claims because it neither manufactured nor prescribed the drug. *Presto v. Sandoz Pharmaceuticals Corp.*, 226 Ga. App. 547, 487 S.E.2d 70 (1997).

**“Learned intermediary” doctrine.** — The manufacturer of an anti-psychotic drug could not be held liable for the suicide of a patient under any warranty claim because of the “learned intermediary” doctrine, absent some showing that the product itself was defective. *Presto v. Sandoz Pharmaceuticals Corp.*, 226 Ga. App. 547, 487 S.E.2d 70 (1997).

**Handgun used to accidentally kill another.** — Handgun with cocked hammer which was discovered by three-year-old, who pulled the trigger and thereby killed another child, could not be considered “not merchantable and not reasonably suited to the use intended” since the gun performed exactly as intended—when the hammer was cocked and the trigger was pulled, it fired. *Rhodes v. R.G. Indus., Inc.*, 173 Ga. App. 51, 325 S.E.2d 465 (1984).

**Skylights.** — Where a subcontractor’s initial proposal and the general contractor’s purchase order referencing the “plans and specs” required that skylights be water-tight or leak free, but the skylights were not leak free, the goods were not merchantable. *American Aluminum Prods. Co. v. Binswanger Glass Co.*, 194 Ga. App. 703, 391 S.E.2d 688 (1990).

**A contract for rebuilding an engine** was not a sale by a merchant so as to invoke the warranty of O.C.G.A. § 11-2-314. *American Whse. & Moving Serv. of Atlanta, Inc. v. Floyd’s Diesel Serv., Inc.*, 164 Ga. App. 106, 296 S.E.2d 64 (1982).

**Breach and consequent damages complete a cause of action** on an implied warranty. *Wood v. Hub. Motor Co.*, 110 Ga. App. 101, 137 S.E.2d 674 (1964) (decided under former Code 1933, § 96-307).

**Negligence is not an element of breach of warranty.** — If goods do not conform to warranty, warrantor’s utmost care will not relieve warrantor of liability. *Wood v. Hub Motor Co.*, 110 Ga. App. 101, 137 S.E.2d 674 (1964) (decided under former Code 1933, § 96-307).

**Strict liability of manufacturer distinguished.** — Establishment of the implied warranty of merchantability as applied to a seller under O.C.G.A. § 11-2-314 is not the same as the strict liability imposed on a manufacturer under O.C.G.A. § 51-1-11. *Buford v. Toys R’ Us, Inc.*, 217 Ga. App. 565, 458 S.E.2d 373 (1995).

**Cited in** *Bell v. Menzies*, 110 Ga. App. 436, 138 S.E.2d 731 (1964); *Reddick v. White Consol. Indus., Inc.*, 295 F. Supp. 243 (S.D. Ga. 1968); *Horne v. Armstrong Prods. Corp.*, 416 F.2d 1329 (5th Cir. 1969); *Rupee v. Mobile Home Brokers, Inc.*, 124 Ga. App. 86, 183 S.E.2d 34 (1971); *Hornbuckle v. Escambia Chem. Corp.*, 127 Ga. App. 522, 194 S.E.2d 344 (1972); *Lashley v. Ford Motor Co.*, 359 F. Supp. 363 (M.D. Ga. 1972); *Smith v. Bruce*, 129 Ga. App. 97, 198 S.E.2d 697 (1973); *Evershine Prods., Inc. v. Schmitt*, 130 Ga. App. 34, 202 S.E.2d 228 (1973); *Mays v. Citizens & S. Nat’l Bank*, 132 Ga. App. 602, 208 S.E.2d 614 (1974); *Weaver v. Ralston Motor Hotel, Inc.*, 135 Ga. App. 536, 218 S.E.2d 260 (1975); *Higginbotham v. Ford Motor Co.*, 540 F.2d 762 (5th Cir. 1976); *Caldwell v. Lord & Taylor, Inc.*, 142 Ga. App. 137, 235 S.E.2d 546 (1977); *Ford Motor Co. v. Carter*, 239 Ga. 657, 238 S.E.2d 361 (1977); *Hutchinson Homes, Inc. v. Guerdon Indus., Inc.*, 143 Ga. App. 664, 239 S.E.2d 553 (1977); *Pepsico Truck Rental, Inc. v. Eastern Foods, Inc.*, 145 Ga. App. 410, 243 S.E.2d 662 (1978); *Vance v. Miller-Taylor Shoe Co.*, 147 Ga. App. 812, 251 S.E.2d 52 (1978); *Ramsey Brick Sales Co. v. Outlaw*, 152 Ga. App. 37, 262 S.E.2d 227 (1979); *Maddux v. R.O.E.M., Inc.*, 152 Ga. App. 732, 264 S.E.2d 31 (1979); *Patron Aviation, Inc. v. Teledyne Indus., Inc.*, 154 Ga. App. 13, 267 S.E.2d 274 (1980); *Preiser v. Jim Letts Oldsmobile, Inc.*, 160 Ga. App. 658, 288 S.E.2d 219 (1981); *Salome v. First Nat’l Bank*, 162 Ga. App. 394, 291 S.E.2d 452 (1982); *Alterman Foods, Inc. v. G.C.C. Beverages, Inc.*, 168 Ga. App. 921, 310 S.E.2d 755 (1983); *W. Linton Howard, Inc. v. Gibbs Mach., Inc.*, 169 Ga. App. 627, 314 S.E.2d 259 (1984); *Gee v.*



Chattahoochee Tractor Sales, Inc., 172 Ga. App. 351, 323 S.E.2d 176 (1984); Citizens Jewelry Co. v. Walker, 178 Ga. App. 897, 345 S.E.2d 106 (1986); Warner Robins Tree Surgeons, Inc. v. Kolb & Co., 181 Ga. App. 20, 351 S.E.2d 486 (1986); Ream Tool Co. v. Newton, 209 Ga. App. 226, 433 S.E.2d 67 (1993); Dixon Dairy Farms, Inc. v. Conagra Feed Co., 245 Ga. App. 836, 538 S.E.2d 897 (2000).

### Leases

#### Section applicable to sales and not leases.

— It would appear from a literal reading of O.C.G.A. § 11-2-314 that it was intended to apply only to “sales” and not leases. Redfern Meats, Inc. v. Hertz Corp., 134 Ga. App. 381, 215 S.E.2d 10 (1975).

**Commercial chattel leases.** — Provisions of O.C.G.A. § 11-2-314 are not applicable to all commercial chattel leases. Redfern Meats, Inc. v. Hertz Corp., 134 Ga. App. 381, 215 S.E.2d 10 (1975).

Warranty provisions of Uniform Commercial Code are applicable to those chattel leases where transaction in question is analogous to a sale. Redfern Meats, Inc. v. Hertz Corp., 134 Ga. App. 381, 215 S.E.2d 10 (1975).

**Irrevocable agreement to transfer ownership in future.** — Where owner had contracted irrevocably to transfer ownership to another at some time in the future, the transaction was analogous to a sale even though in the form of a lease and even though the owner retained title, the implied warranties of O.C.G.A. § 11-2-314 applied. Redfern Meats, Inc. v. Hertz Corp., 134 Ga. App. 381, 215 S.E.2d 10 (1975).

**Four-year lease of vehicle.** — Where a lessee leased a vehicle for four years, title remained with the assignee, and the lessee was required to surrender the car at the expiration of the lease term, there being no option to purchase it, neither the implied warranty provisions nor the exclusion rules therefor of the Uniform Commercial Code applied to the lease agreement. Mark Singleton Buick, Inc. v. Taylor, 194 Ga. App. 630, 391 S.E.2d 435 (1990).

### Torts

**Wrongful death action.** — No wrongful death action arises from any breach of war-

ranties absent negligence or criminal conduct. Miles v. Bell Helicopter Co., 385 F. Supp. 1029 (N.D.Ga. 1974).

A wrongful death action may not be predicated on a breach of warranty arising from the sale of goods, except specified articles intended for human consumption or use. Ryals v. Billy Poppell, Inc., 192 Ga. App. 787, 386 S.E.2d 513 (1989).

**Retailer's liability parallels that of manufacturer under O.C.G.A. § 51-1-11.** — O.C.G.A. § 11-2-314 establishes a concept for retailers similar to that employed in O.C.G.A. § 51-1-11, by which manufacturers may be held strictly liable for defective products. Pierce v. Liberty Furn. Co., 141 Ga. App. 175, 233 S.E.2d 33 (1977).

O.C.G.A. § 11-2-314, defining implied warranty of merchantability, is involved under O.C.G.A. § 51-1-11, which relate to actions for product liability. Parzini v. Center Chem. Co., 134 Ga. App. 414, 214 S.E.2d 700, rev'd on other grounds, 234 Ga. 868, 218 S.E.2d 580 (1975).

**Dealer not liable for manufacturer's warranty.** — Defendant used-car dealer could not be held liable under a complaint alleging that plaintiffs' decedent was killed while driving a used car purchased from defendant which was defective when manufactured and that the car was covered by an express warranty of merchantability, issued by defendant at the time of purchase, where the vehicle in question was not manufactured by defendant. Ryals v. Billy Poppell, Inc., 192 Ga. App. 787, 386 S.E.2d 513 (1989).

### Exclusion or Waiver

**Waiver must be clear and certain.** — Contract intended to waive implied warranties written into the sale by law should be clear and certain on that point. Wilson v. Eargle, 98 Ga. App. 241, 105 S.E.2d 474 (1958) (decided under former Code 1933, § 96-301).

Inconspicuous disclaimer in installment contract could not constitute exclusion of implied warranty of seller that mobile home was fit for ordinary purposes. BCS Fin. Corp. v. Sorbo, 213 Ga. App. 259, 444 S.E.2d 85 (1994).

**Failure to exclude warranty.** — Failure to limit warranty made or to exclude any implied warranties may give rise to liability



**Exclusion or Waiver (Cont'd)**

under either O.C.G.A. §§ 11-2-313 or 11-2-314. *Jones v. Cranman's Sporting Goods*, 142 Ga. App. 838, 237 S.E.2d 402 (1977).

**Vendee's inspection of property.** — A vendee of personal property, by making a personal examination and inspection of same before purchase, with view of vendee determining quality and condition of the property, does not thereby waive an implied warranty by vendor that article sold is merchantable, and reasonably suited to use intended; and vendee can maintain a suit for such breach of warranty growing out of a latent defect which could not, in the exercise of due caution, have been detected; this is true notwithstanding the vendor was ignorant of the existence of such defect. *Williams v. Ballenger*, 87 Ga. App. 255, 73 S.E.2d 509 (1952) (decided under former Code 1933, § 96-301).

**Purchaser's acceptance of property bought with full knowledge of its defective condition** constitutes a waiver of implied warranty that property is in merchantable condition and suited for purpose intended. *Smith v. Northeast Ga. Fair Ass'n*, 85 Ga. App. 32, 67 S.E.2d 836 (1951) (decided under former Code 1933, § 96-301).

**Acceptance of used goods in exchange for reduced price.** — Acceptance of used equipment in exchange for reduced purchase price does not cause corresponding waiver of implied warranty of fitness for ordinary purposes for which such goods are intended. *Solomon Refrigeration, Inc. v. Osburn*, 148 Ga. App. 772, 252 S.E.2d 686 (1979).

**Warranty limiting liability to repair or replacement of defective goods.** — Seller was not liable for consequential damages resulting from alleged breach of warranty arising from defects in its goods where seller's written warranty specifically limited any liability to repairing or replacing any defective goods and where buyer had notice of the existence of the written warranty but never requested or saw a copy of the written warranty. *A-Larms, Inc. v. Alarms Device Mfg. Co.*, 165 Ga. App. 382, 300 S.E.2d 311 (1983).

**Automobile invoice containing language, "I accept the above-described car in its present condition . . ."** indicated that the car was sold "as is" and operated to exclude any

implied warranties; trial court, therefore, erred in not granting partial summary judgment to seller in regard to the claim for breach of implied warranties. *Joseph Charles Parrish, Inc. v. Hill*, 173 Ga. App. 97, 325 S.E.2d 595 (1984).

**Implied warranty not excluded.** — Paragraph written in same size and color type as all other paragraphs on back of form fails completely to comply with O.C.G.A. § 11-2-316 for excluding the warranties implied by law in O.C.G.A. § 11-2-314. *Chrysler Corp. v. Wilson Plumbing Co.*, 132 Ga. App. 435, 208 S.E.2d 321 (1974).

**Evidentiary Issues**

**Merchantability may concern whether product is dangerous for ordinary use.** — Under merchantability such questions may be considered as whether drain solvent consisting of 95 percent to 99 1/2 percent pure sulphuric acid is unmerchantable and dangerous because it is too potent for ordinary use. *Parzini v. Center Chem. Co.*, 134 Ga. App. 414, 214 S.E.2d 700, rev'd on other grounds, 234 Ga. 868, 218 S.E.2d 580 (1975).

**Guarantor of debtor may not raise defense of breach of warranty.** — Whether or not warranty provisions of Uniform Commercial Code apply to lease of machinery, defense of breach of warranty cannot be raised by guarantor of debtor. *Hurst v. Stith Equip. Co.*, 133 Ga. App. 374, 210 S.E.2d 851 (1974).

**Negating causal connection between breach and damages.** — Defendant may demonstrate in defense that product was in fact merchantable and fit for purpose intended, or that if there was a deficiency in such regard there was no causal connection between breach and damages sued for, or that some other factor was the sole proximate cause of damage. *Firestone Tire & Rubber Co. v. Jackson Transp. Co.*, 126 Ga. App. 471, 191 S.E.2d 110 (1972).

**Mere fact of tire blowout** does not demonstrate manufacturer's negligence, nor tend to establish that tire was defective. *Firestone Tire & Rubber Co. v. Jackson Transp. Co.*, 126 Ga. App. 471, 191 S.E.2d 110 (1972).

**Evidence of defect at time of sale.** — Where there was a factual question as to whether a defect existed in a re-treaded tire

at the time of sale, summary judgment was correctly denied. *Jones v. Marcus*, 217 Ga. App. 372, 457 S.E.2d 271 (1995).

Because the product defect must exist at the time of sale or lease for an action under warranty to be valid, plaintiff could not recover for breach of the implied warranty of merchantability since plaintiff failed to show that defendant manufacturer was responsible for the truck's brake failure. *Jenkins v. GMC*, 240 Ga. App. 636, 524 S.E.2d 324 (1999).

**Defective product.** — Affidavit of plaintiff's expert stating that a product was defective and unsuitable for its intended purpose did not suggest the alleged defect was patent so as to justify a grant of summary judgment on the issue of an implied warranty. *Moore v. Berry*, 217 Ga. App. 697, 458 S.E.2d 879 (1995).

Evidence from a veterinarian and farm manager raised an issue of fact regarding whether plaintiff's feed was fit for its intended purpose. *Dixon Dairy Farms, Inc. v. Conagra Feed Co.*, 239 Ga. App. 233, 519 S.E.2d 729 (1999).

Seller of an all-terrain vehicle was entitled to summary judgment on breach of warranty claims because plaintiffs did not present evidence that the vehicle was unfit or unsafe for only one rider and there was no evidence that the seller knew that plaintiffs intended to operate the vehicle with a passenger. *Battersby v. Boyer*, 241 Ga. App. 115, 526 S.E.2d 159 (1999).

**Sale of horse.** — No breach of implied warranty could be shown after undisputed evidence demonstrated that the sellers' representation at the time of sale that a horse would be a good show horse was true. *Sheffield v. Darby*, 244 Ga. App. 437, 535 S.E.2d 776 (2000).

### Privity

**Law as to liability under a warranty requires privity.** *Stewart v. Gainesville Glass Co.*, 131 Ga. App. 747, 206 S.E.2d 857 (1974), *aff'd*, 233 Ga. 578, 212 S.E.2d 377 (1975).

**Plaintiff must be purchaser.** — For plaintiff to maintain action against manufacturer based on implied warranties, plaintiff must be purchaser either directly from manufacturer or from some other person such as a wholesaler or retailer. *Whitaker v.*

*Harvell-Kilgore Corp.*, 418 F.2d 1010 (5th Cir. 1969); *Lamb v. Georgia-Pacific Corp.*, 194 Ga. App. 848, 392 S.E.2d 307 (1990); *Cobb County Sch. Dist. v. MAT Factory, Inc.*, 215 Ga. App. 697, 452 S.E.2d 140 (1994).

Implied warranty that goods are merchantable clearly arises out of contract of sale of goods, so it can only run to buyer who is in privity of contract with seller. *Chaffin v. Atlanta Coca-Cola Bottling Co.*, 127 Ga. App. 619, 194 S.E.2d 513 (1972).

Under Uniform Commercial Code, no implied warranty runs from manufacturer to one not purchasing directly from it. *Lashley v. Ford Motor Co.*, 359 F. Supp. 363 (M.D. Ga. 1972), *aff'd*, 480 F.2d 158 (5th Cir.), *cert. denied*, 414 U.S. 1072, 94 S. Ct. 585, 38 L. Ed. 2d 478 (1973).

In a products liability diversity action brought on the theory of breach of implied warranty of merchantability, Georgia procedural law, which looked to the *lex loci delicti*, controlled the claim. Since the injury took place in Georgia, Georgia substantive law, which required privity, was applied. The plaintiff, who was an employee of the purchaser of the product, failed to satisfy this privity requirement. *Morgan v. Mar-Bel, Inc.*, 614 F. Supp. 438 (N.D. Ga. 1985).

**Lack of privity between manufacturer and ultimate consumer.** — Ordinarily under O.C.G.A. § 11-2-314 there is no implied warranty existing between a manufacturer and an ultimate consumer due to the fact that no privity of contract exists between the two. *Chrysler Corp. v. Wilson Plumbing Co.*, 132 Ga. App. 435, 208 S.E.2d 321 (1974).

**Warranty issued through dealer as part of sale.** — Although in Georgia privity is required in order to impose liability under the theory of express or implied warranty, where an automobile manufacturer, through its authorized dealer issues to a purchaser of one of its automobiles from such dealer, admittedly as a part of the sale, a warranty by the manufacturer running to the purchaser, privity exists and O.C.G.A. § 11-2-314 becomes operative. *Jones v. Cranman's Sporting Goods*, 142 Ga. App. 838, 237 S.E.2d 402 (1977); *Chrysler Corp. v. Wilson Plumbing Co.*, 132 Ga. App. 435, 208 S.E.2d 321 (1974).

Ordinarily, there is no implied warranty existing between manufacturer and purchaser of automobile when there is no



**Privity (Cont'd)**

privity between the two, yet where an automobile manufacturer, through its authorized dealer, issues to a purchaser a warranty by the manufacturer to said purchaser, the implied warranty statute becomes operative. *Ford Motor Co. v. Lee*, 137 Ga. App. 486, 224 S.E.2d 168, aff'd in part and rev'd in part on other grounds, 237 Ga. 554, 229 S.E.2d 379 (1976).

**Dealer's warranty not binding on manufacturer.** — Absent a showing of a de facto principal/agent relationship between an automobile manufacturer and its authorized dealer, a warranty made by the dealer for repair work done on a used vehicle would not extend any responsibility to the manufacturer. *Lauria v. Ford Motor Co.*, 169 Ga. App. 203, 312 S.E.2d 190 (1983).

**No privity meant no duty to warn.** — Claim, based on warranty law, that a hospital had a duty to warn regarding the effects of discontinuing prescription drug use was meritless since the hospital neither manufactured nor prescribed the drug. *Presto v. Charter Peachford Behavioral Health Sys.*, 229 Ga. App. 576, 494 S.E.2d 377 (1997).

**Damages**

**Loss of expected profits.** — Where there is evidence of defect in goods which renders them unfit for ordinary purposes for which such goods are used, vendor may be held liable under O.C.G.A. § 11-2-314. However, loss of expected profits cannot be recovered except where evidence of such loss can be shown with reasonable certainty. *Farmers. Mut. Exch. of Baxley, Inc. v. Dixon*, 146 Ga. App. 663, 247 S.E.2d 124 (1978).

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 15A Am. Jur. 2d, Commercial Code, § 14. 63 Am. Jur. 2d, Products Liability, § 705 et seq. 67A Am. Jur. 2d, Sales, §§ 747-760. 234 Ga. 868; 218 S.E.2d 580 (1975), rev'd on other grounds.

**C.J.S.** — 77A C.J.S., Sales, § 254 et seq.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 2-314.

**ALR.** — Liability of seller of article not inherently dangerous for personal injuries to the buyer, due to the defective or dangerous condition of the article, 13 ALR 1176; 74 ALR 343; 168 ALR 1054.

Warranties and conditions upon sale of seeds, nursery stock, etc., 16 ALR 859; 32 ALR 1241; 62 ALR 451; 117 ALR 470; 168 ALR 581.

Right of dealer against his vendor in case of breach of warranty as to article purchased for resale and resold, 22 ALR 133; 64 ALR 883.

Implied warranty upon retail sale of garment for personal wear, 27 ALR 1507.

Loss of profits as elements of damages for fraud of seller, as to quality of goods purchased for resale, 28 ALR 354.

Seller's duty to ascertain at his peril that articles of food conform to food regulations, 28 ALR 1385.

Express or implied warranty on sale for accommodation of buyer, 32 ALR 1150; 59 ALR 1541.

Express or implied warranty of quality, condition, or fitness of automobile or truck sold by retail dealer, 34 ALR 535; 43 ALR 648.

Warranty or condition as to kind or quality implied by sale under trade term which by use has become generic, 35 ALR 249.

Express or implied warranty of quality, condition, or fitness of automobile or truck sold by retail dealer, 43 ALR 648.

Implied warranty or condition as to quality of timber or lumber, 52 ALR 1536.

Implied warranty of fitness on sale of article by trademark, tradename, or other particular description, 59 ALR 1180; 90 ALR 410.

Implied warranty of strength or fitness of chain, cable, or wire, 59 ALR 1235.

Express or implied warranty on sale for accommodation, 59 ALR 1541.

Construction and effect of express or implied warranty on sale of an article intended for use as an explosive, 62 ALR 1510.

Right of dealer against his vendor in case of breach of warranty as to article purchased for resale or resold, 64 ALR 883.

Implied warranty by other than packer, of fitness of goods sold in sealed cans, 90 ALR 1269; 142 ALR 1434.

Implied warranty of quality, condition, or fitness on sale of "job lot," "leftovers," and the like, 103 ALR 1347.



Presumption of negligence from foreign substance in food, 105 ALR 1039.

Liability of manufacturer or packer of defective article for injury to person or property of ultimate consumer who purchased from middleman, 105 ALR 1502; 111 ALR 1239; 140 ALR 191; 142 ALR 1490.

Liability for injury or death from refrigerating machinery or apparatus, 117 ALR 1425.

Joinder of manufacturer or packer and retailer or other middleman as defendants in action for injury to person or damage to property of purchaser or consumer of defective article, 119 ALR 1356.

Infected or tainted condition of milk or other food, or contamination in water, and its causation of the sickness of the consumer, as inferable from such sickness, 130 ALR 616.

Implied warranty by retailer of cosmetics, 131 ALR 123.

Warranty of title by seller in conditional sale contract, 132 ALR 338.

Construction and application of provision in conditional sale contract regarding implied warranties, 139 ALR 1276.

Implied warranty, by other than packer, of fitness of goods sold in sealed cans, 142 ALR 1434.

Implied warranty of reasonable fitness of food for human consumption as breached by substance natural to the original product and not removed in processing, 143 ALR 1421.

Implied warranty of quality, condition, or fitness on sale of secondhand article, 151 ALR 446.

Manufacturer's liability for injury or damage as affected by his test, or by his failure to test, for defects, 156 ALR 479.

Law of sales and liability in respect thereof as applied to transactions in self-service stores, 163 ALR 238.

Intervening purchaser's knowledge of defects in or danger of article, or failure to inspect therefor, as affecting liability of manufacturer or dealer for personal injury or property damage to subsequent purchaser or other third person, 164 ALR 371.

Implied warranty of quality, fitness, or condition as affected by buyer's inspection of, or opportunity to inspect, goods, 168 ALR 389.

Liability of seller of article not inherently

dangerous for personal injuries due to the defective or dangerous condition of the article, 168 ALR 1054.

Implied warranty of fitness by one serving food, 7 ALR2d 1027; 87 ALR4th 804; 90 ALR4th 12.

Recovery by contractor or artisan, suing for breach of warranty, of damages for loss of good will occasioned by use in his business of unfit materials, 28 ALR2d 591.

Measure and elements of recovery of buyer rescinding sale of domestic animal for seller's breach of warranty, 35 ALR2d 1273.

Form and substance of notice which buyer of goods must give in order to recover damages for seller's breach of warranty, 53 ALR2d 270.

Implied warranty of fitness on sale of livestock, 53 ALR2d 892.

Size and kind of trees contemplated by contracts or deeds in relation to standing timber, 72 ALR2d 727.

What law governs liability of manufacturer or seller for injury caused by product sold, 76 ALR2d 130.

Liability of manufacturer or seller for injury caused by food or food product sold, 77 ALR2d 7.

Liability of manufacturer or seller for injury caused by beverage sold, 77 ALR2d 215.

Liability of manufacturer or seller for injury caused by automobile or other vehicle, aircraft, boat, or their parts, supplies, or equipment, 78 ALR2d 460; 81 ALR3d 318; 97 ALR3d 627; 1 ALR4th 411; 3 ALR4th 489; 5 ALR4th 483.

Liability of manufacturer or seller for injury caused by industrial, business, or farm machinery, tools, equipment, or materials, 78 ALR2d 594; 2 ALR4th 262.

Liability of manufacturer or seller for injury caused by paint, cement, lumber, building supplies, ladders, small tools, and like products, 78 ALR2d 696; 84 ALR3d 877.

Liability of manufacturer or seller for injury caused by toys, games, athletic or sports equipment, or like products, 78 ALR2d 738; 95 ALR3d 390.

Liability of manufacturer or seller for injury caused by firearms, explosives, and flammables, 80 ALR2d 488; 94 ALR3d 291; 15 ALR4th 909; 18 ALR4th 206.

Liability of auctioneer or clerk to buyer as to title, condition, or quality of property sold, 80 ALR2d 1237.

Liability of manufacturer or seller for injury caused by household and domestic machinery, appliances, furnishings, and equipment, 80 ALR2d 598; 89 ALR3d 210; 93 ALR3d 99; 1 ALR4th 748.

Liability of manufacturer or seller for injury caused by clothing, shoes, combs, and similar products, 80 ALR2d 702.

Liability of auctioneer or clerk to buyer as to title, condition, or quality of property sold, 80 ALR2d 1237.

Liability of manufacturer or seller of product sold in container or package for injury caused by container or packaging, 81 ALR2d 229; 36 ALR4th 419.

Liability of manufacturer or seller of container (bottle, barrel, drum, tank, etc.) or other packaging material for injury caused thereby, 81 ALR2d 350; 36 ALR4th 419.

Products liability: manufacturer's responsibility for defective component supplied by another and incorporated in product, 3 ALR3d 1016.

Contributory negligence or assumption of risk as defense to action for personal injury, death, or property damage resulting from alleged breach of implied warranty, 4 ALR3d 501.

Statute of limitations: when cause of action arises on action against manufacturer or seller of product causing injury or death, 4 ALR3d 821.

Seller's duty to test or inspect as affecting his liability for product-caused injury, 6 ALR3d 12.

Manufacturer's duty to test or inspect as affecting his liability for product-caused injury, 6 ALR3d 91.

Liability for warranties and representations in connection with the sale of air-conditioning equipment, 15 ALR3d 1207.

Products liability: right of manufacturer or seller to contribution or indemnity from user of product causing injury or damage to third person, and vice versa, 28 ALR3d 943.

Products liability: extension of strict liability in tort to permit recovery by a third person who was neither a purchaser nor user of product, 33 ALR3d 415.

Liability of manufacturer, seller, or distributor of motor vehicle for defect which merely enhances injury from accident otherwise caused, 42 ALR3d 560; 96 ALR3d 900.

Application of warranty provisions of Uni-

form Commercial Code to bailments, 48 ALR3d 668.

Liability for injury or death of pallbearer, 48 ALR3d 1280.

Necessity and propriety of instructing on alternative theories of negligence or breach of warranty, where instruction on strict liability in tort is given in products liability case, 52 ALR3d 101.

Failure to warn as basis of liability under doctrine of strict liability in tort, 53 ALR3d 239.

Products liability: strict liability in tort where injury results from allergenic (side-effect) reaction to product, 53 ALR3d 298.

Strict liability in tort: liability of seller of used product, 53 ALR3d 337.

Liability of hospital or medical practitioner under doctrine of strict liability in tort, or breach of warranty, for harm caused by drug, medical instrument, or similar device used in treating patient, 54 ALR3d 258.

Products liability: product as unreasonably dangerous or unsafe under doctrine of strict liability in tort, 54 ALR3d 352.

Liability of water supplier for damages resulting from furnishing impure water, 54 ALR3d 936.

Products liability: proof, under strict tort liability doctrine, that defect was present when product left hands of defendant, 54 ALR3d 1079.

Liability of builder or subcontractor for insufficiency of building resulting from latent defects in materials used, 61 ALR3d 792.

Contracts for artificial insemination of cattle, 61 ALR3d 811.

Liability of installer or maintenance company for injury caused by door of automatic passenger elevator, 64 ALR3d 1005.

Promises or attempts by seller to repair goods as tolling statute of limitations for breach of warranty, 68 ALR3d 1277.

Admissibility of evidence of subsequent repairs or other remedial measures in products liability cases, 74 ALR3d 1001; 38 ALR4th 583; 64 ALR5th 119.

Statements on container that enclosed toy, game, sports equipment, or the like, is safe as affecting manufacturer's liability for injury caused by product sold, 74 ALR3d 1298.

What constitutes a contract for sale under Uniform Commercial Code § 2-314, 78 ALR3d 696.



Products liability: liability for injury or death allegedly caused by defective tire, 81 ALR3d 318.

Products liability: liability for injury or death allegedly caused by defect in snowmobile or other recreational-purpose vehicle, 81 ALR3d 394; 66 ALR4th 622.

Products liability: liability for injury or death allegedly caused by defect in mobile home or trailer, 81 ALR3d 421.

What are "merchantable" goods within meaning of UCC § 2-314 dealing with implied warranty of merchantability, 83 ALR3d 694.

Liability of manufacturer, seller, or installer for personal injury caused by door glass, 84 ALR3d 877.

Products liability: drain cleaners, 85 ALR3d 727.

Liability of manufacturer or seller for personal injury or property damage caused by television set, 89 ALR3d 210.

Practices forbidden by state deceptive trade practice and consumer protection acts, 89 ALR3d 449.

Products liability: what statute of limitations governs actions based on strict liability in tort, 91 ALR3d 455.

Who is "merchant" under UCC § 2-314(1) dealing with implied warranties of merchantability, 91 ALR3d 876.

Products liability: stoves, 93 ALR3d 99.

Products liability: toys and games, 95 ALR3d 390.

Farmers as "merchants" within provisions of UCC Article 2, dealing with sales, 95 ALR3d 484.

Products liability: forklift trucks, 95 ALR3d 541.

Products liability: duty of manufacturer to equip product with safety device to protect against patent or obvious danger, 95 ALR3d 1066.

Products liability: modern cases determining whether product is defectively designed, 96 ALR3d 22.

Products liability: defective vehicular gasoline tanks, 96 ALR3d 265.

Liability of packer, foodstore, or restaurant for causing trichinosis, 96 ALR3d 451.

Products liability: personal injury or death allegedly caused by defect in aircraft or its parts, supplies, or equipment, 97 ALR3d 627.

Products liability: personal injury or death

allegedly caused by defect in motorcycle or its parts, supplies, or equipment, 98 ALR3d 317.

Products liability: liability of manufacturer or seller for injury or death caused by defect in boat or its parts, supplies, or equipment, 1 ALR4th 411.

Products liability: defective heating equipment, 1 ALR4th 748.

Products liability: industrial accidents involving conveyor belts or systems, 2 ALR4th 262.

Construction and effect of new motor vehicle warranty limiting manufacturer's liability to repair or replacement of defective parts, 2 ALR4th 576.

Products liability: Diethylstilbestrol (DES), 2 ALR4th 1091.

Liability of manufacturer or seller of snowthrower for injuries to user, 2 ALR4th 1284.

Products liability: defective vehicular windows, 3 ALR4th 489.

Products liability: farm machinery, 4 ALR4th 13.

Products liability: glue and other adhesive products, 7 ALR4th 155.

Products liability: elevators, 7 ALR4th 852.

Products liability: stud guns, staple guns, or parts thereof, 8 ALR4th 70.

Products liability: transformer and other electrical equipment, 10 ALR4th 854.

Products liability: fertilizers, insecticides, pesticides, fungicides, weedkillers, and the like, or articles used in application thereof, 12 ALR4th 462.

Products liability: cranes and other lifting apparatuses, 13 ALR4th 476.

Extent of liability of seller of livestock infected with communicable disease, 14 ALR4th 1096.

Products liability: cement and concrete, 15 ALR4th 1186.

Products liability: tire rims and wheels, 16 ALR4th 137.

Products liability: firefighting equipment, 19 ALR4th 326.

Liability of hospital, physician, or other individual medical practitioner for injury or death resulting from blood transfusion, 20 ALR4th 136.

Liability of blood supplier or donor for injury or death resulting from blood transfusion, 24 ALR4th 508.

Products liability: animal feed or medicines, 29 ALR4th 1045.



Products liability: stud guns, staple guns, or parts thereof, 33 ALR4th 1189.

Products liability: household appliances relating to cleaning, washing, personal care, and water supply, quality, and disposal, 34 ALR4th 95.

Products liability: household equipment relating to storage, preparation, cooking, and disposal of food, 35 ALR4th 663.

Products liability: home and office furnishings, 36 ALR4th 170.

Computer sales and leases: breach of warranty, misrepresentation, or failure of consideration as defense or ground for affirmative relief, 37 ALR4th 110.

Products liability: personal soap, 54 ALR4th 574.

Liability of successor corporation for punitive damages for injury caused by predecessor's product, 55 ALR4th 166.

Products liability: sufficiency of evidence to support product misuse defense in actions concerning lawnmowers, 55 ALR4th 1062.

Products liability: toxic shock syndrome, 59 ALR4th 50.

Products liability: sufficiency of evidence to support product misuse defense in actions concerning agricultural implements and equipment, 60 ALR4th 678.

Products liability: electricity, 60 ALR4th 732.

Products liability: building and construction lumber, 61 ALR4th 121.

Liability of manufacturer of oral live polio (Sabin) vaccine for injury or death from its administration, 66 ALR4th 83.

Liability for injury incurred in operation of power golf cart, 66 ALR4th 622.

Products liability: industrial refrigerator equipment, 72 ALR4th 90.

Products liability: scaffolds and scaffolding equipment, 74 ALR4th 904.

Products liability: tractors, 75 ALR4th 312.

Products liability: bicycles and accessories, 76 ALR4th 117.

Products liability: exercise and related equipment, 76 ALR4th 145.

Products liability: trampolines and similar devices, 76 ALR4th 171.

Products liability: competitive sports equipment, 76 ALR4th 201.

Products liability: skiing equipment, 76 ALR4th 256.

Products liability: general recreational equipment, 77 ALR4th 1121.

Products liability: mechanical amusement rides and devices, 77 ALR4th 1152.

Products liability: lubricating products and systems, 80 ALR4th 972.

Liability for injury or death allegedly caused by spoilage or contamination of beverage, 87 ALR4th 804.

Liability for injury or death allegedly caused by foreign substance in beverage, 90 ALR4th 12.

Liability for injury or death allegedly caused by foreign object in food or food product, 1 ALR5th 1.

Liability for injury or death allegedly caused by spoilage, contamination, or other deleterious condition of food or food product, 2 ALR5th 1.

Liability for injury or death allegedly caused by food product containing object related to, but not intended to be present in, product, 2 ALR5th 189.

Products liability: roofs and roofing materials, 3 ALR5th 851.

Products liability: prefabricated buildings, 4 ALR5th 667.

Purchaser's disbelief in, or nonreliance upon, express warranties made by seller in contract for sale of business as precluding action for breach of express warranties, 7 ALR5th 841.

Products liability: application of strict liability doctrine to seller of used product, 9 ALR5th 1.

Products liability: cigarettes and other tobacco products, 36 ALR5th 541.

Validity, construction, and application of computer software licensing agreements, 38 ALR5th 1.

Products liability: theatrical equipment and props, 42 ALR5th 699.

Causes of action governed by limitations period in UCC § 2-725, 49 ALR5th 1.

Breach of warranty in sale, installation, repair, design, or inspection of septic or sewage disposal systems, 50 ALR5th 417.

Liability of manufacturer or seller for injury or death allegedly caused by use of contraceptive, 54 ALR5th 1.

Construction and application of learned-intermediary doctrine, 57 ALR5th 1.

Products liability: computer hardware and software, 59 ALR5th 461.

Products liability: liability for injury or death allegedly caused by defect in mobile home or trailer, 61 ALR5th 473.

Products liability: swimming pools and accessories, 65 ALR5th 105.

Products liability: paints, stains, and similar products, 69 ALR5th 137.

Products liability: helicopters, 72 ALR5th 299.

Products liability: consumer expectations test, 73 ALR5th 75.

Products liability: ladders, 81 ALR5th 245.

### 11-2-315. Implied warranty: fitness for particular purpose.

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under Code Section 11-2-316 an implied warranty that the goods shall be fit for such purpose. (Code 1933, § 109A-2—315, enacted by Ga. L. 1962, p. 156, § 1.)

**Cross references.** — Nonapplicability of implied warranties to blood transfusions, organ transplants, etc., §§ 11-2-316, 51-1-28.

**Law reviews.** — For article discussing manufacturer's warranty of merchantability and fitness under former § 96-307, see 10 Mercer L. Rev. 272 (1959). For article, "Sales Warranties Under Georgia's Uniform Commercial Code," see 1 Ga. St. B.J. 191 (1964). For article, "Georgia's New Statutory Liability for Manufacturers: An Inadequate Legislative Response," see 2 Ga. L. Rev. 538 (1968). For article discussing aspects of third party practice (impleader) under the Georgia Civil Practice Act, see 4 Ga. St. B.J. 355 (1968). For article, "Consumer Protection Against Sellers Misrepresentations," see 20 Mercer L. Rev. 414 (1969). For article discussing interpretation of warranties under the Uniform Commercial Code, see 4 Ga. L. Rev. 469 (1970). For article discussing the implied warranty of fitness for a particular purpose, see 9 Ga. L. Rev. 149 (1974). For article, "Products Liability Law in Georgia: Is Change Coming?" see 10 Ga. St. B.J. 353 (1974). For article explaining the Unfair Trade Practices and Consumer Protection Act, proposed in Georgia in 1973, see 10 Ga. St. B.J. 409 (1974). For article discussing modification of consumer warranty provisions of the U.C.C. by the Magnuson-Moss Act (15 U.S.C. §§ 2301-2312) with special emphasis on attempted disclaimers, see 27 Mercer L. Rev. 1111 (1976). For article, "Buyer's Right of Rejection: A Quarter Century Under the Uniform Commercial Code, and Recent International Developments,"

see 13 Ga. L. Rev. 805 (1979). For article discussing applicability of implied warranty provisions of the Uniform Commercial Code to construction contracts, see 28 Emory L.J. 335 (1979). For article discussing the applicability of warranty provisions under the Uniform Commercial Code to domestic solar energy devices, see 30 Mercer L. Rev. 547 (1979). For article surveying recent judicial developments in commercial law, see 31 Mercer L. Rev. 13 (1979). For annual survey of law of contracts, see 38 Mercer L. Rev. 107 (1986). For article, "Contractual Limitations of Remedy and the Failure of Essential Purpose Doctrine," see 26 Ga. St. B.J. 113 (1990). For article, "Products Liability Law in Georgia Including Recent Developments," see 43 Mercer L. Rev. 27 (1991).

For note discussing implied warranties in the sale of second-hand goods, see 17 Mercer L. Rev. 455 (1966). For note discussing products liability actions based on breach of implied warranty under the Uniform Commercial Code, see 4 Ga. L. Rev. 164 (1969). For note, "Allowance of Punitive Damages in Products Liability Claims," see 6 Ga. L. Rev. 613 (1972). For note, "Buyer's Right to Revoke Acceptance Against the Automobile Manufacturer for Breach of its Continuing Warranty of Repair or Replacement," see 7 Ga. L. Rev. 711 (1973).

For comment on *Felder v. Neeves*, 36 Ga. App. 41, 135 S.E. 219 (1926), see 1 Ga. L. Rev. No. 1 p. 51 (1927). For comment on *Revlon, Inc. v. Murdock*, 103 Ga. App. 842, 120 S.E.2d 912 (1961), see 24 Ga. B.J. 271 (1961). For comment on *Redfern Meats*,

Inc. v. Hertz Corp., 134 Ga. App. 381, 215 S.E.2d 10 (1975), see 27 Mercer L. Rev. 347 (1975).

## JUDICIAL DECISIONS

### ANALYSIS

GENERAL CONSIDERATION  
MANUFACTURER'S INSTRUCTIONS  
EXCLUSION OR MODIFICATION  
LEASES  
ACTIONS

#### General Consideration

**Editor's notes.** — In light of the similarity between the provisions, decisions under former Code 1933, § 96-301 are included in the annotations for this section.

**Implied warranty is raised by statute**, while express warranty is by contract. *Stewart v. Gainesville Glass Co.*, 131 Ga. App. 747, 206 S.E.2d 857 (1974), aff'd, 233 Ga. 578, 212 S.E.2d 377 (1975).

**What is warranted.** — Warranty of fitness warrants that goods sold are suitable for special purpose of buyer. *Multivision N.W., Inc. v. Jerrold Elecs. Corp.*, 356 F. Supp. 207 (N.D. Ga. 1972).

**Buying goods for general resale is not a "particular purpose"** within meaning of O.C.G.A. § 11-2-315. *Bruce v. Calhoun First Nat'l Bank*, 134 Ga. App. 790, 216 S.E.2d 622 (1975).

**Requirements for creation of warranty of fitness.** — In order to create implied warranty of fitness for particular purpose, O.C.G.A. § 11-2-315 requires that seller have reason to know of particular purpose for which goods are required and that buyer rely on seller's skill or judgment in selecting or furnishing suitable goods. *Bruce v. Calhoun First Nat'l Bank*, 134 Ga. App. 790, 216 S.E.2d 622 (1975).

**Applicability to latent defects.** — Implied warranty is a guaranty against loss only from latent defects. *Jones v. Knightstown Body Co.*, 52 Ga. App. 667, 184 S.E. 427 (1936); *Smith v. Northeast Ga. Fair Ass'n*, 85 Ga. App. 32, 67 S.E.2d 836 (1951).

Law of implied warranty will not avail against patent defects, nor against latent defects which are either disclosed or are discoverable by exercise of caution on part of purchaser. *Jones v. Knightstown Body Co.*,

52 Ga. App. 667, 184 S.E. 427 (1936); *Wilkinson v. Rich's, Inc.*, 77 Ga. App. 239, 48 S.E.2d 552 (1948); *Smith v. Northeast Ga. Fair Ass'n*, 85 Ga. App. 32, 67 S.E.2d 836 (1951).

While plaintiff's argument that no warranty existed because a buyer inspected the blocks buying and used the buyer's own judgment in selecting purchases was relevant to an implied warranty of fitness for a particular purpose, it was not applicable to the warranty of merchantability at issue. *Willis Mining, Inc. v. Noggle*, 235 Ga. App. 747, 509 S.E.2d 731 (1998).

**Parties may expand or limit warranty.** — Parties may expressly agree on provisions of contract and extent of warranty, which may be more limited or more extensive than implied warranty of law. *Jones v. Knightstown Body Co.*, 52 Ga. App. 667, 184 S.E. 427 (1936).

**Waiver of warranty.** — Purchaser's acceptance of property bought with full knowledge of its defective condition constitutes waiver of implied warranty that property is in merchantable condition and suited for the purpose intended. *Smith v. Northeast Ga. Fair Ass'n*, 85 Ga. App. 32, 67 S.E.2d 836 (1951).

Where property is brought under implied warranty that it is reasonably suited to use intended, an acceptance by purchaser waives all defects discovered by the purchaser, or which, by the exercise of ordinary care and prudence, the purchaser might have discovered before delivery. *Jones v. Knightstown Body Co.*, 52 Ga. App. 667, 184 S.E. 427 (1936); *Wilkinson v. Rich's, Inc.*, 77 Ga. App. 239, 48 S.E.2d 552 (1948).

**Medical center's furnishing of facility for use in connection with surgery** to install a plate device to stabilize plaintiff's spine was a



transaction involving "services and labor with an incidental furnishing of equipment and materials" and, as such, the Uniform Commercial Code had no application. *McCombs v. Southern Regional Medical Ctr., Inc.*, 233 Ga. App. 676, 504 S.E.2d 747 (1998).

**Sale of horse.** — No breach of implied warranty could be shown after undisputed evidence demonstrated that the sellers' representation at the time of sale that a horse would be a good show horse was true. *Sheffield v. Darby*, 244 Ga. App. 437, 535 S.E.2d 776 (2000).

**Cited in** *Bell v. Menzies*, 110 Ga. App. 436, 138 S.E.2d 731 (1964); *Hill Aircraft & Leasing Corp. v. Simon*, 122 Ga. App. 524, 177 S.E.2d 803 (1970); *Security Dev. & Inv. Co. v. Ben O'Callaghan Co.*, 125 Ga. App. 526, 188 S.E.2d 238 (1972); *Avery v. Aladdin Prods. Div., Nat'l Serv. Indus., Inc.*, 128 Ga. App. 266, 196 S.E.2d 357 (1973); *Smith v. Bruce*, 129 Ga. App. 97, 198 S.E.2d 697 (1973); *Evershine Prods., Inc. v. Schmitt*, 130 Ga. App. 34, 202 S.E.2d 228 (1973); *Mays v. Citizens & S. Nat'l Bank*, 132 Ga. App. 602, 208 S.E.2d 614 (1974); *Parzini v. Center Chem. Co.*, 134 Ga. App. 414, 214 S.E.2d 700 (1975); *Weaver v. Ralston Motor Hotel, Inc.*, 135 Ga. App. 536, 218 S.E.2d 260 (1975); *Key v. Bagen*, 136 Ga. App. 373, 221 S.E.2d 234 (1975); *Lancaster v. Eberhardt*, 141 Ga. App. 534, 233 S.E.2d 880 (1977); *Caldwell v. Lord & Taylor, Inc.*, 142 Ga. App. 137, 235 S.E.2d 546 (1977); *Hutchinson Homes, Inc. v. Guerdon Indus., Inc.*, 143 Ga. App. 664, 239 S.E.2d 553 (1977); *Farmers Mut. Exch. of Baxley, Inc. v. Dixon*, 146 Ga. App. 663, 247 S.E.2d 124 (1978); *Transart Indus., Inc. v. Gaines-American Moulding Corp.*, 148 Ga. App. 363, 251 S.E.2d 384 (1978); *Ramsey Brick Sales Co. v. Outlaw*, 152 Ga. App. 37, 262 S.E.2d 227 (1979); *Patron Aviation, Inc. v. Teledyne Indus., Inc.*, 154 Ga. App. 13, 267 S.E.2d 274 (1980); *Corbett v. North Fla. Clarklift, Inc.*, 155 Ga. App. 701, 272 S.E.2d 563 (1980); *Rigdon v. Walker Sales & Serv., Inc.*, 161 Ga. App. 459, 288 S.E.2d 711 (1982); *Salome v. First Nat'l Bank*, 162 Ga. App. 394, 291 S.E.2d 452 (1982); *W.B. Anderson Feed & Poultry Co. v. Georgia Gas Distribs., Inc.*, 164 Ga. App. 96, 296 S.E.2d 395 (1982); *Atlanta Cutlery Corp. v. Queen Cutlery Co.*, 168 Ga. App. 584, 309 S.E.2d 691 (1983); *Alterman Foods, Inc. v. G.C.C.*

*Beverages, Inc.*, 168 Ga. App. 921, 310 S.E.2d 755 (1983); *Citizens Jewelry Co. v. Walker*, 178 Ga. App. 897, 345 S.E.2d 106 (1986); *Hill v. Jay Pontiac, Inc.*, 191 Ga. App. 258, 381 S.E.2d 417 (1989); *Cobb County Sch. Dist. v. MAT Factory, Inc.*, 215 Ga. App. 697, 452 S.E.2d 140 (1994).

### Manufacturer's Instructions

**Instruction manual accompanying product.** — Under warranty provisions of Uniform Commercial Code where a product is sold which is to be installed by consumer, written instructions that accompany it create implied warranty that it will be fit for ordinary purpose for which it is used and will be safely operable when installed in accordance with such directions. *Reddick v. White Consol. Indus., Inc.*, 295 F. Supp. 243 (S.D. Ga. 1968).

If a manufacturer furnishes instructions as to manner in which product is to be used, consumer is entitled to think that so used it will not injure the consumer and there is implied warranty that goods are fit for that particular use. *Reddick v. White Consol. Indus., Inc.*, 295 F. Supp. 243 (S.D. Ga. 1968).

A manufacturer furnishing instructions for use of product is warranting same for that particular purpose and use, and no other. This is especially true where appliance sold becomes dangerous if used improperly. *Reddick v. White Consol. Indus., Inc.*, 295 F. Supp. 243 (S.D. Ga. 1968).

### Exclusion or Modification

**Warranty limiting liability to repair or replacement of defective goods.** — Seller was not liable for consequential damages resulting from alleged breach of warranty arising from defects in its goods where seller's written warranty specifically limited any liability to repairing or replacing any defective goods and where buyer had notice of the existence of the written warranty but never requested or saw a copy of the written warranty. *A-Larms, Inc. v. Alarms Device Mfg. Co.*, 165 Ga. App. 382, 300 S.E.2d 311 (1983).

### Leases

**Applicable to sales and not leases.** — It would appear from a literal reading of O.C.G.A. § 11-2-315 that it was intended to

**Leases (Cont'd)**

apply only to "sales" and not leases. *Redfern Meats, Inc. v. Hertz Corp.*, 134 Ga. App. 381, 215 S.E.2d 10 (1975).

**Applicable to leases which are analogous to sales.** — Warranty provisions of Uniform Commercial Code are applicable to those chattel leases where transaction in question is analogous to a sale. *Redfern Meats, Inc. v. Hertz Corp.*, 134 Ga. App. 381, 215 S.E.2d 10 (1975).

**Commercial chattel leases.** — Provisions of O.C.G.A. § 11-2-315 are not applicable to all commercial chattel leases. *Redfern Meats, Inc. v. Hertz Corp.*, 134 Ga. App. 381, 215 S.E.2d 10 (1975).

O.C.G.A. § 11-2-315 is not applicable to commercial chattel leases, and lessor may exculpate liability with a disclaimer clause, as long as the disclaimer is expressed in clear and unambiguous language. *Petroziello v. United States Leasing Corp.*, 176 Ga. App. 858, 338 S.E.2d 63 (1985).

**Irrevocable commitment to transfer ownership in future.** — Where owner contracted irrevocably to transfer ownership to another at some time in the future, the transaction was analogous to sale even though in the form of a lease and even though the owner retained title, the implied warranties of O.C.G.A. § 11-2-315 applied. *Redfern Meats, Inc. v. Hertz Corp.*, 134 Ga. App. 381, 215 S.E.2d 10 (1975).

**Four-year lease of vehicle.** — Where a lessee leased a vehicle for four years, title remained with the assignee, and the lessee was required to surrender the car at the expiration of the lease term, there being no option to purchase it, neither the implied warranty provisions nor the exclusion rules therefor of the Uniform Commercial Code applied to the lease agreement. *Mark Singleton Buick, Inc. v. Taylor*, 194 Ga. App. 630, 391 S.E.2d 435 (1990).

**Actions**

**To bring action against manufacturer, plaintiff must be purchaser.** — For plaintiff to maintain action against manufacturer based on implied warranties, plaintiff must be purchaser either directly from manufacturer or from some other person such as a wholesaler or retailer. *Whitaker v.*

*Harvell-Kilgore Corp.*, 418 F.2d 1010 (5th Cir. 1969).

**Lack of privity** between the manufacturer and user of exercise machine at a health club precluded the user's implied warranty claim against the manufacturer. *Bodymaster Sports Indus., Inc. v. Wimberley*, 232 Ga. App. 170, 501 S.E.2d 556 (1998).

**Defense of breach of warranty may not be raised by guarantor of debtor.** — Whether or not warranty provisions of Uniform Commercial Code apply to lease of machinery, defense of breach of warranty cannot be raised by guarantor of debtor. *Hurst v. Stith Equip. Co.*, 133 Ga. App. 374, 210 S.E.2d 851 (1974).

**Seller's defense.** — Defendant may demonstrate in defense that product was in fact merchantable and fit for purpose intended, or that if there was a deficiency in such regard there was no causal connection between the breach and the damages sued for, or that some other factor was the sole proximate cause of the damage. *Firestone Tire & Rubber Co. v. Jackson Transp. Co.*, 126 Ga. App. 471, 191 S.E.2d 110 (1972).

**Mere fact of tire blowout** does not demonstrate manufacturer's negligence, nor tend to establish that tire was defective. *Firestone Tire & Rubber Co. v. Jackson Transp. Co.*, 126 Ga. App. 471, 191 S.E.2d 110 (1972).

**Distributor of anti-psychotic drug.** — The distributor of an anti-psychotic drug could not be held liable for the suicide of a patient based on warranty claims because it neither manufactured nor prescribed the drug. *Presto v. Sandoz Pharmaceuticals Corp.*, 226 Ga. App. 547, 487 S.E.2d 70 (1997).

**"Learned intermediary" doctrine.** — The manufacturer of an anti-psychotic drug could not be held liable for the suicide of a patient under any warranty claim because of the "learned intermediary" doctrine, absent some showing that the product itself was defective. *Presto v. Sandoz Pharmaceuticals Corp.*, 226 Ga. App. 547, 487 S.E.2d 70 (1997).

**Seller's knowledge of use.** — Where there was no evidence that the seller of re-treaded tires for a pick-up truck knew that it would be used in the owner's construction business, the seller was not liable to the owner based on breach of an implied warranty for a particular purpose. *Jones v. Marcus*, 217 Ga.



App. 372, 457 S.E.2d 271 (1995).

**Manufacturer's knowledge of use.** — Where it was not shown that plaintiff relied on defendant manufacturer's skill and judgment in selecting the truck, or that, if plain-

tiff did, defendant knew of the reliance, plaintiff could not establish an implied warranty of fitness for a particular purpose under this section. *Jenkins v. GMC*, 240 Ga. App. 636, 524 S.E.2d 324 (1999).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 38 Am. Jur. 2d, Guaranty, § 10. 63 Am. Jur. 2d, Products Liability, § 723 et seq. 67A Am. Jur. 2d, Sales, §§ 761-790.

**C.J.S.** — 77A C.J.S., Sales, §§ 252, 253, 258 et seq.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 2-315.

**ALR.** — Implied warranty on sale of vessel, 3 ALR 622.

Liability of seller of article not inherently dangerous for personal injuries to the buyer, due to the defective or dangerous condition of the article, 13 ALR 1176; 74 ALR 343; 168 ALR 1054.

Warranties and conditions upon sale of seeds, nursery stock, etc., 16 ALR 859; 32 ALR 1241; 62 ALR 451; 117 ALR 470; 168 ALR 581.

Loss of profits as elements of damages for fraud of seller, as to quality of goods purchased for resale, 28 ALR 354.

Express or implied warranty on sale for accommodation of buyer, 32 ALR 1150; 59 ALR 1541.

Express or implied warranty of quality, condition, or fitness of automobile or truck sold by retailer dealer, 34 ALR 535; 43 ALR 648.

Implied warranty or condition as to quality of timber or lumber, 52 ALR 1536.

Implied warranty of fitness on sale of article by trademark, tradename, or other particular description, 59 ALR 1180; 90 ALR 410.

Implied warranty of strength or fitness of chain, cable, or wire, 59 ALR 1235.

Express or implied warranty on sale for accommodation, 59 ALR 1541.

Construction and effect of express or implied warranty on sale of an article intended for use as an explosive, 62 ALR 1510.

Liability of manufacturer or packer of defective article for injury to person or property of ultimate consumer who purchased from middleman, 105 ALR 1502; 111 ALR 1239; 140 ALR 191; 142 ALR 1490.

Implied warranty by retailer of cosmetics, 131 ALR 123.

Warranty of title by seller in conditional sale contract, 132 ALR 338.

Construction and application of provision in conditional sale contract regarding implied warranties, 139 ALR 1276.

Implied warranty, by other than packer, of fitness of goods sold in sealed cans, 142 ALR 1434.

Implied warranty of reasonable fitness of food for human consumption as breached by substance natural to the original product and not removed in processing, 143 ALR 1421.

Implied warranty of quality, condition, or fitness on sale of secondhand article, 151 ALR 446.

Seller's advertisements as affecting rights of parties to sale of personal property, 158 ALR 1413.

Law of sales and liability in respect thereof as applied to transactions in self-service stores, 163 ALR 238.

Intervening purchaser's knowledge of defects in or danger of article, or failure to inspect therefor, as affecting liability of manufacturer or dealer for personal injury or property damage to subsequent purchaser or other third person, 164 ALR 371.

Assignability of warranty of goods and chattels, 17 ALR2d 1196.

Seller's or manufacturer's liability for injuries as affected by buyer's or user's allergy or unusual susceptibility to injury from article, 26 ALR2d 963.

Recovery by contractor or artisan, suing for breach of warranty, of damages for loss of good will occasioned by use in his business of unfit materials, 28 ALR2d 591.

Measure and elements of recovery of buyer rescinding sale of domestic animal for seller's breach of warranty, 35 ALR2d 1273.

Form and substance of notice which buyer of goods must give in order to recover damages for seller's breach of warranty, 53 ALR2d 270.



Implied warranty of fitness on sale of livestock, 53 ALR2d 892.

What law governs liability of manufacturer or seller for injury caused by product sold, 76 ALR2d 130.

Liability of manufacturer or seller for injury caused by food or food product sold, 77 ALR2d 7.

Liability of manufacturer or seller for injury caused by beverage sold, 77 ALR2d 215.

Liability of manufacturer or seller for injury caused by automobile or other vehicle, aircraft, boat, or their parts, supplies, or equipment, 78 ALR2d 460; 81 ALR3d 318; 97 ALR3d 627; 1 ALR4th 411; 3 ALR4th 489; 5 ALR4th 483.

Liability of manufacturer or seller for injury caused by industrial, business, or farm machinery, tools, equipment, or materials, 78 ALR2d 594; 2 ALR4th 262.

Liability of manufacturer or seller for injury caused by paint, cement, lumber, building supplies, ladders, small tools, and like products, 78 ALR2d 696; 84 ALR3d 877.

Liability of manufacturer or seller for injury caused by toys, games, athletic or sports equipment, or like products, 78 ALR2d 738; 95 ALR3d 390.

Liability of manufacturer or seller for injury caused by firearms, explosives, and flammables, 80 ALR2d 488; 94 ALR3d 291; 15 ALR4th 909; 18 ALR4th 206.

Liability of manufacturer or seller for injury caused by household and domestic machinery, appliances, furnishings, and equipment, 80 ALR2d 598; 89 ALR3d 210; 93 ALR3d 99; 1 ALR4th 748.

Liability of manufacturer or seller for injury caused by clothing, shoes, combs, and similar products, 80 ALR2d 702.

Liability of auctioneer or clerk to buyer as to title, condition, or quality of property sold, 80 ALR2d 1237.

Products liability: manufacturer's responsibility for defective component supplied by another and incorporated in product, 3 ALR3d 1016.

Contributory negligence or assumption of risk as defense to action for personal injury, death, or property damage resulting from alleged breach of implied warranty, 4 ALR3d 501.

Statute of limitations: when cause of action arises on action against manufacturer or seller of product causing injury or death, 4 ALR3d 821.

Seller's duty to test or inspect as affecting his liability for product-caused injury, 6 ALR3d 12.

Products liability: extension of strict liability in tort to permit recovery by a third person who was neither a purchaser nor user of product, 33 ALR3d 415.

Application of warranty provisions of Uniform Commercial Code to bailments, 48 ALR3d 668.

Liability for injury or death of pallbearer, 48 ALR3d 1280.

Liability of hospital or medical practitioner under doctrine of strict liability in tort, or breach of warranty, for harm caused by drug, medical instrument, or similar device used in treating patient, 54 ALR3d 258.

Products liability: product as unreasonably dangerous or unsafe under doctrine of strict liability in tort, 54 ALR3d 352.

Liability of water supplier for damages resulting from furnishing impure water, 54 ALR3d 936.

Products liability: proof, under strict tort liability doctrine, that defect was present when product left hands of defendant, 54 ALR3d 1079.

Liability of builder or subcontractor for insufficiency of building resulting from latent defects in materials used, 61 ALR3d 792.

Contracts for artificial insemination of cattle, 61 ALR3d 811.

Liability of installer or maintenance company for injury caused by door of automatic passenger elevator, 64 ALR3d 1005.

Statements on container that enclosed toy, game, sports equipment, or the like, is safe as affecting manufacturer's liability for injury caused by product sold, 74 ALR3d 1298.

Products liability: liability for injury or death allegedly caused by defective tire, 81 ALR3d 318.

Products liability: liability for injury or death allegedly caused by defect in snowmobile or other recreational-purpose vehicle, 81 ALR3d 394; 66 ALR4th 622.

Products liability: liability for injury or death allegedly caused by defect in mobile home or trailer, 81 ALR3d 421.

Uniform Commercial Code: implied warranty of fitness for particular purpose as including fitness for ordinary use, 83 ALR3d 656.

What constitutes "particular purpose" within meaning of UCC § 2-315 dealing with implied warranty of fitness, 83 ALR3d 669.

Liability of manufacturer, seller, or installer for personal injury caused by door glass, 84 ALR3d 877.

Liability of manufacturer or seller for personal injury or property damage caused by television set, 89 ALR3d 210.

Practices forbidden by state deceptive trade practice and consumer protection acts, 89 ALR3d 449.

Elements and measure of damages for breach of warranty in sale of horse, 91 ALR3d 419.

Products liability: stoves, 93 ALR3d 99.

Products liability: modern cases determining whether product is defectively designed, 96 ALR3d 22.

Products liability: defective vehicular gasoline tanks, 96 ALR3d 265.

Liability of packer, foodstore, or restaurant for causing trichinosis, 96 ALR3d 451.

Products liability: personal injury or death allegedly caused by defect in aircraft or its parts, supplies, or equipment, 97 ALR3d 627.

Products liability: defective heating equipment, 1 ALR4th 748.

Products liability: industrial accidents involving conveyor belts or systems, 2 ALR4th 262.

Construction and effect of new motor vehicle warranty limiting manufacturer's liability to repair or replacement of defective parts, 2 ALR4th 576.

Liability of manufacturer or seller of snowthrower for injuries to user, 2 ALR4th 1284.

Products liability: defective vehicular windows, 3 ALR4th 489.

Products liability: farm machinery, 4 ALR4th 13.

Products liability: glue and other adhesive products, 7 ALR4th 155.

Products liability: elevators, 7 ALR4th 852.

Products liability: stud guns, staple guns, or parts thereof, 8 ALR4th 70; 33 ALR4th 1189.

Products liability: transformer and other electrical equipment, 10 ALR4th 854.

Products liability: fertilizers, insecticides, pesticides, fungicides, weedkillers, and the like, or articles used in application thereof, 12 ALR4th 462.

Products liability: cranes and other lifting apparatuses, 13 ALR4th 476.

Extent of liability of seller of livestock

infected with communicable disease, 14 ALR4th 1096.

Products liability: cement and concrete, 15 ALR4th 1186.

Products liability: firefighting equipment, 19 ALR4th 326.

Liability of hospital, physician, or other individual medical practitioner for injury or death resulting from blood transfusion, 20 ALR4th 136.

Liability of blood supplier or donor for injury or death resulting from blood transfusion, 24 ALR4th 508.

Products liability: household appliances relating to cleaning, washing, personal care, and water supply, quality, and disposal, 34 ALR4th 95.

Products liability: household equipment relating to storage, preparation, cooking, and disposal of food, 35 ALR4th 663.

Products liability: home and office furnishings, 36 ALR4th 170.

Computer sales and leases: breach of warranty, misrepresentation, or failure of consideration as defense or ground for affirmative relief, 37 ALR4th 110.

Applicability of warranty of fitness under UCC § 2-325 to supplies or equipment used in performance of service contract, 47 ALR4th 238.

Products liability: personal soap, 54 ALR4th 574.

Liability of successor corporation for punitive damages for injury caused by predecessor's product, 55 ALR4th 166.

Products liability: sufficiency of evidence to support product misuse defense in actions concerning lawnmowers, 55 ALR4th 1062.

Products liability: toxic shock syndrome, 59 ALR4th 50.

Products liability: building and construction lumber, 61 ALR4th 121.

Liability of manufacturer of oral live polio (Sabin) vaccine for injury or death from its administration, 66 ALR4th 83.

Liability for injury incurred in operation of power golf cart, 66 ALR4th 622.

Products liability: industrial refrigerator equipment, 72 ALR4th 90.

Products liability: scaffolds and scaffolding equipment, 74 ALR4th 904.

Products liability: tractors, 75 ALR4th 312.

Products liability: bicycles and accessories, 76 ALR4th 117.

Products liability: exercise and related equipment, 76 ALR4th 145.

Products liability: trampolines and similar devices, 76 ALR4th 171.

Products liability: competitive sports equipment, 76 ALR4th 201.

Products liability: skiing equipment, 76 ALR4th 256.

Products liability: general recreational equipment, 77 ALR4th 1121.

Products liability: mechanical amusement rides and devices, 77 ALR4th 1152.

Products liability: lubricating products and systems, 80 ALR4th 972.

Liability for injury or death allegedly caused by spoilage or contamination of beverage, 87 ALR4th 804.

Liability for injury or death allegedly caused by foreign substance in beverage, 90 ALR4th 12.

Liability for injury or death allegedly caused by foreign object in food or food product, 1 ALR5th 1.

Liability for injury or death allegedly caused by spoilage, contamination, or other deleterious condition of food or food product, 2 ALR5th 1.

Liability for injury or death allegedly caused by food product containing object related to, but not intended to be present in, product, 2 ALR5th 189.

Products liability: roofs and roofing materials, 3 ALR5th 851.

Products liability: cigarettes and other tobacco products, 36 ALR5th 541.

Validity, construction, and application of computer software licensing agreements, 38 ALR5th 1.

Products liability: theatrical equipment and props, 42 ALR5th 699.

Liability on implied warranties in sale of used motor vehicle, 47 ALR5th 677.

Causes of action governed by limitations period in UCC § 2-725, 49 ALR5th 1.

Construction and application of learned-intermediary doctrine, 57 ALR5th 1.

Products liability: computer hardware and software, 59 ALR5th 461.

Products liability: liability for injury or death allegedly caused by defect in mobile home or trailer, 61 ALR5th 473.

Products liability: swimming pools and accessories, 65 ALR5th 105.

Products liability: paints, stains, and similar products, 69 ALR5th 137.

Products liability: helicopters, 72 ALR5th 299.

Products liability: consumer expectations test, 73 ALR5th 75.

Products liability: ladders, 81 ALR5th 245.

### **11-2-316. Exclusion or modification of warranties.**

(1) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this article on parol or extrinsic evidence (Code Section 11-2-202) negation or limitation is inoperative to the extent that such construction is unreasonable.

(2) Subject to subsection (3) of this Code section, to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."

(3) Notwithstanding subsection (2) of this Code section:

(a) Unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is," "with all faults," or other language which in common understanding calls the buyer's attention to



the exclusion of warranties and makes plain that there is no implied warranty; and

(b) When the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him; and

(c) An implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade; and

(d) With respect to the sale of cattle, hogs, and sheep by a licensed auction company or by an agent, there shall be no implied warranty by said auction company or agent that the cattle, hogs, and sheep are free from disease; provided, however, that the provisions of this paragraph shall not be applicable to brucellosis reactor cattle detected at an official state laboratory within 30 days following the date of sale.

(4) Remedies for breach of warranty can be limited in accordance with the provisions of this article on liquidation or limitation of damages and on contractual modification of remedy (Code Sections 11-2-718 and 11-2-719).

(5) The implied warranty of merchantability under Code Section 11-2-314 and the implied warranty of fitness for a particular purpose under Code Section 11-2-315 shall not be applicable to the procurement, processing, storage, distribution, or use of whole human blood, blood plasma, blood products, blood derivatives, or other human tissue or organs for the purpose of injecting, transfusing, incorporating, or transplanting any of them into the human body. The injection, transfusion, or other transfer of blood, blood plasma, blood products, or blood derivatives and the transplanting or other transfer of any tissue, bones, or organs into or unto the human body shall not be considered, for the purpose of this article, commodities subject to sale or barter, but shall be considered as medical services. (Code 1933, § 109A-2—316, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 1971, p. 457, § 2; Ga. L. 1979, p. 756, § 1.)

**Cross references.** — Prohibition against sale, auction, etc., of livestock infected with disease or placed under quarantine by Commissioner of Agriculture, § 4-6-2. Regulation of labeling of blood, blood plasma, etc., Ch. 24, T. 31. For further provisions as to nonapplicability of implied warranties to blood transfusions, organ transplants, etc., § 51-1-28.

**Law reviews.** — For article, "Sales Warranties Under Georgia's Uniform Commercial Code," see 1 Ga. St. B.J. 191 (1964). For article, "Georgia's New Statutory Liability for Manufacturers: An Inadequate Legisla-

tive Response," see 2 Ga. L. Rev. 538 (1968). For article, "Consumer Protection Against Sellers Misrepresentations," see 20 Mercer L. Rev. 414 (1969). For article discussing interpretation of warranties under the Uniform Commercial Code, see 4 Ga. L. Rev. 469 (1970). For article discussing the implied warranty of fitness for a particular purpose, see 9 Ga. L. Rev. 149 (1974). For article, "Products Liability Law in Georgia: Is Change Coming?" see 10 Ga. St. B.J. 353 (1974). For article explaining the Unfair Trade Practices and Consumer Protection Act, proposed in Georgia in 1973, see 10 Ga.

St. B.J. 409 (1974). For article surveying Georgia cases dealing with commercial law from June 1977 through May 1978, see 30 Mercer L. Rev. 15 (1978). For article discussing the applicability of warranty provisions under the Uniform Commercial Code to domestic solar energy devices, see 30 Mercer L. Rev. 547 (1979). For article surveying developments in Georgia commercial law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 33 (1981). For article, "Products Liability Law in Georgia Including Recent Developments," see 43 Mercer L. Rev. 27 (1991).

For note discussing implied warranties in the sale of second-hand goods, see 17 Mercer L. Rev. 455 (1966). For note, "Allowance of Punitive Damages in Products Liability Claims," see 6 Ga. L. Rev. 613 (1972). For note, "Buyer's Right to Revoke Acceptance Against the Automobile Manufacturer for Breach of its Continuing Warranty of Repair

or Replacement," see 7 Ga. L. Rev. 711 (1973). For note, "Enforcing Manufacturers' Warranty Exclusions Against Non-Privy Commercial Purchasers: The Need for Uniform Guidelines," see 20 Ga. L. Rev. 461 (1986).

For comment on *Felder v. Neeves*, 36 Ga. App. 41, 135 S.E. 219 (1926), see 1 Ga. L. Rev. No. 1 p. 51 (1927). For comment on *Manheim v. Ford Motor Co.*, 210 So. 2d 440 (Fla. 1967), discussing effect of automobile manufacturer's disclaimer of the Uniform Commercial Code's implied warranties of merchantability and fitness, see 2 Ga. L. Rev. 314 (1968). For comment, "Damage Awards and Computer Systems — Trends," see 35 Emory L.J. 255 (1986). For comment, "U.C.C. Article Two Warranty Disclaimers and the 'Conspicuousness' Requirement of Section 2-316," see 43 Mercer L. Rev. 943 (1992).

## JUDICIAL DECISIONS

### ANALYSIS

GENERAL CONSIDERATION

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### General Consideration

**Editor's notes.** — In light of the similarity of the issues dealt with, decisions under former Code 1910, § 4136 and former Code 1933, § 96-301 are included in the annotations for this section.

**Unconscionability of exclusion or modification.** — Although a seller may exclude or modify warranties, a court may refuse to enforce an exclusion or modification on the basis of unconscionability. *Mullis v. Speight Seed Farms, Inc.*, 234 Ga. App. 27, 505 S.E.2d 818 (1998).

**Implied warranties exist unless expressly or from nature of transaction excepted.** *Wilson v. Eargle*, 98 Ga. App. 241, 105 S.E.2d 474 (1958) (decided under former Code 1933, § 96-301).

**Purpose of O.C.G.A. § 11-2-316 includes** preventing indirect elimination of warranty liability through indemnification. *Redfern*

*Meats, Inc. v. Hertz Corp.*, 134 Ga. App. 381, 215 S.E.2d 10 (1975).

**How warranties are raised.** — Implied warranty is raised by statute, while express warranty is by contract. *Stewart v. Gainesville Glass Co.*, 131 Ga. App. 747, 206 S.E.2d 857 (1974), *aff'd*, 233 Ga. 578, 212 S.E.2d 377 (1975).

**O.C.G.A. § 11-2-316 does not apply to a warranty under O.C.G.A. § 44-12-63.** *Redfern Meats, Inc. v. Hertz Corp.*, 134 Ga. App. 381, 215 S.E.2d 10 (1975).

**An agreement for the installation and maintenance of a protective alarm system** was not a sale and, as a result, the implied warranty and other U.C.C. considerations were not applicable. *D.L. Lee & Sons v. ADT Sec. Sys.*, 916 F. Supp. 1571 (S.D. Ga. 1995).

**Section does not govern limitation of remedies.** — The provisions of O.C.G.A. § 11-2-316 have no bearing on the seller's



ability to achieve the less comprehensive legal effect of limiting the remedies which are available to the buyer for breach of implied warranties. It is the separate provisions of O.C.G.A. §§ 11-2-718 or 11-2-719 which govern the limitation of remedies. *Apex Supply Co. v. Benbow Indus., Inc.*, 189 Ga. App. 598, 376 S.E.2d 694 (1988).

**No public policy against all disclaimers.** — Disclaimer provisions of O.C.G.A. § 11-2-316 do not establish public policy against use of disclaimers in all commercial transactions. *Redfern Meats, Inc. v. Hertz Corp.*, 134 Ga. App. 381, 215 S.E.2d 10 (1975).

**It is unreasonable to allow express warranty to be negated by disclaimer in same contract.** *Century Dodge, Inc. v. Mobley*, 155 Ga. App. 712, 272 S.E.2d 502 (1980).

Contract for sale of car describing it as new created express warranty to that effect which was not negated by disclaimer of express warranties in same contract. *Century Dodge, Inc. v. Mobley*, 155 Ga. App. 712, 272 S.E.2d 502 (1980).

**Disclaimer limiting liability to purchase price unconscionable.** — A disclaimer of liability for breach of warranty by a tobacco seed manufacturer, which stated that liability would be limited to the purchase price, was unconscionable and would not be enforced; an absence of liability on the part of the manufacturer would leave farmers with no recourse for a loss caused by a crop failure, and the allocation of risk for ineffective seeds is better shouldered by the manufacturer than the consumer. *Mullis v. Speight Seed Farms, Inc.*, 234 Ga. App. 27, 505 S.E.2d 818 (1998).

**Consequential damages excluded by warranty.** — Seller was not liable for consequential damages resulting from alleged breach of warranty arising from defects in its goods where seller's written warranty specifically limited any liability to repairing or replacing any defective goods and where buyer had notice of the existence of the written warranty but never requested or saw a copy of the written warranty. *A-Larms, Inc. v. Alarms Device Mfg. Co.*, 165 Ga. App. 382, 300 S.E.2d 311 (1983).

**Description of vehicle as "new" not inconsistent with recognition of possible factory-damage.** — There is nothing unreasonable or inconsistent in an affirmation, promise or description by a manufacturer

that its vehicle is "new" and its recognition that, even so, the vehicle might contain factory-damage and/or factory-repairs. *GMC v. Green*, 173 Ga. App. 188, 325 S.E.2d 794 (1984).

**Prior contrary oral representations merged into written contract.** — Where there was a written contract covering the sale of an engine from plaintiff to defendant, which contained certain stipulations and warranties by plaintiff, any oral agreement by plaintiff at time of or before written agreement was entered into to the contrary would be merged into and done away with by the written agreement. *Worthington Pump & Mach. Corp. v. Briarcliff*, 67 Ga. App. 71, 19 S.E.2d 574 (1942) (decided under former Code 1933, § 96-301).

**Revocation of acceptance** under O.C.G.A. § 11-2-608 is an available remedy even where the seller has attempted to limit its warranties. *Esquire Mobile Homes, Inc. v. Arrendale*, 182 Ga. App. 528, 356 S.E.2d 250 (1987).

Revocation is an available remedy even where the seller has attempted to limit its warranties by use of "as is" language under O.C.G.A. § 11-2-316. *Prudential Metal Supply Corp. v. Atlantic Freight Sales Co.*, 204 Ga. App. 439, 419 S.E.2d 520 (1992).

**Where there is no express covenant of warranty, purchaser must exercise caution in detecting defects.** *Smith v. Northeast Ga. Fair Ass'n*, 85 Ga. App. 32, 67 S.E.2d 836 (1951) (decided under former Code 1933, § 96-301).

**Waiver of implied warranty.** — A contract drawn so as to waive implied warranties written into sale by law should be clear and certain on that point. *Wilson v. Eargle*, 98 Ga. App. 241, 105 S.E.2d 474 (1958) (decided under former Code 1933, § 96-301).

**Acceptance of article with obvious defect waives claim for damages growing out of implied warranty.** — If defects or discrepancies in article purchased are patent, such as might have been discovered by exercise of ordinary care and prudence, then acceptance by purchaser, in the absence of fraud, will operate as an absolute waiver on the purchaser's part even of a claim for damages growing out of an implied warranty, but such mere acceptance will not prevent the purchaser from making a claim for damages arising out of an express warranty. *Evans v.*



**General Consideration (Cont'd)**

Mitchell, 44 Ga. App. 695, 162 S.E. 660 (1932) (decided under former Code 1910, § 4136).

Purchaser's acceptance of property bought with full knowledge of its defective condition constitutes waiver of implied warranty that property is in merchantable condition and suited for purpose intended. *Smith v. Northeast Ga. Fair Ass'n*, 85 Ga. App. 32, 67 S.E.2d 836 (1951) (decided under former Code 1933, § 96-301).

**Cited in** *Whitaker v. Harvell-Kilgore Corp.*, 418 F.2d 1010 (5th Cir. 1969); *GMC v. Halco Instruments, Inc.*, 124 Ga. App. 630, 185 S.E.2d 619 (1971); *Jacobs v. Metro Chrysler-Plymouth, Inc.*, 125 Ga. App. 462, 188 S.E.2d 250 (1972); *Smith, Kline & French Labs. v. Just*, 126 Ga. App. 643, 191 S.E.2d 632 (1972); *Avery v. Aladdin Prods. Div., Nat'l Serv. Indus., Inc.*, 128 Ga. App. 266, 196 S.E.2d 357 (1973); *Smith v. Bruce*, 129 Ga. App. 97, 198 S.E.2d 697 (1973); *Harison-Gulley Chevrolet, Inc. v. Carr*, 134 Ga. App. 449, 214 S.E.2d 712 (1975); *Lancaster v. Eberhardt*, 141 Ga. App. 534, 233 S.E.2d 880 (1977); *Transart Indus., Inc. v. Gaines-American Moulding Corp.*, 148 Ga. App. 363, 251 S.E.2d 384 (1978); *Patron Aviation, Inc. v. Teledyne Indus., Inc.*, 154 Ga. App. 13, 267 S.E.2d 274 (1980); *Hardee v. Coastal Tractor Co.*, 153 Ga. App. 487, 265 S.E.2d 838 (1980); *Burroughs Corp. v. Macon Rubber Co.*, 154 Ga. App. 322, 268 S.E.2d 374 (1980); *Corbett v. North Fla. Clarklift, Inc.*, 155 Ga. App. 701, 272 S.E.2d 563 (1980); *Bicknell v. B & S Enters.*, 160 Ga. App. 307, 287 S.E.2d 310 (1981); *Frick Forest Prods., Inc. v. International Hardwoods, Inc.*, 161 Ga. App. 359, 288 S.E.2d 625 (1982); *Rigdon v. Walker Sales & Serv., Inc.*, 161 Ga. App. 459, 288 S.E.2d 711 (1982); *Teledyne Indus., Inc. v. Patron Aviation, Inc.*, 161 Ga. App. 596, 288 S.E.2d 911 (1982); *Sires v. Luke*, 544 F. Supp. 1155 (S.D. Ga. 1982); *W. Linton Howard, Inc. v. Gibbs Mach., Inc.*, 169 Ga. App. 627, 314 S.E.2d 259 (1984); *Holman Motor Co. v. Evans*, 169 Ga. App. 610, 314 S.E.2d 453 (1984); *Entertainment Developers, Inc. v. Relco, Inc.*, 172 Ga. App. 176, 322 S.E.2d 304 (1984); *W.M. Hobbs, Ltd. v. Accusystems of Ga., Inc.*, 177 Ga. App. 432, 339 S.E.2d 646 (1986); *Citizens Jewelry Co. v. Walker*, 178 Ga. App. 897,

345 S.E.2d 106 (1986); *McCrimmon v. Tandy Corp.*, 202 Ga. App. 233, 414 S.E.2d 15 (1991).

**Writing Requirement**

**Conspicuous writing.** — Requirement that disclaimer terms be conspicuous follows main current of interpretation of O.C.G.A. § 11-2-316. *White v. First Fed. Sav. & Loan Ass'n*, 158 Ga. App. 373, 280 S.E.2d 398 (1981).

O.C.G.A. § 11-2-316(2) requires that, to exclude or modify an implied warranty of fitness, the actual warranty disclaimer language itself be conspicuous. That requirement is not satisfied if the disclaimer provision contains only general introductory language which is conspicuous. *Leland Indus., Inc. v. Suntek Indus., Inc.*, 184 Ga. App. 635, 362 S.E.2d 441 (1987).

Warranty disclaimer language was "conspicuous" where it appeared in capital letters, in a separate paragraph on the front of an invoice, and in a type style which was otherwise employed on the form only with regard to language relating to the limitation of remedies. *Apex Supply Co. v. Benbow Indus., Inc.*, 189 Ga. App. 598, 376 S.E.2d 694 (1988).

Although, by its terms, O.C.G.A. § 11-2-316(3)(a) does not explicitly require that the "other language" be conspicuous, it implicitly imposes such a requirement. *Leland Indus., Inc. v. Suntek Indus., Inc.*, 184 Ga. App. 635, 362 S.E.2d 441 (1987).

A writing would, regardless of its "conspicuousness," be ineffective to disclaim the implied warranty of merchantability if that writing nowhere specifically mentions "merchantability." *Leland Indus., Inc. v. Suntek Indus., Inc.*, 184 Ga. App. 635, 362 S.E.2d 441 (1987).

**Effect of font.** — Language printed in type which was bolder and larger than that generally used in the document, and emphasized by capitalization and by being within a dark bordered rectangle, was sufficiently conspicuous to satisfy the requirements of O.C.G.A. § 11-2-316(2). *Webster v. Sensormatic Elec. Corp.*, 193 Ga. App. 654, 389 S.E.2d 15 (1989).

**Modification need not be in writing.** — Modification or restitution of the remedy available for breach of warranty need not be in writing. Parole evidence to show the usage

of the trade to explain or supplement the available remedies for breach of warranty was improperly excluded. *Topeka Mach. Exch., Inc. v. Stoler Indus., Inc.*, 220 Ga. App. 799, 470 S.E.2d 250 (1996).

### Leases

**Inapplicability to auto lease not providing for purchase at termination.** — Restrictions of O.C.G.A. § 11-2-316 on exclusion of warranties are not applicable to lease contract for automobile containing no provision for purchase at termination. *Mays v. Citizens & S. Nat'l Bank*, 132 Ga. App. 602, 208 S.E.2d 614 (1974), overruled on other grounds, *Mock v. Canterbury Realty Co.*, 152 Ga. App. 872, 264 S.E.2d 489 (1980).

Where a lessee leased a vehicle for four years, title remained with the assignee, and the lessee was required to surrender the car at the expiration of the lease term, there being no option to purchase it, neither the implied warranty provisions nor the exclusion rules therefor of the Uniform Commercial Code applied to the lease agreement. *Mark Singleton Buick, Inc. v. Taylor*, 194 Ga. App. 630, 391 S.E.2d 435 (1990).

**Debtor may waive any defense of nonexpressed warranties in plain language in a lease,** and such waiver is enforceable under O.C.G.A. § 11-2-316 by party to the lease. *Hurst v. Stith Equip. Co.*, 133 Ga. App. 374, 210 S.E.2d 851 (1974).

### Implied Warranty of Merchantability

**Implied warranty of merchantability runs only to buyer.** — Implied warranty that goods are merchantable clearly arises out of contract of sale of goods, so it can only run to buyer who is in privity of contract with seller. *Chaffin v. Atlanta Coca-Cola Bottling Co.*, 127 Ga. App. 619, 194 S.E.2d 513 (1972).

**Second-hand sales.** — When article sold, even though used or second-hand, was sold by seller who "is a merchant with respect to goods of that kind," an implied warranty of merchantability attaches to the sale under O.C.G.A. § 11-2-314 unless excluded or modified by O.C.G.A. § 11-2-316. *Georgia Timberlands, Inc. v. Southern Airways Co.*, 125 Ga. App. 404, 188 S.E.2d 108 (1972).

**Statement of mileage.** — It is an illogical extension to include within the concept of

warranty of merchantability or fitness for purposes intended a statement of mileage required by an unrelated statute absent any showing that the statement of mileage is incorrect and/or connected to the injuries suffered. *Troutt v. Nash AMC/Jeep, Inc.*, 157 Ga. App. 399, 278 S.E.2d 54 (1981).

**Georgia's "blood shield" statutes applied to a commercial laboratory,** so as to bar a hemophiliac's strict liability and breach of warranty claims against the laboratory for a defective blood-clotting agent which allegedly exposed the hemophiliac to the virus associated with acquired immune deficiency syndrome (AIDS). *Jones v. Miles Labs., Inc.*, 705 F. Supp. 561 (N.D. Ga. 1987), *aff'd*, 887 F.2d 1576 (11th Cir. 1989), *aff'd*, 887 F.2d 1576 (11th Cir. 1989).

**Exclusions must be conspicuous.** — Exclusions of implied warranties of fitness or merchantability must be in writing and conspicuous. *White v. First Fed. Sav. & Loan Ass'n*, 158 Ga. App. 373, 280 S.E.2d 398 (1981).

**Jury decides factual question of modification or exclusion of warranty.** — Where the trial court specifically instructed the jury that "an implied warranty can be excluded or modified by course of dealings or course of performance or usage of trade," the evidence of such, sufficient to create an exception to the rule requiring conspicuous written exclusion of warranties, were questions of fact for the jury to determine. *Willis Mining, Inc. v. Noggle*, 235 Ga. App. 747, 509 S.E.2d 731 (1998).

**Exclusionary paragraph of same size and color type as rest of form.** — Paragraph written in same size and color type as all other paragraphs on back of form fails completely to comply with O.C.G.A. § 11-2-316 for excluding the warranties implied by law in O.C.G.A. § 11-2-314. *Chrysler Corp. v. Wilson Plumbing Co.*, 132 Ga. App. 435, 208 S.E.2d 321 (1974).

**Disclaimer of implied warranty was adequate.** — Where the disclaimer was in letters larger than any other type on the form, where significant portions of the disclaimer were capitalized, thus distinguishing them from other language on the form, and where the language was conspicuously set forth, the limitation of the implied warranty of merchantability met the requirements of O.C.G.A. § 11-2-316(2). *Harris v. Sulcus*



### Implied Warranty of Merchantability (Cont'd)

Computer Corp., 175 Ga. App. 140, 332 S.E.2d 660 (1985).

Roofing material vendor's disclaimer of warranty, which stated in capitalized letters that the vendor made no warranties, express or implied, including merchantability or fitness for a particular purpose, except as expressly stated therein, was sufficient to preclude an action against the vendor for breach of the implied warranties of merchantability and fitness. *Steele v. Gold Kist, Inc.*, 186 Ga. App. 569, 368 S.E.2d 196, cert. denied, 186 Ga. App. 919, 368 S.E.2d 196 (1988).

Printed language effectively precluded a claim for breach of implied warranty, where, although the text of the disclaimer was not in bold print, the heading "DISCLAIMER OF WARRANTIES" was in large capital letters and the entire paragraph was blocked off by an outline. *Bennett v. Matt Gay Chevrolet Oldsmobile, Inc.*, 200 Ga. App. 348, 408 S.E.2d 111, cert. denied, 200 Ga. App. 895, 408 S.E.2d 111 (1991).

### Goods "Sold As Is"

**Term "sold as is" excludes implied warranties.** — The term, "sold as is," when contained in contract for sale of personalty, means that buyer takes article in its then present state or condition without any implied warranty as to soundness of condition, or suitability for use, or purposes intended. *Hutchinson Homes, Inc. v. Guerdon Indus., Inc.*, 143 Ga. App. 664, 239 S.E.2d 553 (1977).

**Express warranty not negated.** — Statement in purchase agreement that goods are sold "as is" does not negate express warranty. *City Dodge, Inc. v. Gardner*, 232 Ga. 766, 208 S.E.2d 794 (1974).

**Automobile invoice containing language, "I accept the above-described car in its present condition . . ."** indicated that the car was sold "as is" and operated to exclude any implied warranties; trial court, therefore, erred in not granting partial summary judgment to seller in regard to the claim for breach of implied warranties. *Joseph Charles Parrish, Inc. v. Hill*, 173 Ga. App. 97, 325 S.E.2d 595 (1984).

### Buyer's Examination of Goods

#### **Demand that buyer fully examine goods.**

— To bring transaction within scope of "refused to examine" of O.C.G.A. § 11-2-316(3)(b), it is not sufficient that goods are available for inspection. There must in addition be demand by seller that buyer examine goods fully, which demand puts buyer on notice that the buyer is assuming risk of defects which examination ought to reveal. The language "refused to examine" in that subsection is intended to make clear the necessity for such demand. *Austin Lee Corp. v. Cascades Motel, Inc.*, 123 Ga. App. 642, 182 S.E.2d 173 (1971).

### Actions

**Action for deceit.** — Where purchaser did not receive car described and identified in bill of sale, but instead received one-half of described vehicle welded to one-half of another unidentified and unidentifiable vehicle, disclaimer of warranties in bill of sale was not sufficient defense against action for deceit. *Bill Spreen Toyota, Inc. v. Jenquin*, 163 Ga. App. 855, 294 S.E.2d 533 (1982).

**Revival of waived defense.** — If debtor waives defense of nonexpressed warranties in plain language, the debtor's guarantor cannot revive it. *Hurst v. Stith Equip. Co.*, 133 Ga. App. 374, 210 S.E.2d 851 (1974).

**Defense of breach of warranty cannot be raised by guarantor of debtor.** — Whether or not warranty provisions of Uniform Commercial Code apply to lease of machinery, defense of breach of warranty cannot be raised by a guarantor of debtor. *Hurst v. Stith Equip. Co.*, 133 Ga. App. 374, 210 S.E.2d 851 (1974).

**The grant of summary judgment to a defendant with respect to an allegation that equipment is not fit for the purpose intended will be affirmed where the lease/purchase agreement effectively excludes any implied warranties of merchantability or suitability for a particular purpose, pursuant to O.C.G.A. § 11-2-316.** *Holcomb v. Commercial Credit Servs. Corp.*, 180 Ga. App. 451, 349 S.E.2d 523 (1986).



## RESEARCH REFERENCES

**Am. Jur. 2d.** — 63 Am. Jur. 2d, Products Liability, §§ 794 et seq., 826 et seq. 67A Am. Jur. 2d, Sales, §§ 822-852.

**C.J.S.** — 77A C.J.S., Sales, § 263 et seq.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 2-316.

**ALR.** — Warranties and conditions upon sale of seeds, nursery stock, etc., 16 ALR 859; 32 ALR 1241; 62 ALR 451; 117 ALR 470; 168 ALR 581.

Validity and effect of provision in contract of sale which, in effect, guarantees the buyer against decline in prices, 29 ALR 112.

Express or implied warranty on sale for accommodation of buyer, 32 ALR 1150; 59 ALR 1541.

Express or implied warranty of quality, condition, or fitness of automobile or truck sold by retail dealer, 34 ALR 535; 43 ALR 648.

Implied warranty or condition as to quality of timber or lumber, 52 ALR 1536.

Validity of provision of contract of sale of personal property negating implied warranties, 117 ALR 1350.

Necessity of buyer's actual knowledge of disclaimer of warranty of personal property, 160 ALR 357.

Law of sales and liability in respect thereof as applied to transactions in self-service stores, 163 ALR 238.

Express warranty as excluding implied warranty of fitness, 164 ALR 1321.

What amounts to a "sale by sample" as regards warranties, 12 ALR2d 524.

Assignability of warranty of goods and chattels, 17 ALR2d 1196.

Seller's waiver of sales contract provision limiting time within which buyer may object to or return goods or article for defects or failure to comply with warranty or representations, 24 ALR2d 717.

Recovery by contractor or artisan, suing for breach of warranty, of damages for loss of good will occasioned by use in his business of unfit materials, 28 ALR2d 591.

Measure and elements of recovery of buyer rescinding sale of domestic animal for seller's breach of warranty, 35 ALR2d 1273.

Implied warranty of fitness on sale of livestock, 53 ALR2d 892.

Manufacturer's or seller's duty to give warning regarding product as affecting his

liability for product-caused injury, 76 ALR2d 9; 53 ALR3d 239.

Liability of manufacturer or seller for injury caused by automobile or other vehicle, aircraft, boat, or their parts, supplies, or equipment, 78 ALR2d 460; 81 ALR3d 318; 97 ALR3d 627; 1 ALR4th 411; 3 ALR4th 489; 5 ALR4th 483.

Liability of manufacturer or seller for injury caused by industrial, business, or farm machinery, tools, equipment, or materials, 78 ALR2d 594; 2 ALR4th 262.

Liability of manufacturer or seller for injury caused by paint, cement, lumber, building supplies, ladders, small tools, and like products, 78 ALR2d 696; 84 ALR3d 877.

Liability of manufacturer or seller for injury caused by toys, games, athletic or sports equipment, or like products, 78 ALR2d 738; 95 ALR3d 390.

Construction and effect of affirmative provision in contract of sale by which purchaser agrees to take article "as is," in the condition in which it is, or equivalent term, 24 ALR3d 465.

Application of warranty provisions of Uniform Commercial Code to bailments, 48 ALR3d 668.

Validity of disclaimer of warranty clauses in sale of new automobile, 54 ALR3d 1217.

Construction and effect of UCC § 2-316(2) providing that implied warranty disclaimer must be "conspicuous," 73 ALR3d 248.

Products liability: liability for injury or death allegedly caused by defective tires, 81 ALR3d 318.

Products liability: liability for injury or death allegedly caused by defect in snowmobile or other recreational-purpose vehicle, 81 ALR3d 394; 66 ALR4th 622.

Products liability: liability for injury or death allegedly caused by defect in mobile home or trailer, 81 ALR3d 421.

Liability of manufacturer, seller, or installer for personal injury caused by door glass, 84 ALR3d 877.

Measure of damages in action for breach of warranty of title to personal property under UCC § 2-714, 94 ALR3d 583.

What constitutes "affirmation of fact" giving rise to express warranty under UCC § 2-313(1)(a), 94 ALR3d 729.

Products liability: personal injury or death allegedly caused by defect in aircraft or its parts, supplies, or equipment, 97 ALR3d 627.

Products liability: liability of manufacturer or seller for injury or death caused by defect in boat or its parts, supplies, or equipment, 1 ALR4th 411.

Products liability: industrial accidents involving conveyor belts or systems, 2 ALR4th 262.

Construction and effect of new motor vehicle warranty limiting manufacturer's liability to repair or replacement of defective parts, 2 ALR4th 576.

Products liability: defective vehicular windows, 3 ALR4th 489.

Products liability: farm machinery, 4 ALR4th 13.

Products liability: elevators, 7 ALR4th 852.

Products liability: stud guns, staple guns, or parts thereof, 8 ALR4th 70; 33 ALR4th 1189.

Products liability: transformer and other electrical equipment, 10 ALR4th 854.

Products liability: cranes and other lifting apparatuses, 13 ALR4th 476.

Products liability: cement and concrete, 15 ALR4th 1186.

Products liability: tire rims and wheels, 16 ALR4th 137.

Products liability: firefighting equipment, 19 ALR4th 326.

Liability of hospital, physician, or other individual medical practitioner for injury or death resulting from blood transfusion, 20 ALR4th 136.

Liability of blood supplier or donor for injury or death resulting from blood transfusion, 24 ALR4th 508.

Products liability: building and construction lumber, 61 ALR4th 121.

Liability for injury incurred in operation of power golf cart, 66 ALR4th 622.

Products liability: industrial refrigerator equipment, 72 ALR4th 90.

Products liability: scaffolds and scaffolding equipment, 74 ALR4th 904.

Products liability: tractors, 75 ALR4th 312.

Products liability: bicycles and accessories, 76 ALR4th 117.

Products liability: exercise and related equipment, 76 ALR4th 145.

Products liability: trampolines and similar devices, 76 ALR4th 171.

Products liability: competitive sports equipment, 76 ALR4th 201.

Products liability: skiing equipment, 76 ALR4th 256.

Products liability: general recreational equipment, 77 ALR4th 1121.

Products liability: mechanical amusement rides and devices, 77 ALR4th 1152.

Products liability: lubricating products and systems, 80 ALR4th 972.

Products liability: mechanical amusement rides and devices, 3 ALR5th 851.

Products liability: theatrical equipment and props, 42 ALR5th 699.

Liability on implied warranties in sale of used motor vehicle, 47 ALR5th 677.

Validity, construction, and application of blood shield statutes, 75 ALR5th 229.

Products liability: ladders, 81 ALR5th 245.

### 11-2-317. Cumulation and conflict of warranties express or implied.

Warranties whether express or implied shall be construed as consistent with each other and as cumulative, but if such construction is unreasonable the intention of the parties shall determine which warranty is dominant. In ascertaining that intention the following rules apply:

(a) Exact or technical specifications displace an inconsistent sample or model or general language of description.

(b) A sample from an existing bulk displaces inconsistent general language of description.

(c) Express warranties displace inconsistent implied warranties other than an implied warranty of fitness for a particular purpose. (Code 1933, § 109A-2—317, enacted by Ga. L. 1962, p. 156, § 1.)

**Law reviews.** — For article, “Sales Warranties Under Georgia’s Uniform Commercial Code,” see 1 Ga. St. B.J. 191 (1964). For article discussing interpretation of warranties under the Uniform Commercial Code, see 4 Ga. L. Rev. 469 (1970). For article, “Products Liability Law in Georgia: Is Change Coming?” see 10 Ga. St. B.J. 353

(1974). For article explaining the Unfair Trade Practices and Consumer Protection Act, proposed in Georgia in 1973, see 10 Ga. St. B.J. 409 (1974). For article, “Products Liability Law in Georgia Including Recent Developments,” see 43 Mercer L. Rev. 27 (1991).

### JUDICIAL DECISIONS

**How warranties are raised.** — Implied warranty is raised by statute, while express warranty is by contract. *Stewart v. Gainesville Glass Co.*, 131 Ga. App. 747, 206 S.E.2d 857 (1974), *aff’d*, 233 Ga. 578, 212 S.E.2d 377 (1975).

**Cited** in *Whitaker v. Harvell-Kilgore Corp.*, 418 F.2d 1010 (5th Cir. 1969); *Citizens Jewelry Co. v. Walker*, 178 Ga. App. 897, 345 S.E.2d 106 (1986).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 63 Am. Jur. 2d, Products Liability, § 831 et seq. 67A Am. Jur. 2d, Sales, §§ 703, 704.

**C.J.S.** — 77A C.J.S., Sales, §§ 250, 258 et seq.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 2-317.

**ALR.** — Express or implied warranty of quality, condition, or fitness of automobile or truck sold by retail dealer, 43 ALR 648.

Law of sales and liability in respect thereof as applied to transactions in self-service stores, 163 ALR 238.

Express warranty as excluding implied warranty of fitness, 164 ALR 1321.

What amounts to a “sale by sample” as regards warranties, 12 ALR2d 524.

Recovery by contractor or artisan, suing for breach of warranty, of damages for loss of good will occasioned by use in his business of unfit materials, 28 ALR2d 591.

Measure and elements of recovery of buyer rescinding sale of domestic animal for seller’s breach of warranty, 35 ALR2d 1273.

Application of warranty provisions of Uniform Commercial Code to bailments, 48 ALR3d 668.

Validity of disclaimer of warranty clauses in sale of new automobile, 54 ALR3d 1217.

Seller’s promises or attempts to repair article sold as affecting buyer’s duty to minimize damages for breach of sale contract or of warranty, 66 ALR3d 1162.

Uniform Commercial Code: implied warranty of fitness for particular purpose as including fitness for ordinary use, 83 ALR3d 656.

What constitutes “affirmation of fact” giving rise to express warranty under UCC § 2-313(1)(a), 94 ALR3d 729.

Products liability: industrial accidents involving conveyor belts or systems, 2 ALR4th 262.

Construction and effect of new motor vehicle warranty limiting manufacturer’s liability to repair or replacement of defective parts, 2 ALR4th 576.

Products liability: defective vehicular windows, 3 ALR4th 489.

Products liability: manufacturer’s postsale obligation to modify, repair, or recall product, 47 ALR5th 395.

Liability on implied warranties in sale of used motor vehicle, 47 ALR5th 677.

### 11-2-318. Third party beneficiaries of warranties express or implied.

A seller’s warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume, or be affected by the goods and who is injured in person by breach of the



warranty. A seller may not exclude or limit the operation of this Code section. (Code 1933, § 109A-2—318, enacted by Ga. L. 1962, p. 156, § 1.)

**Cross references.** — Necessity of privity to support tort action generally, and as to liability of manufacturer of personal property sold as new property directly or through a dealer or other person, § 51-1-11. Civil action for knowing or negligent selling of unwholesome provisions, drugs, alcoholic beverages, etc., to another person by use of which damage results to purchaser or his family, § 51-1-23 et seq.

**Law reviews.** — For article, “Georgia’s New Statutory Liability for Manufacturers: An Inadequate Legislative Responses,” see 2 Ga. L. Rev. 538 (1968). For article discussing interpretation of warranties under the Uniform Commercial Code, see 4 Ga. L. Rev. 469 (1970). For article, “Products Liability Law in Georgia: Is Change Coming?” see 10 Ga. St. B.J. 353 (1974). For article explaining the Unfair Trade Practices and Consumer Protection Act, proposed in Georgia in 1973, see 10 Ga. St. B.J. 409 (1974). For article discussing modification of consumer warranty provisions of the U.C.C. by the Magnuson-Moss Act (15 U.S.C. §§ 2301-2312) with special emphasis on attempted disclaimers, see 27 Mercer L. Rev.

1111 (1976). For article discussing strict liability for defective products in Georgia, see 13 Ga. St. B.J. 142 (1977). For article surveying developments in the Georgia torts law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 247 (1981). For article, “Products Liability Law in Georgia Including Recent Developments,” see 43 Mercer L. Rev. 27 (1991).

For note, “Allowance of Punitive Damages in Products Liability Claims,” see 6 Ga. L. Rev. 613 (1972). For note, “Buyer’s Right to Revoke Acceptance Against the Automobile Manufacturer for Breach of its Continuing Warranty of Repair or Replacement,” see 7 Ga. L. Rev. 711 (1973). For note, “Enforcing Manufacturers’ Warranty Exclusions Against Non-Privy Commercial Purchasers: The Need for Uniform Guidelines,” see 20 Ga. L. Rev. 461 (1986).

For comment on U.C.C.’s restrictive effect on consumers’ right of action against manufacturers absent privity, see 1 Ga. St. B.J. 129 (1964). For comment on *Putnam v. Erie City Mfg. Co.*, 338 F.2d 911 (5th Cir. 1964), as to privity requirement in implied warranty actions, see 17 Mercer L. Rev. 318 (1965).

## JUDICIAL DECISIONS

### ANALYSIS

GENERAL CONSIDERATION  
EMPLOYEES OF BUYER  
MANUFACTURER’S LIABILITY

#### General Consideration

**Expression of public policy on product liability.** — O.C.G.A. §§ 11-2-318 and 51-1-11 are recent expressions of legislature establishing and limiting public policy of state in area of product liability. *Ellis v. Rich’s Inc.*, 233 Ga. 573, 212 S.E.2d 373 (1975).

**Exception to privity requirement.** — Under O.C.G.A. § 51-1-11, no privity is necessary to institute an action for tort, but if tort results from violation of duty, itself the consequence of contract, right of action is generally confined to parties and privies of that contract except in cases where party would have right of action for injury done independently of contract and except as provided in

O.C.G.A. § 11-2-318. *Shell v. Watts*, 125 Ga. App. 542, 188 S.E.2d 269, rev’d on other grounds, 229 Ga. 474, 192 S.E.2d 265 (1972).

O.C.G.A. § 51-1-11 purportedly limits the right of tort action based on the violation of a duty, itself the consequence of a contract, to a party or privy, except in “cases where the party would have had a right of action for the injury done, independently of the contract” or in cases covered by O.C.G.A. § 11-2-318 of the Uniform Commercial Code extending the benefit of express or implied warranties to certain natural persons without regard to privity. *Koppers Co. v. Parks*, 120 Ga. App. 551, 171 S.E.2d 639 (1969).

Generally, this state has recognized the necessity of privity between parties where plaintiff-purchaser of an article has been injured because of its alleged defectiveness and brings action based on warranty, but an exception to this rule requiring privity is expressed in O.C.G.A. § 11-2-318. *Evershine Prods., Inc. v. Schmitt*, 130 Ga. App. 34, 202 S.E.2d 228 (1973).

The rule of privity in contract actions is made a statutory requirement by O.C.G.A. § 51-1-11. In actions based upon the breach of express or implied warranties this requirement is subject only to the exception contained in O.C.G.A. § 11-2-318. *Ellis v. Rich's Inc.*, 233 Ga. 573, 212 S.E.2d 373 (1975).

Privity is required in actions for breach of express warranties except as provided in O.C.G.A. § 11-2-318 and except where warranty clearly extends to some identifiable third person. *Stewart v. Gainesville Glass Co.*, 233 Ga. 578, 212 S.E.2d 377 (1975).

**Necessity of privity between buyer and seller.** — Nothing contained in O.C.G.A. § 11-2-318, which extends the seller's warranties to family members and guests in the buyer's home who may reasonably be expected to use the product and who are injured thereby, eliminates the requirement that the buyer and the defendant be in privity. *Thomaston v. Fort Wayne Pools, Inc.*, 181 Ga. App. 541, 352 S.E.2d 794 (1987); *Gowen v. Cady*, 189 Ga. App. 473, 376 S.E.2d 390, cert. denied, 189 Ga. App. 912, 376 S.E.2d 390 (1988).

Plaintiff, parent of a child who sustained burns from spilled coffee, was not in privity with defendant restaurant that sold the coffee to a family friend of plaintiff, who was in turn purchasing the coffee for another family friend. *Barnett v. Leiserv, Inc.*, 968 F. Supp. 690 (N.D. Ga. 1997), aff'd, 137 F.3d 1356 (11th Cir. 1998).

**O.C.G.A. § 11-2-318 extends warranty to natural persons in family or household of buyer** reasonably using or affected by goods, who are injured or damaged by breach thereof. *Reddick v. White Consol. Indus., Inc.*, 295 F. Supp. 243 (S.D. Ga. 1968).

**Section does not limit members of family covered to those living within buyer's household.** — In O.C.G.A. § 11-2-318, the words "family or household" do not, because stated in the alternative, limit members of family who may rely on implied warranty to

those who live within household of buyer. *Chastain v. Fuqua Indus., Inc.*, 156 Ga. App. 719, 275 S.E.2d 679 (1980).

**Nephew living next door.** — Word "family" as used in O.C.G.A. § 11-2-318 includes nephew of purchaser who lived next door and not in owner's house. *Chastain v. Fuqua Indus., Inc.*, 156 Ga. App. 719, 275 S.E.2d 679 (1980).

**"Family" and "household" have different meanings** in O.C.G.A. § 11-2-318. *Chastain v. Fuqua Indus., Inc.*, 156 Ga. App. 719, 275 S.E.2d 679 (1980).

**"Guest in his home"** has significance different from and independent of clause "person in household." *Chastain v. Fuqua Indus., Inc.*, 156 Ga. App. 719, 275 S.E.2d 679 (1980).

**Person meeting briefly at buyer's home before embarking on trip.** — Plaintiff was not a "guest in [the] home" of buyer where plaintiff and buyer met briefly at buyer's home before embarking on a fishing trip on buyer's boat, aboard which buyer's handgun accidentally discharged and injured plaintiff. *Curlee v. Mock Enters., Inc.*, 173 Ga. App. 594, 327 S.E.2d 736 (1985).

**Warranty of personalty does not run with chattel to second or subsequent purchasers.** *Stewart v. Gainesville Glass Co.*, 131 Ga. App. 747, 206 S.E.2d 857 (1974), aff'd, 233 Ga. 578, 212 S.E.2d 377 (1975).

Where the father of an injured child purchased a used motorcycle which caused the child's injuries several years after it was manufactured, plaintiffs were not the beneficiaries of any warranty, express or implied, arising from the manufacture of the motorcycle. *Weatherby v. Honda Motor Co.*, 195 Ga. App. 169, 393 S.E.2d 64 (1990).

**Mere fact that one would benefit by performance of warranty** does not make that person a third-party beneficiary. *Stewart v. Gainesville Glass Co.*, 131 Ga. App. 747, 206 S.E.2d 857 (1974), aff'd, 233 Ga. 578, 212 S.E.2d 377 (1975).

**Cited in** *Wood v. Hub Motor Co.*, 110 Ga. App. 101, 137 S.E.2d 674 (1964); *Stovall & Co. v. Tate*, 124 Ga. App. 605, 184 S.E.2d 834 (1971); *Chaffin v. Atlanta Coca-Cola Bottling Co.*, 127 Ga. App. 619, 194 S.E.2d 513 (1972); *Standard v. Meadors*, 347 F. Supp. 908 (N.D. Ga. 1972); *Dodge Trucks, Inc. v. Wilson*, 140 Ga. App. 743, 231 S.E.2d 818 (1976); *Pierce v. Liberty Furn. Co.*, 141 Ga.



**General Consideration (Cont'd)**

App. 175, 233 S.E.2d 33 (1977); *GMC v. Davis*, 141 Ga. App. 495, 233 S.E.2d 825 (1977); *Ford Motor Co. v. Carter*, 239 Ga. 657, 238 S.E.2d 361 (1977); *Rhodes v. R.G. Indus., Inc.*, 173 Ga. App. 51, 325 S.E.2d 465 (1984).

**Employees of Buyer**

**Privity is not extended to employee of purchaser** by O.C.G.A. § 11-2-318. *Beam v. Omark Indus., Inc.*, 143 Ga. App. 142, 237 S.E.2d 607 (1977).

To extent that breach of implied warranty is a contract notion, plaintiff who is employee of purchaser rather than person in family or household of buyer or a guest in the purchaser's home may not rely on express or implied warranties of manufacturer, as there is no privity. *Parzini v. Center Chem. Co.*, 134 Ga. App. 414, 214 S.E.2d 700, rev'd on other grounds, 234 Ga. 868, 218 S.E.2d 580 (1975).

Employees of purchaser do not have privity with manufacturer. *Watkins v. Barber-Colman Co.*, 625 F.2d 714 (5th Cir. 1980).

Employees of a purchaser simply do not have privity with the manufacturer and will not be allowed to institute action for breach of an implied warranty. *Starling v. Seaboard Coast Line R.R.*, 533 F. Supp. 183 (S.D. Ga. 1982).

Class excepted by O.C.G.A. § 11-2-318 from horizontal privity requirement does not include employees of buyer. *Weaver v. Ralston Motor Hotel, Inc.*, 135 Ga. App. 536, 218 S.E.2d 260 (1975).

**Employment as maid of buyer.** — Plaintiff, employed as maid at time injury was sustained, does not fall into category of persons benefiting from implied warranty under O.C.G.A. § 11-2-318. *Verddier v. Neal Blun Co.*, 128 Ga. App. 321, 196 S.E.2d 469 (1973).

**Armed forces members injured by products purchased by federal government.** — Member of armed forces injured by product purchased by federal government does not fall within ambit of O.C.G.A. § 11-2-318. *Miles v. Bell Helicopter Co.*, 385 F. Supp. 1029 (N.D. Ga. 1974).

**Manufacturer's Liability**

**O.C.G.A. §§ 11-2-318 and 51-1-11 preclude extension of strict liability to parties other than the manufacturer.** *Ellis v. Rich's, Inc.*, 233 Ga. 573, 212 S.E.2d 373 (1975).

**Plaintiff must be purchaser.** — For plaintiff to maintain action against manufacturer based on implied warranties, plaintiff must be a purchaser either directly from manufacturer or from some other person such as a wholesaler or retailer. *Whitaker v. Harvell-Kilgore Corp.*, 418 F.2d 1010 (5th Cir. 1969).

In a product liability action against the manufacturers of a boat and motor after a boating accident, where plaintiffs bought the boat from another consumer who in turn had purchased it from the original buyer who was in privity with the manufacturers, plaintiffs did not meet the required exceptions of O.C.G.A. § 11-2-318. *Davis v. Brunswick Corp.*, 854 F. Supp. 1574 (N.D. Ga. 1993).

Lack of privity between the manufacturer and user of exercise machine at a health club precluded an implied warranty claim against the manufacturer. *Bodymaster Sports Indus., Inc. v. Wimberley*, 232 Ga. App. 170, 501 S.E.2d 556 (1998).

**Extension of warranty through dealer.** — Ordinarily, there is no implied warranty existing between manufacturer and purchaser of automobile when there is no privity between the two, yet where automobile manufacturer, through its authorized dealer, issues to purchaser a warranty by manufacturer to said purchaser, implied warranty statute becomes operative. *Ford Motor Co. v. Lee*, 137 Ga. App. 486, 224 S.E.2d 168, aff'd in part and rev'd in part on other grounds, 237 Ga. 554, 229 S.E.2d 379 (1976).

**Repeal of former Code 1933, § 96-307 does not negate effect of express warranties by manufacturer.** — Repeal of former Code 1933, § 96-307 which provided implied warranty to ultimate consumer for whom product was intended does not mean that there can be no warranties if manufacturer or producer makes an express warranty to ultimate consumer, which is commonly done in the sale of a number of items, such as automobiles and household appliances. *Evershine Prods., Inc. v. Schmitt*, 130 Ga. App. 34, 202 S.E.2d 228 (1973).



**Second-hand goods.** — When goods are sold by original purchaser to third party as used or second-hand goods, there is no implied warranty with respect to manufacturer or original seller. Even with respect to

the original purchaser or second seller, absent special circumstances, "the rule is that there is no implied warranty as to the condition, fitness or quality of the article." *GMC v. Halco Instruments, Inc.*, 124 Ga. App. 630, 185 S.E.2d 619 (1971).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 67A Am. Jur. 2d, Sales, §§ 708-715.

**C.J.S.** — 77A C.J.S., Sales, §§ 240, 241.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 2-318.

**ALR.** — Joinder of manufacturer or packer and retailer or other middleman as defendants in action for injury to person or damage to property of purchaser or consumer of defective article, 119 ALR 1356.

Express warranty as excluding implied warranty of fitness, 164 ALR 1321.

Assignability of warranty of goods and chattels, 17 ALR2d 1196.

Privity of contract as essential to recovery in action based on theory other than negligence, against manufacturer or seller of product alleged to have caused injury, 75 ALR2d 39.

Right of member of armed forces to recover from manufacturer or seller for injury caused by defective military material, equipment, supplies, or components thereof, 38 ALR3d 1247.

Liability of manufacturer or seller of power lawnmower for injuries to user, 41 ALR3d 986.

Liability of manufacturer, seller, or distributor of motor vehicle for defect which merely enhances injury from accident otherwise caused, 42 ALR3d 560; 96 ALR3d 265.

Application of warranty provisions of Uniform Commercial Code to bailments, 48 ALR3d 668.

Liability of manufacturer, seller, or installer for personal injury caused by door glass, 84 ALR3d 877.

Products liability: toys and games, 95 ALR3d 390.

Products liability: forklift trucks, 95 ALR3d 541.

Products liability: defective vehicular gasoline tanks, 96 ALR3d 265.

Products liability: industrial accidents involving conveyor belts or systems, 2 ALR4th 262.

Construction and effect of new motor vehicle warranty limiting manufacturer's liability to repair or replacement of defective parts, 2 ALR4th 576.

Products liability: defective vehicular windows, 3 ALR4th 489.

Liability of manufacturer of oral live polio (Sabin) vaccine for injury or death from its administration, 66 ALR4th 83.

Products liability: general recreational equipment, 77 ALR4th 1121.

Purchaser's disbelief in, or nonreliance upon, express warranties made by seller in contract for sale of business as precluding action for breach of express warranties, 7 ALR5th 841.

Liability on implied warranties in sale of used motor vehicle, 47 ALR5th 677.

Third-party beneficiaries of warranties under UCC § 2-318, 50 ALR5th 327.

### 11-2-319. F.O.B. and F.A.S. terms.

(1) Unless otherwise agreed the term F.O.B. (which means "free on board") at a named place, even though used only in connection with the stated price, is a delivery term under which:

(a) When the term is F.O.B. the place of shipment, the seller must at that place ship the goods in the manner provided in this article (Code Section 11-2-504) and bear the expense and risk of putting them into the possession of the carrier; or

(b) When the term is F.O.B. the place of destination, the seller must at his own expense and risk transport the goods to that place and there tender delivery of them in the manner provided in this article (Code Section 11-2-503);

(c) When under either paragraph (a) or (b) of this subsection the term is also F.O.B. vessel, car, or other vehicle, the seller must in addition at his own expense and risk load the goods on board. If the term is F.O.B. vessel the buyer must name the vessel and in an appropriate case the seller must comply with the provisions of this article on the form of bill of lading (Code Section 11-2-323).

(2) Unless otherwise agreed the term F.A.S. vessel (which means “free alongside”) at a named port, even though used only in connection with the stated price, is a delivery term under which the seller must:

(a) At his own expense and risk deliver the goods alongside the vessel in the manner usual in that port or on a dock designated and provided by the buyer; and

(b) Obtain and tender a receipt for the goods in exchange for which the carrier is under a duty to issue a bill of lading.

(3) Unless otherwise agreed in any case falling within subsection (1)(a) or (c) or subsection (2) of this Code section the buyer must seasonably give any needed instructions for making delivery, including when the term is F.A.S. or F.O.B. the loading berth of the vessel and in an appropriate case its name and sailing date. The seller may treat the failure of needed instructions as a failure of cooperation under this article (Code Section 11-2-311). He may also at his option move the goods in any reasonable manner preparatory to delivery or shipment.

(4) Under the term F.O.B. vessel or F.A.S. unless otherwise agreed the buyer must make payment against tender of the required documents and the seller may not tender nor the buyer demand delivery of the goods in substitution for the documents. (Code 1933, § 109A-2—319, enacted by Ga. L. 1962, p. 156, § 1.)

### JUDICIAL DECISIONS

**Title did not pass to the shipper's customer upon delivery of goods to the carrier** where it was agreed between all parties that the seller bore the expense, not of putting the goods in possession of the carrier, but rather of transporting the goods to the place of destination. *Clark v. Messer Indus., Inc.*, 222 Ga. App. 606, 475 S.E.2d 653 (1996).

**Cited in** *Undercofler v. United States Steel Corp.*, 109 Ga. App. 8, 135 S.E.2d 69 (1964); *Giant Peanut Co. v. Carolina Chems., Inc.*, 129 Ga. App. 718, 200 S.E.2d 918 (1973); *Fratelli Gardino v. Caribbean Lumber Co.*, 587 F.2d 204 (5th Cir. 1979).

## OPINIONS OF THE ATTORNEY GENERAL

**Increased freight rates after contract made.** — Absent contrary agreement, seller bears risk and expense of increased freight

rates after contract is made. 1969 Op. Att'y Gen. No. 69-1.

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 67 Am. Jur. 2d, Sales, §§ 566-575.

**C.J.S.** — 77A C.J.S., Sales, §§ 94 et seq., 168.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 2-319.

**ALR.** — What amounts to delivery f.o.b., 16 ALR 597.

F.O.B. provision in sale contract as affecting time or place of passing of title, 101 ALR 292.

## 11-2-320. C.I.F. and C. &amp; F. terms.

(1) The term C.I.F. means that the price includes in a lump sum the cost of the goods and the insurance and freight to the named destination. The term C. & F. or C.F. means that the price so includes cost and freight to the named destination.

(2) Unless otherwise agreed and even though used only in connection with the stated price and destination, the term C.I.F. destination or its equivalent requires the seller at his own expense and risk to:

(a) Put the goods into the possession of a carrier at the port for shipment and obtain a negotiable bill or bills of lading covering the entire transportation to the named destination; and

(b) Load the goods and obtain a receipt from the carrier (which may be contained in the bill of lading) showing that the freight has been paid or provided for; and

(c) Obtain a policy or certificate of insurance, including any war risk insurance, of a kind and on terms then current at the port of shipment in the usual amount, in the currency of the contract, shown to cover the same goods covered by the bill of lading and providing for payment of loss to the order of the buyer or for the account of whom it may concern; but the seller may add to the price the amount of the premium for any such war risk insurance; and

(d) Prepare an invoice of the goods and procure any other documents required to effect shipment or to comply with the contract; and

(e) Forward and tender with commercial promptness all the documents in due form and with any indorsement necessary to perfect the buyer's rights.

(3) Unless otherwise agreed the term C. & F. or its equivalent has the same effect and imposes upon the seller the same obligations and risks as a C.I.F. term except the obligation as to insurance.



(4) Under the term C.I.F. or C. & F. unless otherwise agreed the buyer must make payment against tender of the required documents and the seller may not tender nor the buyer demand delivery of the goods in substitution for the documents. (Code 1933, § 109A-2—320, enacted by Ga. L. 1962, p. 156, § 1.)

#### JUDICIAL DECISIONS

**Cited in** Undercofler v. United States Steel Corp., 109 Ga. App. 8, 135 S.E.2d 69 (1964); Georgia Ports Auth. v. Mitsubishi Int'l Corp., 156 Ga. App. 304, 274 S.E.2d 699 (1980).

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 67 Am. Jur. 2d, Sales, §§ 553-558. **ALR.** — What constitutes delivery of goods sold under "C.I.F." contract, 10 ALR 701; 20 ALR 1236.

**C.J.S.** — 77A C.J.S., Sales, §§ 94 et seq., 167.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 2-320.

#### **11-2-321. C.I.F. or C. & F.: "net landed weights"; "payment on arrival"; warranty of condition on arrival.**

Under a contract containing a term C.I.F. or C. & F.:

(1) Where the price is based on or is to be adjusted according to "net landed weights," "delivered weights," "out turn" quantity or quality, or the like, unless otherwise agreed the seller must reasonably estimate the price. The payment due on tender of the documents called for by the contract is the amount so estimated, but after final adjustment of the price a settlement must be made with commercial promptness.

(2) An agreement described in subsection (1) of this Code section or any warranty of quality or condition of the goods on arrival places upon the seller the risk of ordinary deterioration, shrinkage, and the like in transportation but has no effect on the place or time of identification to the contract for sale or delivery or on the passing of the risk of loss.

(3) Unless otherwise agreed where the contract provides for payment on or after arrival of the goods the seller must before payment allow such preliminary inspection as is feasible; but if the goods are lost delivery of the documents and payment are due when the goods should have arrived. (Code 1933, § 109A-2—321, enacted by Ga. L. 1962, p. 156, § 1.)

#### JUDICIAL DECISIONS

**Cited in** Undercofler v. United States Steel Corp., 109 Ga. App. 8, 135 S.E.2d 69 (1964).

## RESEARCH REFERENCES

**C.J.S.** — 77A C.J.S., Sales, §§ 185 et seq., 208 et seq., 215.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 2-321.

**ALR.** — What constitutes delivery of goods sold under “c.i.f.” contract, 10 ALR 701; 20 ALR 1236.

Resale by buyer where seller has refused to receive the property rejected for breach of warranty, 24 ALR 1445.

Buyer’s right to inspect at destination where goods are delivered to carrier, 27 ALR 524.

Warranties and conditions upon sale of seeds, nursery stock, etc., 62 ALR 451; 117 ALR 470; 168 ALR 581.

Provision in bill of lading prohibiting or limiting consignee’s right to inspect goods shipped, 25 ALR2d 770.

**11-2-322. Delivery “ex-ship.”**

(1) Unless otherwise agreed a term for delivery of goods “ex-ship” (which means from the carrying vessel) or in equivalent language is not restricted to a particular ship and requires delivery from a ship which has reached a place at the named port of destination where goods of the kind are usually discharged.

(2) Under such a term unless otherwise agreed:

(a) The seller must discharge all liens arising out of the carriage and furnish the buyer with a direction which puts the carrier under a duty to deliver the goods; and

(b) The risk of loss does not pass to the buyer until the goods leave the ship’s tackle or are otherwise properly unloaded. (Code 1933, § 109A-2—322, enacted by Ga. L. 1962, p. 156, § 1.)

## RESEARCH REFERENCES

**C.J.S.** — 77A C.J.S., Sales, §§ 94 et seq., 167, 215.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 2-322.

**11-2-323. Form of bill of lading required in overseas shipment; “overseas.”**

(1) Where the contract contemplates overseas shipment and contains a term C.I.F. or C. & F. or F.O.B. vessel, the seller unless otherwise agreed must obtain a negotiable bill of lading stating that the goods have been loaded on board or, in the case of a term C.I.F. or C. & F., received for shipment.

(2) Where in a case within subsection (1) of this Code section a bill of lading has been issued in a set of parts, unless otherwise agreed if the documents are not to be sent from abroad the buyer may demand tender of the full set; otherwise only one part of the bill of lading need be tendered. Even if the agreement expressly requires a full set:

(a) Due tender of a single part is acceptable within the provisions of this article on cure of improper delivery (subsection (1) of Code Section 11-2-508); and

(b) Even though the full set is demanded, if the documents are sent from abroad the person tendering an incomplete set may nevertheless require payment upon furnishing an indemnity which the buyer in good faith deems adequate.

(3) A shipment by water or by air or a contract contemplating such shipment is "overseas" insofar as by usage of trade or agreement it is subject to the commercial, financing, or shipping practices characteristic of international deep water commerce. (Code 1933, § 109A-2—323, enacted by Ga. L. 1962, p. 156, § 1.)

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 13 Am. Jur. 2d, Carriers, § 324. 70 Am. Jur. 2d, Shipping, § 458.

**C.J.S.** — 80 C.J.S., Shipping, § 256 et seq.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 2-323.

**ALR.** — What constitutes delivery of goods sold under "C.I.F." contract, 20 ALR 1236.

#### 11-2-324. "No arrival, no sale" term.

Under a term "no arrival, no sale" or terms of like meaning, unless otherwise agreed:

(a) The seller must properly ship conforming goods and if they arrive by any means he must tender them on arrival but he assumes no obligation that the goods will arrive unless he has caused the nonarrival; and

(b) Where without fault of the seller the goods are in part lost or have so deteriorated as no longer to conform to the contract or arrive after the contract time, the buyer may proceed as if there had been casualty to identified goods (Code Section 11-2-613). (Code 1933, § 109A-2—324, enacted by Ga. L. 1962, p. 156, § 1.)

**Law reviews.** — For article, "Impracticability As Risk Allocation: The Effect of Changed Circumstances upon Contract Obligations for the Sale of Goods," see 22 Ga. L. Rev. 503 (1988).

#### RESEARCH REFERENCES

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 2-324.



**11-2-325. "Letter of credit" term; "confirmed credit."**

(1) Failure of the buyer seasonably to furnish an agreed letter of credit is a breach of the contract for sale.

(2) The delivery to seller of a proper letter of credit suspends the buyer's obligation to pay. If the letter of credit is dishonored, the seller may on seasonable notification to the buyer require payment directly from him.

(3) Unless otherwise agreed the term "letter of credit" or "banker's credit" in a contract for sale means an irrevocable credit issued by a financing agency of good repute and, where the shipment is overseas, of good international repute. The term "confirmed credit" means that the credit must also carry the direct obligation of such an agency which does business in the seller's financial market. (Code 1933, § 109A-2—325, enacted by Ga. L. 1962, p. 156, § 1.)

**RESEARCH REFERENCES**

**C.J.S.** — 77A C.J.S., Sales, § 208.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 2-325.

**ALR.** — Construction or provision for letter of credit in contract of sale, 38 ALR 608.

**11-2-326. Sale on approval and sale or return; rights of creditors.**

(1) Unless otherwise agreed, if delivered goods may be returned by the buyer even though they conform to the contract, the transaction is:

(a) A "sale on approval" if the goods are delivered primarily for use; and

(b) A "sale or return" if the goods are delivered primarily for resale.

(2) Goods held on approval are not subject to the claims of the buyer's creditors until acceptance; goods held on sale or return are subject to such claims while in the buyer's possession.

(3) Any "or return" term of a contract for sale is to be treated as a separate contract for sale within the statute of frauds section of this article (Code Section 11-2-201) and as contradicting the sale aspect of the contract within the provisions of this article on parol or extrinsic evidence (Code Section 11-2-202). (Code 1933, § 109A-2—326, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 1963, p. 188, § 2; Ga. L. 2001, p. 362, § 6.)

**The 2001 amendment**, effective July 1, 2001, deleted "consignment sales and" in the catchline, substituted "Goods" for "Except as provided in subsection (3) of this Code section, goods" at the beginning of subsection (2), deleted subsection (3), which read: "Where goods are delivered to a

person for sale and such person maintains a place of business at which he deals in goods of the kind involved, under a name other than the name of the person making delivery, then with respect to claims of creditors of the person conducting the business the goods are deemed to be on sale or return.

The provisions of this subsection are applicable even though an agreement purports to reserve title to the person making delivery until payment or resale or uses such words as 'on consignment' or 'on memorandum.' However, this subsection is not applicable if the person making delivery: (a) Complies with an applicable law providing for a consignor's interest or the like to be evidenced by a sign; or (b) Establishes that the person

conducting the business is generally known by his creditors to be substantially engaged in selling the goods of others; or (c) Complies with the filing provisions of the article on secured transactions (Article 9 of this title).", and redesignated former subsection (4) as present subsection (3).

**Law reviews.** — For survey article on commercial law, see 34 Mercer L. Rev. 31 (1982).

## JUDICIAL DECISIONS

**Purpose of O.C.G.A. § 11-2-326** is to protect creditors of person in possession of goods (the dealer) who would have a right to assume goods were property of dealer. *Guardian Dist. Co. v. Settles*, 114 Ga. App. 418, 151 S.E.2d 530 (1966).

One purpose behind O.C.G.A. § 11-2-326 is subordination of secret consignment seller claims to claims of consignment buyer's creditors. *Financeamerica Corp. v. Morris* (In re KLP, Inc.), 7 Bankr. 256 (Bankr. N.D. Ga. 1980).

**O.C.G.A. § 11-2-326 importance lies primarily in role it plays, along with notice provisions of Article 9** of this title, in giving disclosed claims to property priority over secret claims. *Financeamerica Corp. v. Morris* (In re KLP, Inc.), 7 Bankr. 256 (Bankr. N.D. Ga. 1980).

**O.C.G.A. § 11-2-326 applies to transactions which are not true sales at all**, since section governs agreements which somehow provide that "delivered goods may be returned by the buyer even though they conform to the contract." *Financeamerica Corp. v. Morris* (In re KLP, Inc.), 7 Bankr. 256 (Bankr. N.D. Ga. 1980).

**The burden of proof is on the defendant** to prove that the consignee is generally known by creditors to be substantially engaged in selling the goods of others. *Loeb v. G.A. Gertmenian & Sons* (In re A.J. Nichols, Ltd.), 21 Bankr. 612 (Bankr. N.D. Ga. 1982).

**Consignment sales insufficient.** — Debtor aviation company's index of consignment sales at 10 percent over the course of a ten year period was insufficient to render it substantially engaged in the sale of goods to others within the meaning of O.C.G.A. § 11-2-326. *ATG Aerospace, Inc. v. High-Line Aviation Ltd.*, 149 Bankr. 730 (Bankr. N.D. Ga. 1992).

**Car delivered by owner to dealer to secure offers for owner's approval.** — Where individual owner of automobile delivers it to automobile dealer for the purpose of having said dealer secure offers for purchase thereof, and to sell same upon approval of offer by individual owner, the automobile dealer to receive a commission of set sum regardless of sale price, such transaction is not a "sale or return" transaction between a buyer and a seller within meaning of O.C.G.A. § 11-2-326. *Allgeier v. Campisi*, 117 Ga. App. 105, 159 S.E.2d 458 (1968).

**Transaction between a mobile home manufacturer and a retail dealer**, involving a mobile home claimed by a floor-plan financier was a "sale or return," and the mobile home was subject to the financier's claim arising from a security interest in the dealer's after-acquired inventory without regard to whether the manufacturer was compensated for the mobile home. *GECC v. Catalina Homes, Inc.*, 178 Ga. App. 319, 342 S.E.2d 734 (1986).

**Voidable preference under Bankruptcy Code.** — Debtor's return of goods held on sale or return within the preference period constituted a voidable preference under the Bankruptcy Code, 11 U.S.C.S. § 547(b). *Loeb v. G.A. Gertmenian & Sons* (In re A.J. Nichols, Ltd.), 21 Bankr. 612 (Bankr. N.D. Ga. 1982).

**Cited in** *McDonald v. Peoples Auto. Loan & Fin. Corp.*, 115 Ga. App. 483, 154 S.E.2d 886 (1967); *Evans Implement Co. v. Thomas Indus., Inc.*, 117 Ga. App. 279, 160 S.E.2d 462 (1968); *Knox Jewelry Co. v. Cincinnati Ins. Co.*, 130 Ga. App. 519, 203 S.E.2d 739 (1974); *King's Appliance & Elecs., Inc. v. Citizens & S. Bank*, 157 Ga. App. 857, 278 S.E.2d 733 (1981); *Logan Paving Co. v. Massey-Ferguson Credit Corp.*, 172 Ga. App.

368, 323 S.E.2d 259 (1984); *Amatulli Imports, Inc. v. House of Persia, Inc.*, 191 Ga. App. 827, 383 S.E.2d 192 (1989).

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 67 Am. Jur. 2d, Sales, §§ 465-502.

**C.J.S.** — 35 C.J.S., Factors, §§ 1, 56, 60, 63.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 2-326.

**ALR.** — Duty of purchaser of goods “on trial” or “on approval” regarding notice of rejection, 78 ALR 533.

Reasonableness or personal judgment of buyer as test where goods are sold subject to being satisfactory to the buyer, 86 ALR2d 200.

Time for return of goods sold on “sale or return” absent specific time provision in contract, 93 ALR2d 342.

Consignment transactions under the Uniform Commercial Code, 40 ALR3d 1078.

#### 11-2-327. Special incidents of sale on approval and sale or return.

(1) Under a sale on approval unless otherwise agreed:

(a) Although the goods are identified to the contract the risk of loss and the title do not pass to the buyer until acceptance; and

(b) Use of the goods consistent with the purpose of trial is not acceptance but failure seasonably to notify the seller of election to return the goods is acceptance, and if the goods conform to the contract acceptance of any part is acceptance of the whole; and

(c) After due notification of election to return, the return is at the seller’s risk and expense but a merchant buyer must follow any reasonable instructions.

(2) Under a sale or return unless otherwise agreed:

(a) The option to return extends to the whole or any commercial unit of the goods while in substantially their original condition, but must be exercised seasonably; and

(b) The return is at the buyer’s risk and expense. (Code 1933, § 109A-2—327, enacted by Ga. L. 1962, p. 156, § 1.)

#### JUDICIAL DECISIONS

**Cited** in *Knox Jewelry Co. v. Cincinnati Ins. Co.*, 130 Ga. App. 519, 203 S.E.2d 739 (1974); *Walter E. Heller & Co. v. Aetna Bus. Credit, Inc.*, 158 Ga. App. 249, 280 S.E.2d

144 (1981); *Amatulli Imports, Inc. v. House of Persia, Inc.*, 191 Ga. App. 827, 383 S.E.2d 192 (1989).

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 67 Am. Jur. 2d, Sales, §§ 465, 467.

**C.J.S.** — 77A C.J.S., Sales, § 214.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 2-327.

**ALR.** — Duty of purchaser of goods “on



trial" or "on approval" regarding notice of rejection, 78 ALR 533.

Loss on goods shipped as proratable between carrier's insurer and shipper's insurer, 169 ALR 666.

Duty of consignee as to valuation of goods on reshipment to consignor, 16 ALR2d 866.

Reasonableness or personal judgment of buyer as test where goods are sold subject to

being satisfactory to the buyer, 86 ALR2d 200.

Time for return of goods sold on "sale or return" absent specific time provision in contract, 93 ALR2d 342.

Risk of loss of goods in "sale or return" transaction under UCC § 2-327, 66 ALR3d 190.

### 11-2-328. Sale by auction.

(1) In a sale by auction if goods are put up in lots each lot is the subject of a separate sale.

(2) A sale by auction is complete when the auctioneer so announces by the fall of the hammer or in other customary manner. Where a bid is made while the hammer is falling in acceptance of a prior bid the auctioneer may in his discretion reopen the bidding or declare the goods sold under the bid on which the hammer was falling. In sales by auction the auctioneer shall be considered agent of both parties so far as to dispense with any further memorandum in writing than his own entries.

(3) Such a sale is with reserve unless the goods are in explicit terms put up without reserve. In an auction with reserve the auctioneer may withdraw the goods at any time until he announces completion of the sale. In an auction without reserve, after the auctioneer calls for bids on an article or lot, that article or lot cannot be withdrawn unless no bid is made within a reasonable time. In either case a bidder may retract his bid until the auctioneer's announcement of completion of the sale, but a bidder's retraction does not revive any previous bid.

(4) If the auctioneer knowingly receives a bid on the seller's behalf or the seller makes or procures such a bid, and notice has not been given that liberty for such bidding is reserved, the buyer may at his option avoid the sale or take the goods at the price of the last good faith bid prior to the completion of the sale. This subsection shall not apply to any bid at a forced sale. (Code 1933, § 109A-2—328, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 1968, p. 1101, § 1.)

**Cross references.** — Regulation of live-stock auctions generally, § 4-6-40 et seq.

### JUDICIAL DECISIONS

**Not applicable to real property sales.** — O.C.G.A. § 11-2-328 applies only to sales of goods as opposed to sales of real property. *Cuba v. Resolution Trust Corp.*, 849 F. Supp. 793 (N.D. Ga. 1994).

**Cited** in *Dublin Livestock & Comm'n Co. v. Day*, 178 Ga. App. 50, 341 S.E.2d 913 (1986).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 7 Am. Jur. 2d, Auctions and Auctioneers, §§ 18, 26, 30, 34, 38, 40. 30 Am. Jur. 2d, Executions and Enforcement of Judgements, § 495.

**C.J.S.** — 7 C.J.S., Auctions and Auctioneers, §§ 7, 8.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 2-328.

**ALR.** — Modes of making and accepting bids at auctions, 11 ALR 543.

Regulations affecting auctions or auctioneers, 39 ALR 773; 111 ALR 473.

Liability of auctioneer or clerk to buyer as to title, condition, or quality of property sold, 80 ALR2d 1237.

Personal liability of auctioneer to owner or mortgage for conversion, 96 ALR2d 208.

Auction sales under UCC § 2-328, 44 ALR4th 110.

## PART 4

## TITLE, CREDITORS, AND GOOD FAITH PURCHASERS

**11-2-401. Passing of title; reservation for security; limited application of this Code section.**

Each provision of this article with regard to the rights, obligations, and remedies of the seller, the buyer, purchasers, or other third parties applies irrespective of title to the goods except where the provision refers to such title. Insofar as situations are not covered by the other provisions of this article and matters concerning title become material the following rules apply:

(1) Title to goods cannot pass under a contract for sale prior to their identification to the contract (Code Section 11-2-501), and unless otherwise explicitly agreed the buyer acquires by their identification a special property as limited by this title. Any retention or reservation by the seller of the title (property) in goods shipped or delivered to the buyer is limited in effect to a reservation of a security interest. Subject to these provisions and to the provisions of the article on secured transactions (Article 9 of this title), title to goods passes from the seller to the buyer in any manner and on any conditions explicitly agreed on by the parties.

(2) Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods, despite any reservation of a security interest and even though a document of title is to be delivered at a different time or place; and in particular and despite any reservation of a security interest by the bill of lading:

(a) If the contract requires or authorizes the seller to send the goods to the buyer but does not require him to deliver them at destination, title passes to the buyer at the time and place of shipment; but

(b) If the contract requires delivery at destination, title passes on tender there.

(3) Unless otherwise explicitly agreed where delivery is to be made without moving goods:

(a) If the seller is to deliver a document of title, title passes at the time when and the place where he delivers such documents; or

(b) If the goods are at the time of contracting already identified and no documents are to be delivered, title passes at the time and place of contracting.

(4) A rejection or other refusal by the buyer to receive or retain the goods, whether or not justified, or a justified revocation of acceptance revests title to the goods in the seller. Such revesting occurs by operation of law and is not a "sale." (Code 1933, § 109A-2—401, enacted by Ga. L. 1962, p. 156, § 1.)

**Law reviews.** — For article discussing the resolution of conflicting claims to goods between an unsecured seller of goods and a creditor of a buyer claiming under an after-acquired property clause, see 28 Mercer L. Rev. 625 (1977). For article surveying insurance law in 1984-1985, see 37 Mercer L. Rev. 275 (1985).

For comment on *Cook Motor Co. v. Richardson*, 103 Ga. App. 129, 118 S.E.2d 502 (1961), see 24 Ga. B.J. 266 (1961). For comment on *Fender v. Colonial Stores, Inc.*, 138 Ga. App. 31, 225 S.E.2d 691 (1976), see 28 Mercer L. Rev. 751 (1977).

## JUDICIAL DECISIONS

### ANALYSIS

#### GENERAL CONSIDERATION

#### REJECTION OR REVOCATION OF ACCEPTANCE

#### General Consideration

**When title passes.** — If contract requires or authorizes seller to send goods to buyer but does not require seller to deliver them at destination, title passes to buyer at the time and place of shipment, but if contract requires delivery at destination, title passes on tender there. *Promech Corp. v. Brodhead-Garrett Co.*, 131 Ga. App. 314, 205 S.E.2d 511 (1974).

**Title did not pass to the shipper's customer upon delivery of goods to the carrier** where it was agreed between all parties that the seller bore the expense, not of putting the goods in possession of the carrier, but rather of transporting the goods to the place of destination. *Clark v. Messer Indus., Inc.*, 222 Ga. App. 606, 475 S.E.2d 653 (1996).

**Delivery, in exchange for promise to pay in future, without retained security interest.** — Where defendant offered to pay in future for goods to be delivered presently, and

seller agreed, delivered merchandise to defendant, and did not retain any security interest therein, there was a completed "sale" of the goods in question, and defendant had not only rightful possession of items, but title to them as well. *Elliott v. State*, 149 Ga. App. 579, 254 S.E.2d 900 (1979).

**Customer's selection of goods and placing in shopping cart.** — Where defendant owner of barbecue restaurant continued to purchase large quantities of cut meat from plaintiff market's meat case (thereby leaving the market's meat case empty for other customers) instead of special ordering required meat as requested by plaintiff, plaintiff prevented defendant from paying for meat when defendant again disregarded plaintiff's instructions, and defendant refused to leave the market premises without paying for the meat selected, title to the meat did not pass to the defendant at the time defendant selected it and placed it in



defendant's car so as to serve as a basis for allowing defendant to ignore plaintiff's demand that defendant leave, thereby violating a criminal statute (criminal trespass). *Watson v. State*, 190 Ga. App. 671, 379 S.E.2d 811 (1989).

**Delivery of automobile.** — Where seller delivered possession of automobile to buyer and transaction was complete as between them even though compliance had not yet been made with recording and insurance statutes, buyer was "owner" of the automobile and buyer alone was liable to third party for injuries sustained in accident while buyer was driving automobile. *American Mut. Fire Ins. Co. v. Cotton States Mut. Ins. Co.*, 149 Ga. App. 280, 253 S.E.2d 825 (1979).

The evidence authorized the finding by the fact finder that, pursuant to the parties' understanding, the title to a motor vehicle passed to the buyer at the time the buyer received physical possession, with the seller holding the certificate as security only for the final payment of \$50.00, which document was to be delivered at such time and place as the indebtedness was paid, and that, consequently, the sale was complete and the seller's uninsured motorist coverage on the vehicle was no longer in effect. *Stone v. Nolan*, 171 Ga. App. 644, 320 S.E.2d 781 (1984).

Since there was no explicit agreement to the contrary, a used car dealer acquired title to a car and the right to sell the car to a third party when the car was delivered to the dealer for this purpose; the fact that the dealer did not obtain the certificate of title did not deprive the dealer of title in the car or prevent it from transferring title. *Right Touch of Class, Inc. v. Superior Bank*, 244 Ga. App. 473, 536 S.E.2d 181 (2000); *Mitchell Motors, Inc. v. Barnett*, 249 Ga. App. 639, 549 S.E.2d 445 (2001).

**O.C.G.A. § 11-2-401 creates, in favor of unpaid cash seller, unperfected interest** which, though generally subject to a valid and perfected Article Nine security interest, may on some rare occasions provide relief to the aggrieved cash seller who can substantiate allegations either that a secured party acted in other than good faith or that one of the conditions described in O.C.G.A.

11-9-113 has been met. *Dixie Bonded Whse. & Grain Co. v. Allstate Fin. Corp.*, 693 F. Supp. 1162 (M.D. Ga. 1988).

**Seller's failure to reserve title or obtain security interest.** — Unpaid seller of cotton was an unsecured creditor with no standing to challenge a secured creditor's ownership rights in accounts receivable, where the seller failed to reserve title and did not obtain a security interest in the cotton or the accounts receivable before releasing possession and control of its goods. *Graniteville Co. v. Bleckley Lumber Co.*, 944 F.2d 819 (11th Cir. 1991).

**Seller's security interest not discharged by sale where buyer does not complete terms of sale.** — The security interest of the mortgagee of a mobile home retail installment sales contract was not discharged by a sale to the mobile home dealer by the mortgagee following default by the purchasers where the mortgagee and the dealer agreed that the title to the mobile home was to be transferred to the dealer only after it had paid mortgagee for the mobile home, the dealer did not complete payment for the mobile home, and there was no transfer of the certificate of title or ownership interest to the dealer, nor was there need prior to the resale of the mobile home for the mortgagee to secure a new certificate of title. *Sunnyland Employees' Fed. Credit Union v. Fort Wayne Mtg. Co.*, 182 Ga. App. 5, 354 S.E.2d 645 (1987).

**When owner estopped from asserting title to property sold by another.** — Where one party sells property belonging to another, if latter received proceeds of sale with knowledge of fact that it is proceeds of sale of own property, the seller is estopped from asserting title to property against purchaser; if party to whom property belongs receives proceeds from sale of property in ignorance of fact that it is proceeds from sale of own property, seller is not estopped to assert title against purchaser, but may be required to account for money received. *Stubbs v. Smith*, 248 Ga. 768, 285 S.E.2d 720 (1982).

**Definition of "sale" used in drug prosecution.** — There was no error, in a prosecution for trafficking in cocaine, in using the language contained in O.C.G.A. § 11-2-401(2)

**General Consideration (Cont'd)**

when giving the jury a definition of the word "sale." *Quinn v. State*, 171 Ga. App. 590, 320 S.E.2d 827 (1984).

**Sale of marijuana was completed** when defendant caused marijuana to be delivered to undercover agent. *Freeman v. State*, 163 Ga. App. 71, 292 S.E.2d 563 (1982).

**Sale of marijuana not completed.** — Offense of selling marijuana was not complete upon defendants' leading of undercover agents to the site of the marijuana since an agreed-upon weighing, loading, and delivering had not yet occurred; thus, the substantive trafficking offense did not merge with or extinguish the conspiracy-to-traffic offense. *Meyers v. State*, 174 Ga. App. 161, 329 S.E.2d 293 (1985).

**Factor's purchase of accounts receivable.** — Factor's interest as a good faith purchaser of a cotton buyer's accounts receivable was superior to the interests asserted by unsecured aggrieved sellers, where the factor's actions with respect to the sellers could be characterized as nothing other than honesty in fact and good faith under Article Two of the UCC. *Dixie Bonded Whse. & Grain Co. v. Allstate Fin. Corp.*, 755 F. Supp. 1543 (M.D. Ga.), *aff'd*, 944 F.2d 819 (11th Cir. 1991).

**Cited** in *Wooden v. Michigan Nat'l Bank*, 117 Ga. App. 852, 162 S.E.2d 222 (1968); *First Nat'l Bank & Trust Co. v. Smithloff*, 119 Ga. App. 284, 167 S.E.2d 190 (1969); *First Nat'l Bank & Trust Co. v. McElmurray*, 120 Ga. App. 134, 169 S.E.2d 720 (1969); *Marshall v. Universal C.I.T. Credit Corp.*, 121 Ga. App. 751, 175 S.E.2d 84 (1970); *Rockwin Corp. v. Kincaid*, 124 Ga. App. 570, 184 S.E.2d 509 (1971); *Tri-County Livestock Auction Co. v. Bank of Madison*, 228 Ga. 325, 185 S.E.2d 393 (1971); *Giant Peanut & Grain Co. v. Long Mfg. Co.*, 129 Ga. App. 685, 201 S.E.2d 26 (1973); *International Harvester Credit Corp. v. Associates Fin. Servs. Co.*, 133 Ga. App. 488, 211 S.E.2d 430 (1974); *Redfern Meats, Inc. v. Hertz Corp.*, 134 Ga. App. 381, 215 S.E.2d 10 (1975); *McDuffie v. State*, 135 Ga. App. 616, 218 S.E.2d 320 (1975); *Cone Mills Corp. v. A.G. Estes, Inc.*, 399 F. Supp. 938 (N.D. Ga. 1975); *Spurlock v. Commercial Banking Co.*, 138 Ga. App. 892, 227 S.E.2d 790 (1976); *Canal*

*Ins. Co. v. P & J Truck Lines*, 145 Ga. App. 545, 244 S.E.2d 81 (1978); *Johnson v. State*, 154 Ga. App. 353, 268 S.E.2d 406 (1980); *Madewell v. Marietta Dodge, Inc.*, 506 F. Supp. 286 (N.D. Ga. 1980); *Leader Nat'l Ins. Co. v. Smith*, 162 Ga. App. 612, 292 S.E.2d 456 (1982); *Palmer v. State*, 250 Ga. 219, 297 S.E.2d 22 (1982); *Robinson v. State*, 164 Ga. App. 652, 297 S.E.2d 751 (1982); *Ansley Park Plumbing & Heating Co. v. Mikart, Inc.*, 9 Bankr. 144 (Bankr. N.D. Ga. 1981); *Graniteville Co. v. Bleckley Lumber Co.*, 687 F. Supp. 589 (M.D. Ga. 1988); *Cotton States Mut. Ins. Co. v. Gomez*, 192 Ga. App. 76, 383 S.E.2d 567 (1989); *Mail Concepts, Inc. v. Foote & Davies, Inc.*, 200 Ga. App. 778, 409 S.E.2d 567 (1991); *Saffron, Inc. v. Macon Kraft, Inc.*, 134 Bankr. 62 (Bankr. M.D. Ga. 1991); *Superior Bank, FSB v. Human Servs. Employees Credit Union*, 252 Ga. App. 489, 556 S.E.2d 155 (2001).

**Rejection or Revocation of Acceptance**

**Election at time of delivery.** — O.C.G.A. § 11-2-401(4), which provides that a "rejection or other refusal by the buyer to receive or retain the goods, whether or not justified, or a justified revocation of acceptance revests title to the goods in the seller," pertains to an election a buyer may make at the time the goods are presented to the buyer for delivery. *Tennessee-Virginia Constr. Co. v. Willingham*, 117 Ga. App. 290, 160 S.E.2d 444 (1968).

**Return of automobile to dealer.** — The plaintiffs obtained all the rights to an automobile originally held by the defendant when they purchased the automobile from the dealer to whom it had been entrusted. However, after returning the car to the dealer in hopes this would enable plaintiffs to obtain a proper certificate of title, the plaintiffs eventually agreed to give up their claim to the automobile in exchange for the dealer's promise to order them a new and different automobile. This subsequent agreement with the dealer revoked any right or title the plaintiffs had to the automobile in question and revested title back to the original owner, the defendant. *Walker v. Castello*, 187 Ga. App. 196, 369 S.E.2d 527 (1988).



## RESEARCH REFERENCES

**Am. Jur. 2d.** — 67 Am. Jur. 2d, Sales, §§ 390-398. 68A Am. Jur. 2d, Secured Transactions, § 13.

**C.J.S.** — 77A C.J.S., Sales, § 214 et seq.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 2-401.

**ALR.** — Forfeiture by innocent vendor of article sold conditionally and used by vendee in violation of law, 2 ALR 1596.

Taking note for price as waiver of reservation of title under conditional sale, 13 ALR 1044; 55 ALR 1160.

Bankruptcy: rights of trustee in bankruptcy and contract purchaser of chattel remaining in the possession of the bankrupt, 22 ALR 1328.

Validity and effect of provision in contract of sale with reservation of title, for collection of unpaid purchase money after retaking the property, 25 ALR 1490; 43 ALR 1243.

Provision in land contract against removal of buildings as affecting rights of third person under chattel mortgage or conditional sale, 30 ALR 542.

Rule that title passes on delivery to carrier as applicable to shipment in "pool" car for several purchasers, 36 ALR 410.

Who bears loss incident to destruction of goods sold conditionally, 38 ALR 1319.

Passing of title to goods by acceptance of draft for purchase price, with warehouse receipt attached, or by transfer of draft with receipt, 55 ALR 1116.

Time and place of passage of title to goods shipped under bill of lading, with draft attached, consigning them to shipper's order, 60 ALR 677.

Rights and remedies as between parties to a conditional sale after the seller has repossessed himself of the property, 83 ALR 959; 99 ALR 1288; 49 ALR2d 15.

Validity as against third person of sale or pledge of goods, or receipts issued for goods, retained in warehouse on premises of seller or pledgor (field warehousing), 133 ALR 209.

Rights and duties of parties to conditional sales contract as to resale of repossessed property, 49 ALR2d 15.

Punitive damages for wrongful seizure of chattel by one claiming security interest, 35 ALR3d 1016.

## 11-2-402. Rights of seller's creditors against sold goods.

(1) Except as provided in subsections (2) and (3) of this Code section, rights of unsecured creditors of the seller with respect to goods which have been identified to a contract for sale are subject to the buyer's rights to recover the goods under this article (Code Sections 11-2-502 and 11-2-716).

(2) A creditor of the seller may treat a sale or an identification of goods to a contract for sale as void if as against him a retention of possession by the seller is fraudulent under any rule of law of the state where the goods are situated, except that retention of possession in good faith and current course of trade by a merchant-seller for a commercially reasonable time after a sale or identification is not fraudulent.

(3) Nothing in this article shall be deemed to impair the rights of creditors of the seller:

(a) Under the provisions of the article on secured transactions (Article 9 of this title); or

(b) Where identification to the contract or delivery is made not in current course of trade but in satisfaction of or as security for a preexisting claim for money, security, or the like and is made under



circumstances which under any rule of law of the state where the goods are situated would apart from this article constitute the transaction a fraudulent transfer or voidable preference. (Code 1933, § 109A-2—402, enacted by Ga. L. 1962, p. 156, § 1.)

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 6 Am. Jur. 2d, Attachment and Garnishment, § 90. 15A Am. Jur. 2d, Commercial Code, § 11. 67 Am. Jur. 2d, Sales, §§ 462-464. 68A Am. Jur. 2d, Secured Transactions, § 13.

**C.J.S.** — 37 C.J.S., Fraudulent Conveyances, § 212.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 2-402.

**ALR.** — Validity as against third person of sale or pledge of goods, or receipts issued for goods, retained in warehouse on premises of seller or pledgor (field warehousing), 133 ALR 209.

### 11-2-403. Power to transfer; good faith purchase of goods; “entrusting.”

(1) A purchaser of goods acquires all title which his transferor had or had power to transfer except that a purchaser of a limited interest acquires rights only to the extent of the interest purchased. A person with voidable title has power to transfer a good title to a good faith purchaser for value. When goods have been delivered under a transaction of purchase the purchaser has such power even though:

- (a) The transferor was deceived as to the identity of the purchaser; or
- (b) The delivery was in exchange for a check which is later dishonored; or
- (c) It was agreed that the transaction was to be a “cash sale”; or
- (d) The delivery was procured through fraud punishable as larcenous under the criminal law.

(2) Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business.

(3) “Entrusting” includes any delivery and any acquiescence in retention of possession regardless of any condition expressed between the parties to the delivery or acquiescence and regardless of whether the procurement of the entrusting or the possessor’s disposition of the goods have been such as to be larcenous under the criminal law.

(4) The rights of other purchasers of goods and of lien creditors are governed by the articles on secured transactions (Article 9 of this title), bulk transfers (Article 6 of this title), and documents of title (Article 7 of this title). (Code 1933, § 109A-2—403, enacted by Ga. L. 1962, p. 156, § 1.)

**Cross references.** — Effect of sale to person without notice of equity, § 23-1-19.

**Law reviews.** — For article discussing, “Voidability of Minors’ Contracts: A Feudal

Doctrine in a Modern Economy," see 1 Ga. L. Rev. 205 (1967). For article discussing the resolution of conflicting claims to goods between an unsecured seller of goods and a creditor of a buyer claiming under an after-acquired property clause, see 28 Mercer L. Rev. 625 (1977). For article, "The Good Faith Purchase Idea and the Uniform

Commercial Code," see 15 Ga. L. Rev. 605 (1981). For article surveying developments in Georgia commercial law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 33 (1981).

For comment on *Hewitt v. Malone*, 105 Ga. App. 281, 124 S.E.2d 501 (1962), see 25 Ga. B.J. 218 (1962).

## JUDICIAL DECISIONS

### ANALYSIS

#### GENERAL CONSIDERATION

#### GOOD FAITH PURCHASER FOR VALUE

#### BUYER IN ORDINARY COURSE OF BUSINESS

#### SECURITY INTEREST

#### APPLICATION

### General Consideration

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Code 1933, § 96-207 are included in the annotations for this section.

**Subsection (2) and (3) applied only to the owner of the goods** as the entruster. *Superior Bank, FSB v. Human Servs. Employees Credit Union*, 252 Ga. App. 489, 556 S.E.2d 155 (2001).

**Exception to rule that seller can convey no greater title than possesses.** — O.C.G.A. § 11-2-403 and former § 11-9-306 (see now O.C.G.A. §§ 11-9-102 and 11-9-315) provide precisely limited exception to common-law rule that seller can convey no greater title than seller has as to rights of an entruster, because as between the seller and an innocent purchaser, it is entruster whose act or omission enables wrongdoer to commit fraud. *Commercial Credit Equip. Corp. v. Bates*, 159 Ga. App. 910, 285 S.E.2d 560 (1981).

**Divestment of true owner's title.** — Where owner of personal property gives another apparent right to sell such property by reason of having conferred upon the other indicia of title, a sale to an innocent purchaser divests true owner's title. *Teague Ford Sales, Inc. v. Commercial Auto Loan Corp.*, 96 Ga. App. 129, 99 S.E.2d 524 (1957) (decided under former § 96-207).

**Special application of O.C.G.A. § 23-1-14.** — Rule that where owner has given to another such evidence of right to sell goods as, according to custom of trade or common

understanding of the world, usually accompanies authority of disposal, or has given external indicia of the right of disposing of property, sale to an innocent purchaser divests true owner's title, is merely a special application of rule embodied in O.C.G.A. § 23-1-14, that, when one of two innocent persons must suffer by act of third person, owner who put it in power of third person to inflict injury shall bear loss. *Cook Motor Co. v. Richardson*, 103 Ga. App. 129, 118 S.E.2d 502 (1961) (decided under Code 1933, § 96-207).

**Innocent purchaser protected.** — The estoppel is based on justice of protecting an innocent purchaser against damage that would otherwise come to purchaser through original act of owner in making it possible for one, whether immediate or in succession, to appear as rightfully entitled to sell that for which innocent party parts with money or property. *Morris v. Courts*, 59 Ga. App. 666, 1 S.E.2d 687 (1939) (decided under former § 96-207).

**O.C.G.A. § 11-2-403(2) and (3) are applicable only to owners of goods.** *United Carolina Bank v. Sistrunk*, 158 Ga. App. 107, 279 S.E.2d 272 (1981).

Where plaintiff was not the owner of a mobile home, it could not be its entruster, and hence defendant's contention that the remedy provided by O.C.G.A. § 11-2-403(2) and (3) applied was without merit. *Sunnyland Employees' Fed. Credit Union v. Fort Wayne Mtg. Co.*, 182 Ga. App. 5, 354 S.E.2d 645 (1987).

**Merchant.** — O.C.G.A. § 11-2-403 requires, from an objective viewpoint, that the

**General Consideration (Cont'd)**

entruster know, or in the exercise of reasonable diligence should know, that the entrustor placed the goods with one who might appear to third persons to be a dealer in the type of goods in question, and where entrustor met entrustee at an auction bidding for the litigated tractor, agreed for entrustee to install equipment on tractor and visited entrustee's repair shop, entrustee could reasonably appear to be a merchant. *Perez-Medina v. First Team Auction, Inc.*, 206 Ga. App. 719, 426 S.E.2d 397 (1992).

**Cited in** *Charles S. Martin Distrib. Co. v. Banks*, 111 Ga. App. 538, 142 S.E.2d 309 (1965); *First Nat'l Bank & Trust Co. v. Smithloff*, 119 Ga. App. 284, 167 S.E.2d 190 (1969); *First Nat'l Bank & Trust Co. v. McElmurray*, 120 Ga. App. 134, 169 S.E.2d 720 (1969); *Marshall v. Universal C.I.T. Credit Corp.*, 121 Ga. App. 751, 175 S.E.2d 84 (1970); *Greater S. Distrib. Co. v. Usry*, 124 Ga. App. 525, 184 S.E.2d 486 (1971); *Rockwin Corp. v. Kincaid*, 124 Ga. App. 570, 184 S.E.2d 509 (1971); *Tri-County Livestock Auction Co. v. Bank of Madison*, 228 Ga. 325, 185 S.E.2d 393 (1971); *International Harvester Credit Corp. v. Commercial Credit Equip. Corp.*, 125 Ga. App. 477, 188 S.E.2d 110 (1972); *Cone Mills Corp. v. A.G. Estes, Inc.*, 399 F. Supp. 938 (N.D. Ga. 1975); *Chastain-Roberts Co. v. Better Brands, Inc.*, 141 Ga. App. 186, 233 S.E.2d 5 (1977); *Sylvester Motor & Tractor Co. v. Farmers Bank*, 153 Ga. App. 614, 266 S.E.2d 293 (1980); *Commercial Credit Equip. Corp. v. Bates*, 154 Ga. App. 71, 267 S.E.2d 469 (1980); *McConnell v. Barrett*, 154 Ga. App. 767, 270 S.E.2d 13 (1980); *Hanington v. Palmer*, 103 Bankr. 348 (Bankr. M.D. Ga. 1989).

**Good Faith Purchaser for Value**

**Proof of ownership not required.** — There is no requirement that a good faith purchaser for value receive a bill of sale or other proof of ownership before the purchaser can hold good title to a tractor. *Brown v. Allen*, 203 Ga. App. 894, 418 S.E.2d 153 (1992).

**One holding perfected security interest in after-acquired property.** — Where seller did not perfect purchase money security inter-

est, lien of security instrument previously perfected by filing held by plaintiff bank covering after-acquired property attached to property sold when it came into possession of buyer, even though at that time buyer had only voidable title, having paid with bad check, thus giving bank priority over the seller as a purchaser for value, provided bank had acted in good faith. *Central Bank v. American Charms, Inc.*, 149 Ga. App. 218, 253 S.E.2d 857 (1979).

**Bank was a good faith purchaser** for value of certain cars under the following circumstances: The proprietor of a used-car business maintained a special checking account with the bank; the proprietor purchased cars from a car auction company with checks drawn upon this account; the proprietor then executed a promissory note to the bank, which loaned the proprietor the purchase price and took a security interest in the car; the account became overdrawn and the bank refused to honor the checks made out to the auction company. *Georgia Cas. & Sur. Co. v. Tennille Banking Co. (In re Smith)*, 51 Bankr. 904 (Bankr. M.D. Ga. 1985).

**Dealer acquiring vehicle from forger.** — Automobile dealer, who acquired a vehicle from a person who gave a forged check to its owner and then purported to "sell" the vehicle to the dealer, was a good faith purchaser for value. *Charles Evans BMW, Inc. v. Williams*, 196 Ga. App. 230, 395 S.E.2d 650 (1990).

**Buyer in Ordinary Course of Business**

**Plaintiffs in attachment proceedings.** — Where plaintiffs in attachment proceedings are seeking refund of down payment after rescission of contract, fact that debt is to be satisfied by execution sale of attached mobile home does not make them buyers in ordinary course of business. *Troy Lumber Co. v. Williams*, 124 Ga. App. 636, 185 S.E.2d 580 (1971).

**Security Interest**

**Security interest continues in collateral** notwithstanding sale, exchange, or other disposition, unless authorized by secured party. *Commercial Credit Equip. Corp. v. Bates*, 159 Ga. App. 910, 285 S.E.2d 560 (1981).



**Priority of entruster's security interest.** — Where financing statement giving notice of interest of entruster in office machines entrusted to a bankrupt was signed by debtor, incorporated a security agreement and adequately described collateral, and was filed prior to filing of a bank's financing statement covering inventory, equipment, furniture, and fixtures, the prior security interest must prevail. *First Nat'l Bank & Trust Co. v. Olivetti Corp. of Am.*, 130 Ga. App. 896, 204 S.E.2d 781 (1974).

### Application

**Placing automobile in hands of dealer.** — Delivery of automobiles by plaintiff, under contract of sale, to one known by plaintiff to be a dealer in used automobiles in Georgia, without taking any security therefor, and with whom plaintiff had done business in a similar manner many times before, constituted such evidence of right to sell plaintiff's automobiles as according to custom of trade or common understanding of the world usually accompanies authority to dispose of them; plaintiff gave to dealer possession of the automobiles under external indicia of ownership, and dealer's subsequent sale to defendant divested plaintiff of title. *Cook Motor Co. v. Richardson*, 103 Ga. App. 129, 118 S.E.2d 502 (1961).

Defendant, by placing automobile in hands of merchant dealing in automobiles, gives latter power to transfer all defendant's rights to plaintiff buyer in ordinary course of business, and any limitation defendant placed upon authority of merchant is of no moment and not material to the issues. *Christopher v. McGehee*, 124 Ga. App. 310, 183 S.E.2d 624, *aff'd*, 228 Ga. 466, 186 S.E.2d 97 (1971).

Where the evidence showed that an automobile dealer entrusted a car to an automobile sales and leasing firm which was a merchant dealing in such goods, under O.C.G.A. § 11-2-403 the sales and leasing firm was empowered to transfer ownership interest in the car to a buyer in the ordinary course of business. *Perimeter Ford, Inc. v. Edwards*, 197 Ga. App. 747, 399 S.E.2d 520 (1990).

Even though a car dealer did not intend to sell the car to another dealer and authorize it to sell the car to a third party until the latter dealer's check cleared, the facts sup-

ported the conclusion that the first dealer entrusted the car to the other dealer with the understanding that the latter would arrange for financing and sell the car to the third party, who, as a buyer in the ordinary course of business, obtained all of the first dealer's interest to the car. *Right Touch of Class, Inc. v. Superior Bank*, 244 Ga. App. 473, 536 S.E.2d 181 (2000); *Mitchell Motors, Inc. v. Barnett*, 249 Ga. App. 639, 549 S.E.2d 445 (2001).

**Leaving purchased truck with dealer for modifications.** — Where truck dealer sells same truck to two customers successively, first purchaser is estopped from asserting otherwise good claim to ownership against subsequent purchaser and possessor where the first purchaser allowed truck to stay under control of dealer after transaction so as to effect modifications of truck amounting to an "entrusting" or acquiescence under O.C.G.A. § 11-2-403, giving the dealer power to transfer all rights in the truck. *Simson v. Moon*, 137 Ga. App. 82, 222 S.E.2d 873 (1975), *cert. dismissed*, 236 Ga. 786, 225 S.E.2d 314 (1976).

**Automobile dealer "entrusted" cars to a leasing firm** even though the vehicles were delivered directly to the firm's customers, where the delivery of the cars was simultaneous with the execution of lease agreements. *Classic Cadillac v. World Omni Leasing, Inc.*, 199 Ga. App. 115, 404 S.E.2d 452 (1991).

**Authority of automobile broker.** — O.C.G.A. § 11-2-403(2) was inapplicable to the sale of an automobile by an automobile broker where the automobile owner's son indicated acceptance of a lower selling price in a telephone conversation with a salesperson for the automobile broker; the broker was acting within its authority in selling the automobile. *McDowell v. Owens*, 170 Ga. App. 421, 317 S.E.2d 275 (1984).

**Title revoked upon return of automobile to dealer.** — The plaintiffs obtained all the rights to an automobile originally held by the defendant when they purchased the automobile from the dealer to whom it had been entrusted. However, after returning the car to the dealer in hopes this would enable the dealer to obtain a proper certificate of title, the plaintiffs eventually agreed to give up their claim to the automobile in exchange for the dealer's promise to order

**Application** (Cont'd)

them a new and different automobile. This subsequent agreement with the dealer revoked any right or title the plaintiffs had to the automobile in question and revested title back to the original owner, the defendant. *Walker v. Castello*, 187 Ga. App. 196, 369 S.E.2d 527 (1988).

**Where car is purchased by check later found to be worthless**, and where such car is put into possession of purchaser and is later sold by original purchaser to innocent purchaser for valuable consideration, trover will not lie for original seller to recover property. *Gouldman-Taber Pontiac, Inc. v. Thomas*, 96 Ga. App. 279, 99 S.E.2d 711 (1957) (decided under former § 96-207).

Where, under contract of sale of automobiles, by terms of which payment was to be made in cash, vendor delivered possession of automobiles to vendee, accepted in payment a check or draft which later was found to be worthless, and where such vendee, being in possession of automobiles, later sold the same to an innocent purchaser for value, trover would not lie to aid the original seller in recovering the property from the possession of the second vendee. *Cook Motor Co. v. Richardson*, 103 Ga. App. 129, 118 S.E.2d 502 (1961).

**Entrustment of stolen corn.** — Plaintiff could not recover in trover and conversion from defendant grain elevator company for corn sold to defendant by plaintiff's manager, who had pocketed the proceeds, where the purchases were made in the ordinary course of business, and, since the allegedly stolen goods had been entrusted to the manager by plaintiff, the manager had the power to transfer all rights of the entruster to defendant. *Locke v. Arabi Grain & Eleva-*

*tor Co.*, 197 Ga. App. 854, 399 S.E.2d 705 (1990).

**Entrustment of auctioned tractor.** — Auctioned tractor was entrusted despite the fact that it was placed in merchant's possession only for the purpose of installing equipment for plaintiff rather than for sale. *Perez-Medina v. First Team Auction, Inc.*, 206 Ga. App. 719, 426 S.E.2d 397 (1992).

**Horses not included with farm.** — Purchasers of a horse farm did not acquire title to horses as good faith purchasers for value, even though the horses were listed both on a security agreement as collateral for a loan the purchasers had made to the vendor and in the sales agreement for the farm, where the horses in question were awarded to the vendor's former partner as part of a judgment and the partner obtained the horses through levy on the judgment, so that the vendor had no title in the horses and had no legal right to sell what was not owned. *Russell v. Lawrence*, 234 Ga. App. 612, 507 S.E.2d 161 (1998).

**Delivered stock certificate bearing blank assignment and power of attorney.** — Blank assignment and power of attorney endorsed on delivered stock certificate estops transferor from claiming any further interest or title in stock as against a bona fide transferee. This concept is based upon the principle that where an owner has given to another external indicia of right to dispose of property, a sale to an innocent purchaser divests true owner's title, and upon principle that when one of two innocent persons must suffer by act of a third person, the one who puts it in the power of the third person to inflict the injury shall bear the loss. *Morris v. Courts*, 59 Ga. App. 666, 1 S.E.2d 687 (1939) (decided under former § 96-207).

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 67 Am. Jur. 2d, Sales, §§ 432-464. 68A Am. Jur. 2d, Secured Transactions, § 13. (decided under former § 96-207).

**C.J.S.** — 31 C.J.S., Estoppel and Waiver, §§ 118, 119.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 2-403.

**ALR.** — Factor's failure to account for

proceeds of sale as affecting rights of seller and purchaser inter se, 50 ALR 1301.

Purchaser's right to protection under factor's act where transaction involves exchange of goods, 132 ALR 525.

Selling agent's power to exchange or barter principal's personal property, 44 ALR2d 1058.

Rights and duties of parties to conditional

sales contract as to resale of repossessed property, 49 ALR2d 15.

Relative rights as between assignee of conditional seller and a subsequent buyer from the conditional seller after repossession or the like, 72 ALR2d 342.

Sales: what is "entrusting" goods to merchant dealer under UCC § 2-403, 59 ALR4th 567.

## PART 5

### PERFORMANCE

**Cross references.** — Performance of contracts generally, § 13-4-20 et seq.

#### 11-2-501. Insurable interest in goods; manner of identification of goods.

(1) The buyer obtains a special property and an insurable interest in goods by identification of existing goods as goods to which the contract refers even though the goods so identified are nonconforming and he has an option to return or reject them. Such identification can be made at any time and in any manner explicitly agreed to by the parties. In the absence of explicit agreement identification occurs:

(a) When the contract is made if it is for the sale of goods already existing and identified;

(b) If the contract is for the sale of future goods other than those described in paragraph (c) of this subsection, when goods are shipped, marked, or otherwise designated by the seller as goods to which the contract refers;

(c) When the crops are planted or otherwise become growing crops or the young are conceived if the contract is for the sale of unborn young to be born within 12 months after contracting or for the sale of crops to be harvested within 12 months or the next normal harvest season after contracting whichever is longer.

(2) The seller retains an insurable interest in goods so long as title to or any security interest in the goods remains in him and where the identification is by the seller alone he may until default or insolvency or notification to the buyer that the identification is final substitute other goods for those identified.

(3) Nothing in this Code section impairs any insurable interest recognized under any other statute or rule of law. (Code 1933, § 109A-2—501, enacted by Ga. L. 1962, p. 156, § 1.)

**Law reviews.** — For article discussing the resolution of conflicting claims to goods between an unsecured seller of goods and a creditor of a buyer claiming under an

after-acquired property clause, see 28 Mercer L. Rev. 625 (1977). For article, "Impracticability As Risk Allocation: The Effect of Changed Circumstances upon Contract Ob-



ligations for the Sale of Goods,” see 22 Ga. L. Rev. 503 (1988).

### JUDICIAL DECISIONS

**Cited** in First Nat’l Bank & Trust Co. v. Smithloff, 119 Ga. App. 284, 167 S.E.2d 190 (1969); Promech Corp. v. Brodhead-Garrett Co., 131 Ga. App. 314, 205 S.E.2d 511 (1974); International Harvester Credit Corp. v. Associates Fin. Servs. Co., 133 Ga. App. 488, 211 S.E.2d 430 (1974); Trust Co. v.

Thompson, 133 Ga. App. 866, 212 S.E.2d 498 (1975); Redfern Meats, Inc. v. Hertz Corp., 134 Ga. App. 381, 215 S.E.2d 10 (1975); Western Publishing Co. v. International Horizons, Inc., 21 Bankr. 414 (N.D. Ga. 1982).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 43 Am. Jur. 2d, Insurance, § 962.

**C.J.S.** — 44 C.J.S., Insurance, §§ 218-221.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 2-501.

### 11-2-502. Buyer’s right to goods on seller’s insolvency.

(1) Subject to subsections (2) and (3) of this Code section and even though the goods have not been shipped a buyer who has paid a part or all of the price of goods in which the buyer has a special property under the provisions of Code Section 11-2-501 may on making and keeping good a tender of any unpaid portion of their price recover them from the seller if:

(a) In the case of goods bought for personal, family, or household purposes, the seller repudiates or fails to deliver as required by the contract; or

(b) In all cases, the seller becomes insolvent within ten days after receipt of the first installment on their price.

(2) The buyer’s right to recover the goods under paragraph (a) of subsection (1) of this Code section vests upon acquisition of a special property, even if the seller had not then repudiated or failed to deliver.

(3) If the identification creating the buyer’s special property has been made by the buyer he or she acquires the right to recover the goods only if they conform to the contract for sale. (Code 1933, § 109A-2—502, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 2001, p. 362, § 7.)

**The 2001 amendment**, effective July 1, 2001, in the introductory language of subsection (1), substituted “subsections (2) and (3)” for “subsection (2)” near the beginning, substituted “the buyer” for “he” in the middle, and substituted “if:” for “if the seller becomes insolvent within ten days after receipt of the first installment on their price.” at the end, and added paragraphs

(1)(a) and (1)(b); added subsection (2); redesignated former subsection (2) as present subsection (3), and, in subsection (3), substituted “the buyer’s” for “his” and substituted “or she” for “he”.

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 2001, “buyer he or she” was substituted for “buyer or she” in subsection (3).

## RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 2-502.

**11-2-503. Manner of seller's tender of delivery.**

(1) Tender of delivery requires that the seller put and hold conforming goods at the buyer's disposition and give the buyer any notification reasonably necessary to enable him to take delivery. The manner, time, and place for tender are determined by the agreement and this article, and in particular:

(a) Tender must be at a reasonable hour, and if it is of goods they must be kept available for the period reasonably necessary to enable the buyer to take possession; but

(b) Unless otherwise agreed the buyer must furnish facilities reasonably suited to the receipt of the goods.

(2) Where the case is within Code Section 11-2-504 respecting shipment tender requires that the seller comply with its provisions.

(3) Where the seller is required to deliver at a particular destination tender requires that he comply with subsection (1) of this Code section and also in any appropriate case tender documents as described in subsections (4) and (5) of this Code section.

(4) Where goods are in the possession of a bailee and are to be delivered without being moved:

(a) Tender requires that the seller either tender a negotiable document of title covering such goods or procure acknowledgment by the bailee of the buyer's right to possession of the goods; but

(b) Tender to the buyer of a nonnegotiable document of title or of a written direction to the bailee to deliver is sufficient tender unless the buyer seasonably objects, and receipt by the bailee of notification of the buyer's rights fixes those rights as against the bailee and all third persons; but risk of loss of the goods and of any failure by the bailee to honor the nonnegotiable document of title or to obey the direction remains on the seller until the buyer has had a reasonable time to present the document or direction, and a refusal by the bailee to honor the document or to obey the direction defeats the tender.

(5) Where the contract requires the seller to deliver documents:

(a) He must tender all such documents in correct form, except as provided in this article with respect to bills of lading in a set (subsection (2) of Code Section 11-2-323); and

(b) Tender through customary banking channels is sufficient and dishonor of a draft accompanying the documents constitutes nonacceptance or rejection. (Code 1933, § 109A-2—503, enacted by Ga. L. 1962, p. 156, § 1.)

**Cross references.** — Bailments generally, § 44-12-40 et seq.

### JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity in the provisions, decisions under former Code 1933, § 20-1106 are included in the annotations for this section.

**Tender defined.** — Tender is an offer to deliver something, made in pursuance of some contract or obligation, under such circumstances as to require no further act from party making it to complete transfer; it may be either of money or of specific articles. *Carnation v. Pridgen*, 84 Ga. App. 768, 67 S.E.2d 485 (1951) (decided under Code 1933, § 20-1106).

**Tender not required where party states it will be refused.** — It is unnecessary to make a tender where party to whom offer is made states that tender will be refused if made. *Carnation v. Pridgen*, 84 Ga. App. 768, 67 S.E.2d 485 (1951) (decided under Code 1933, § 20-1106).

**Vendee breaching by refusing to accept**

**goods may not assert lack of delivery as defense.** — Defendant, maker of note, having breached contract by refusing to accept goods purchased thereunder, the contract by its terms not subject to cancellation, and vendor having elected to store goods for vendee, and having notified vendee of disposition of the goods, defendant cannot set up as a defense to suit on the note that contract merchandise was not delivered to vendee according to contract terms. *Carnation v. Pridgen*, 84 Ga. App. 768, 67 S.E.2d 485 (1951) (decided under Code 1933, § 20-1106).

**Cited in** *Undercofler v. Eastern Air Lines*, 221 Ga. 824, 147 S.E.2d 436 (1966); *Hill Aircraft & Leasing Corp. v. Planes, Inc.*, 169 Ga. App. 161, 312 S.E.2d 119 (1983); *Kemira, Inc. v. Miller (In re Lemco Gypsum, Inc.)*, 95 Bankr. 860 (Bankr. S.D. Ga. 1989).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 67 Am. Jur. 2d, Sales, §§ 520, 521, 527, 545.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 2-503.

**ALR.** — Act done on same day as; but before another act or event, as satisfying a statutory requirement that the former must precede the latter, 21 ALR 1216.

Right to deposit goods in street as incident of loading or unloading, 23 ALR 816.

When instrument deemed payable at a "special place" within the provision of the

Uniform Negotiable Instruments Law making ability and willingness to pay at such place equivalent to tender, 24 ALR 1050.

Construction and effect of provision in contract of sale as to declaration by seller of carrier vessel, 27 ALR 165.

Failure to ship by carrier designated by buyer as affecting passing of title, 31 ALR 955.

Upon whom loss from theft or the like falls, where seller turns over goods at buyer's premises, 50 ALR2d 330.

### 11-2-504. Shipment by seller.

Where the seller is required or authorized to send the goods to the buyer and the contract does not require him to deliver them at a particular destination, then unless otherwise agreed he must:



(a) Put the goods in the possession of such a carrier and make such a contract for their transportation as may be reasonable having regard to the nature of the goods and other circumstances of the case; and

(b) Obtain and promptly deliver or tender in due form any document necessary to enable the buyer to obtain possession of the goods or otherwise required by the agreement or by usage of trade; and

(c) Promptly notify the buyer of the shipment.

Failure to notify the buyer under paragraph (c) of this Code section or to make a proper contract under paragraph (a) of this Code section is a ground for rejection only if material delay or loss ensues. (Code 1933, § 109A-2—504, enacted by Ga. L. 1962, p. 156, § 1.)

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 67 Am. Jur. 2d, Sales, §§ 528, 529.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 2-504.

**ALR.** — Failure to ship by carrier designated by buyer as affecting passing of title, 31 ALR 955.

Means of transportation contemplated by provision relating to “freight rates” in contract, 83 ALR 1306.

Buyer’s duty to give seller instructions to ship where former has not exercised his option under contract to require shipment before time specified, 119 ALR 1495.

#### 11-2-505. Seller’s shipment under reservation.

(1) Where the seller has identified goods to the contract by or before shipment:

(a) His procurement of a negotiable bill of lading to his own order or otherwise reserves in him a security interest in the goods. His procurement of the bill to the order of a financing agency or of the buyer indicates in addition only the seller’s expectation of transferring that interest to the person named.

(b) A nonnegotiable bill of lading to himself or his nominee reserves possession of the goods as security but except in a case of conditional delivery (subsection (2) of Code Section 11-2-507) a nonnegotiable bill of lading naming the buyer as consignee reserves no security interest even though the seller retains possession of the bill of lading.

(2) When shipment by the seller with reservation of a security interest is in violation of the contract for sale it constitutes an improper contract for transportation within Code Section 11-2-504 but impairs neither the rights given to the buyer by shipment and identification of the goods to the contract nor the seller’s powers as a holder of a negotiable document. (Code 1933, § 109A-2—505, enacted by Ga. L. 1962, p. 156, § 1.)

## JUDICIAL DECISIONS

**Cited** in Georgia Ports Auth. v. Mitsubishi Int'l Corp., 156 Ga. App. 304, 274 S.E.2d 699 (1980).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 67 Am. Jur. 2d, Sales, § 415. 68A Am. Jur. 2d, Secured Transactions, § 13.      **U.L.A.** — Uniform Commercial Code (U.L.A.) § 2-505.

**C.J.S.** — 13 C.J.S., Carriers, §§ 398-401. 80 C.J.S., Shipping, § 260.

**11-2-506. Rights of financing agency.**

(1) A financing agency by paying or purchasing for value a draft which relates to a shipment of goods acquires to the extent of the payment or purchase and in addition to its own rights under the draft and any document of title securing it any rights of the shipper in the goods including the right to stop delivery and the shipper's right to have the draft honored by the buyer.

(2) The right to reimbursement of a financing agency which has in good faith honored or purchased the draft under commitment to or authority from the buyer is not impaired by subsequent discovery of defects with reference to any relevant document which was apparently regular on its face. (Code 1933, § 109A-2—506, enacted by Ga. L. 1962, p. 156, § 1.)

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 68A Am. Jur. 2d, Secured Transactions, § 13.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 2-506.

**ALR.** — Repossession by secured seller as affecting his right to recover on note or other obligation given as a down payment, 49 ALR3d 364.

**11-2-507. Effect of seller's tender; delivery on condition.**

(1) Tender of delivery is a condition to the buyer's duty to accept the goods and, unless otherwise agreed, to his duty to pay for them. Tender entitles the seller to acceptance of the goods and to payment according to the contract.

(2) Where payment is due and demanded on the delivery to the buyer of goods or documents of title, his right as against the seller to retain or dispose of them is conditional upon his making the payment due. (Code 1933, § 109A-2—507, enacted by Ga. L. 1962, p. 156, § 1.)

## JUDICIAL DECISIONS

**Cited in** B & P Lumber Co. v. First Nat'l Bank, 147 Ga. App. 762, 250 S.E.2d 505 (1978).

## RESEARCH REFERENCES

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 2-507.

**ALR.** — Effect of premature tender of goods which is refused by the buyer, 47 ALR 193.

Necessity of proving specific reason for

injury or damage to shipment of fruit or vegetables in order to overcome prima facie case against carrier where shipment was received in good condition and delivered in bad condition, 115 ALR 1274.

### 11-2-508. Cure by seller of improper tender or delivery; replacement.

(1) Where any tender or delivery by the seller is rejected because nonconforming and the time for performance has not yet expired, the seller may seasonably notify the buyer of his intention to cure and may then within the contract time make a conforming delivery.

(2) Where the buyer rejects a nonconforming tender which the seller had reasonable grounds to believe would be acceptable with or without money allowance the seller may if he seasonably notifies the buyer have a further reasonable time to substitute a conforming tender. (Code 1933, § 109A-2—508, enacted by Ga. L. 1962, p. 156, § 1.)

**Law reviews.** — For article, "Buyer's Right of Rejection: A Quarter Century Under the Uniform Commercial Code, and Recent International Developments," see 13 Ga. L. Rev. 805 (1979).

For note, "David Tunick, Inc. v. Kornfield: Applying U.C.C. Section 2-716 and Uniqueness to a Section 2-508 Analysis," see 45 Mercer L. Rev. 1407 (1994).

## JUDICIAL DECISIONS

**Cited in** Hill Aircraft & Leasing Corp. v. Planes, Inc., 169 Ga. App. 161, 312 S.E.2d

119 (1983); Wolfes v. Terrell, 173 Ga. App. 835, 328 S.E.2d 569 (1985).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 67 Am. Jur. 2d, Sales, §§ 578-584.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 2-508.

**ALR.** — Effect of premature tender of

goods which is refused by the buyer, 47 ALR 193.

Seller's cure of improper tender or delivery under UCC § 2-508, 36 ALR4th 544.

### 11-2-509. Risk of loss in the absence of breach.

(1) Where the contract requires or authorizes the seller to ship the goods by carrier:



(a) If it does not require him to deliver them at a particular destination, the risk of loss passes to the buyer when the goods are duly delivered to the carrier even though the shipment is under reservation (Code Section 11-2-505); but

(b) If it does require him to deliver them at a particular destination and the goods are there duly tendered while in the possession of the carrier, the risk of loss passes to the buyer when the goods are there duly so tendered as to enable the buyer to take delivery.

(2) Where the goods are held by a bailee to be delivered without being moved, the risk of loss passes to the buyer:

(a) On his receipt of a negotiable document of title covering the goods; or

(b) On acknowledgment by the bailee of the buyer's right to possession of the goods; or

(c) After his receipt of a nonnegotiable document of title or other written direction to deliver, as provided in subsection (4)(b) of Code Section 11-2-503.

(3) In any case not within subsection (1) or (2) of this Code section, the risk of loss passes to the buyer on his receipt of the goods if the seller is a merchant; otherwise the risk passes to the buyer on tender of delivery.

(4) The provisions of this Code section are subject to contrary agreement of the parties and to the provisions of this article on sale on approval (Code Section 11-2-327) and on effect of breach on risk of loss (Code Section 11-2-510). (Code 1933, § 109A-2—509, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 1963, p. 188, § 3.)

**Cross references.** — Insurance of agricultural products stored or deposited in public warehouses, § 10-4-25. Bailments generally, § 44-12-40 et seq.

**Law reviews.** — For article, "Impractica-

bility As Risk Allocation: The Effect of Changed Circumstances upon Contract Obligations for the Sale of Goods," see 22 Ga. L. Rev. 503 (1988).

## JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity in the provisions, decisions under former Code 1933, § 96-108 are included in the annotations for this section.

**Provision regarding delays or damage beyond vendor's control.** — Where the contract of sale provided that "vendor shall not be held liable for any loss or damage arising from delays or damages caused by fire or strikes, delays in transportation, or other

causes beyond vendor's control," this stipulation is not such an agreement as would come within proviso of former Code 1933, § 96-108, "unless it is otherwise agreed in the contract of sale." *Wood v. Phoenix Ins. Co.*, 199 Ga. 461, 34 S.E.2d 688 (1945) (decided under Code 1933, § 96-108).

**Cited in** *Georgia Ports Auth. v. Mitsubishi Int'l Corp.*, 156 Ga. App. 304, 274 S.E.2d 699 (1980).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 67 Am. Jur. 2d, Sales, §§ 412, 419-427.

**C.J.S.** — 77A C.J.S., Sales, § 214.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 2-509.

**ALR.** — Provisions of sales contract relating to party to bear the loss from insolvency of or breach of contract by bank through which paper representing price is routed for collection, 99 ALR 1472.

Loss on goods shipped as proratable between carrier's insurer and shipper's insurer, 169 ALR 666.

Upon whom loss from theft or the like falls, where seller turns over goods at buyer's premises, 50 ALR2d 330.

Who bears risk of loss of goods under UCC § 2-509 and § 2-510, 66 ALR3d 145.

**11-2-510. Effect of breach on risk of loss.**

(1) Where a tender or delivery of goods so fails to conform to the contract as to give a right of rejection the risk of their loss remains on the seller until cure or acceptance.

(2) Where the buyer rightfully revokes acceptance he may to the extent of any deficiency in his effective insurance coverage treat the risk of loss as having rested on the seller from the beginning.

(3) Where the buyer as to conforming goods already identified to the contract for sale repudiates or is otherwise in breach before risk of their loss has passed to him, the seller may to the extent of any deficiency in his effective insurance coverage treat the risk of loss as resting on the buyer for a commercially reasonable time. (Code 1933, § 109A-2—510, enacted by Ga. L. 1962, p. 156, § 1.)

**Law reviews.** — For article, "Impracticability As Risk Allocation: The Effect of Changed Circumstances upon Contract Ob-

ligations for the Sale of Goods," see 22 Ga. L. Rev. 503 (1988).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 67 Am. Jur. 2d, Sales, §§ 413, 428-430.

**C.J.S.** — 77A C.J.S., Sales, § 214.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 2-510.

**ALR.** — Applicability of provision in contract of sale for return of article, where article delivered does not answer to description, 30 ALR 321.

Provisions of sales contract relating to

party to bear the loss from insolvency of or breach of contract by bank through which paper representing price is routed for collection, 99 ALR 1472.

Upon whom loss from theft or the like falls, where seller turns over goods at buyer's premises, 50 ALR2d 330.

Who bears risk of loss of goods under UCC § 2-509 and § 2-510, 66 ALR3d 145.

**11-2-511. Tender of payment by buyer; payment by check.**

(1) Unless otherwise agreed tender of payment is a condition to the seller's duty to tender and complete any delivery.

(2) Tender of payment is sufficient when made by any means or in any manner current in the ordinary course of business unless the seller demands payment in legal tender and gives any extension of time reasonably necessary to procure it.

(3) Subject to the provisions of this title on the effect of an instrument on an obligation, payment by check is conditional and is defeated as between the parties by dishonor of the check on due presentment. (Code 1933, § 109A-2—511, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 1997, p. 143, § 11.)

**Law reviews.** — For article discussing the resolution of conflicting claims to goods between an unsecured seller of goods and a

creditor of a buyer claiming under an after-acquired property clause, see 28 Mercer L. Rev. 625 (1977).

### JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity in the provisions, decisions under former Code 1933, § 96-106 are included in the annotations for this section.

**Unless credit is specifically agreed on or is custom of trade, purchase money is due immediately,** and seller may demand payment before delivering goods. *Douglas Motor Sales, Inc. v. Cy Owens, Inc.*, 99 Ga. App. 890, 109 S.E.2d 874 (1959) (decided under Code 1933, § 96-106).

**Title with seller until payment.** — Where goods are sold for cash to be paid on delivery, payment of purchase price is condition precedent to sale; and where purchase price is not paid, title remains in seller, notwithstanding possession of goods by buyer. Fact that payment is to be made by check does not alter above rule. *Douglas Motor Sales, Inc. v. Cy Owens, Inc.*, 99 Ga. App. 890, 109 S.E.2d 874 (1959) (decided under Code 1933, § 96-106).

**Acceleration of debt.** — In action alleging wrongful repossession of automobile, where creditor declared entire principal due upon default of debtor, the latter may tender payment by any means current in the ordinary course of business and if seller demands payment in legal tender, seller must

give reasonable extension of time. *Chrysler Credit Corp. v. Barnes*, 126 Ga. App. 444, 191 S.E.2d 121 (1972).

**Sale of timber.** — In action on contract for sale of stand of timber, payment to be made as timber was cut, averment that plaintiff admitted defendant in possession of premises and defendant commenced cutting and sawing operations must be taken as referring to an entry under a mere license to cut and remove timber in accordance with the contract, defendant to acquire title only to the product as the same was sawed, stacked, and paid for. *Pope v. Barnett*, 49 Ga. App. 59, 163 S.E. 517 (1932) (decided under Code 1933, § 96-106).

**Stopping payment on check after buyer takes possession.** — When payment is stopped on check after defendant purchasers are in possession of automobiles, conversion of automobiles is established by plaintiff seller and prima facie case made out. *Douglas Motor Sales, Inc. v. Cy Owens, Inc.*, 99 Ga. App. 890, 109 S.E.2d 874 (1959) (decided under Code 1933, § 96-106).

**Cited in** *Ford Motor Credit Co. v. Spicer*, 144 Ga. App. 383, 241 S.E.2d 273 (1977); *Harris v. Harbin Lumber Co. (In re Ellison)*, 31 Bankr. 545 (Bankr. M.D. Ga. 1983).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 67 Am. Jur. 2d, Sales, § 668.

**C.J.S.** — 77A C.J.S., Sales, § 207 et seq. 86 C.J.S., Tender, § 21 et seq.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 2-511.

**ALR.** — Tender by check, 23 ALR 1284; 51 ALR 393.



Acceptance of cashier's check from debtor as absolute or conditional payment, 45 ALR 1487.

Right of judgment creditor to demand

that debtor's tender of payment be in cash or by certified check rather than by uncertified check, 82 ALR3d 1199.

### 11-2-512. Payment by buyer before inspection.

(1) Where the contract requires payment before inspection nonconformity of the goods does not excuse the buyer from so making payment unless:

(a) The nonconformity appears without inspection; or

(b) Despite tender of the required documents the circumstances would justify injunction against honor under the provisions of this title (Code Section 11-5-109).

(2) Payment pursuant to subsection (1) of this Code section does not constitute an acceptance of goods or impair the buyer's right to inspect or any of his remedies. (Code 1933, § 109A-2—512, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 2002, p. 995, § 2.)

**The 2002 amendment**, effective July 1, 2002, substituted "(Code Section 11-5-109)" for "(Code Section 11-5-114)" at the end of paragraph (1)(b). See Editor's note for applicability.

**Editor's notes.** — Ga. L. 2002, p. 995, § 8, not codified by the General Assembly, provides that: "This Act shall become effective July 1, 2002, and shall apply to a letter of credit that is issued on or after July 1, 2002."

This Act does not apply to a transaction, event, obligation, or duty arising out of or associated with a letter of credit that was issued before July 1, 2002."

**Law reviews.** — For article, "Buyer's Right of Rejection: A Quarter Century Under the Uniform Commercial Code, and Recent International Developments," see 13 Ga. L. Rev. 805 (1979).

## JUDICIAL DECISIONS

**Cited** in *Givens v. State*, 216 Ga. App. 176, 454 S.E.2d 141 (1995).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 67 Am. Jur. 2d, Sales, § 618.

**C.J.S.** — 77A C.J.S., Sales, § 209.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 2-512.

### 11-2-513. Buyer's right to inspection of goods.

(1) Unless otherwise agreed and subject to subsection (3) of this Code section, where goods are tendered or delivered or identified to the contract for sale, the buyer has a right before payment or acceptance to inspect them at any reasonable place and time and in any reasonable manner. When the seller is required or authorized to send the goods to the buyer, the inspection may be after their arrival.

(2) Expenses of inspection must be borne by the buyer but may be recovered from the seller if the goods do not conform and are rejected.

(3) Unless otherwise agreed and subject to the provisions of this article on C.I.F. contracts (subsection (3) of Code Section 11-2-321), the buyer is not entitled to inspect the goods before payment of the price when the contract provides:

(a) For delivery "C.O.D." or on other like terms; or

(b) For payment against documents of title, except where such payment is due only after the goods are to become available for inspection.

(4) A place or method of inspection fixed by the parties is presumed to be exclusive but unless otherwise expressly agreed it does not postpone identification or shift the place for delivery or for passing the risk of loss. If compliance becomes impossible, inspection shall be as provided in this Code section unless the place or method fixed was clearly intended as an indispensable condition failure of which avoids the contract. (Code 1933, § 109A-2—513, enacted by Ga. L. 1962, p. 156, § 1.)

**Law reviews.** — For article, "Buyer's Right of Rejection: A Quarter Century Under the Uniform Commercial Code, and Recent International Developments," see 13 Ga. L. Rev. 805 (1979).

For note, "Buyer's Right to Revoke Acceptance Against the Automobile Manufacturer for Breach of its Continuing Warranty of Repair or Replacement," see 7 Ga. L. Rev. 711 (1973).

### JUDICIAL DECISIONS

**Cited** in Tennessee-Virginia Constr. Co. v. Willingham, 117 Ga. App. 290, 160 S.E.2d 444 (1968); Atlantic Aluminum & Metal

Distribs. v. Adams, 123 Ga. App. 387, 181 S.E.2d 101 (1971); Givens v. State, 216 Ga. App. 176, 454 S.E.2d 141 (1995).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 67 Am. Jur. 2d, Sales, §§ 610-616, 699.

**C.J.S.** — 77A C.J.S., Sales, § 185 et seq.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 2-513.

**ALR.** — Right of bank which receives for collection draft with bill of lading attached, to deliver bill of lading conditionally to consignee to enable him to inspect the goods, 18 ALR 732.

Buyer's right to inspect at destination where goods are delivered to carrier, 27 ALR 524.

Implied warranty or condition as to quality of timber or lumber, 52 ALR 1536.

Implied warranty of quality, fitness, or condition as affected by buyer's inspection of, or opportunity to inspect, goods, 168 ALR 389.

Provision in bill of lading prohibiting or limiting consignee's right to inspect goods shipped, 25 ALR2d 770.

Time, place and manner of buyer's inspection of goods under UCC § 2-513, 36 ALR4th 726.

**11-2-514. When documents deliverable on acceptance; when on payment.**

Unless otherwise agreed documents against which a draft is drawn are to be delivered to the drawee on acceptance of the draft if it is payable more than three days after presentment; otherwise, only on payment. (Code 1933, § 109A-2—514, enacted by Ga. L. 1962, p. 156, § 1.)

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 13 Am. Jur. 2d, Carriers, § 367. **U.L.A.** — Uniform Commercial Code (U.L.A.) § 2-514.  
**C.J.S.** — 77A C.J.S., Sales, §§ 153, 208.

**11-2-515. Preserving evidence of goods in dispute.**

In furtherance of the adjustment of any claim or dispute:

(a) Either party on reasonable notification to the other and for the purpose of ascertaining the facts and preserving evidence has the right to inspect, test, and sample the goods including such of them as may be in the possession or control of the other; and

(b) The parties may agree to a third party inspection or survey to determine the conformity or condition of the goods and may agree that the findings shall be binding upon them in any subsequent litigation or adjustment. (Code 1933, § 109A-2—515, enacted by Ga. L. 1962, p. 156, § 1.)

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 67 Am. Jur. 2d, Sales, §§ 620-622. **ALR.** — Conclusiveness of determination of third party whose approval is provided for by contract for sale of goods, 7 ALR3d 555.  
**C.J.S.** — 17B C.J.S., Contracts, § 565 et seq.  
**U.L.A.** — Uniform Commercial Code (U.L.A.) § 2-515.

**PART 6****BREACH, REPUDIATION, AND EXCUSE**

**Cross references.** — Rights of buyer and seller upon buyer's cancellation of consumer credit sale made after home solicitation, § 10-1-6.

**RESEARCH REFERENCES**

**ALR.** — Causes of action governed by limitations period in UCC § 2-725, 49 ALR5th 1. **Reputation and remedies for repudiation under § 212(e) of Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA) (12 USCS § 1821(e)), 132 ALR Fed. 1.**



**11-2-601. Buyer's rights on improper delivery.**

Subject to the provisions of this article on breach in installment contracts (Code Section 11-2-612) and unless otherwise agreed under the Code sections on contractual limitations of remedy (Code Sections 11-2-718 and 11-2-719), if the goods or the tender of delivery fail in any respect to conform to the contract, the buyer may:

(a) Reject the whole; or

(b) Accept the whole; or

(c) Accept any commercial unit or units and reject the rest. (Code 1933, § 109A-2—601, enacted by Ga. L. 1962, p. 156, § 1.)

**Law reviews.** — For article, "Buyer's Right of Rejection: A Quarter Century Under the Uniform Commercial Code, and Recent International Developments," see 13 Ga. L. Rev. 805 (1979).

For note, "Buyer's Right to Revoke Acceptance Against the Automobile Manufacturer for Breach of its Continuing Warranty of Repair or Replacement," see 7 Ga. L. Rev. 711 (1973).

**JUDICIAL DECISIONS**

**Cited in Tennessee-Virginia Constr. Co. v. Willingham**, 117 Ga. App. 290, 160 S.E.2d 444 (1968); **Financial Bldg. Consultants, Inc. v. St. Charles Mfg. Co.**, 145 Ga. App. 768, 244 S.E.2d 877 (1978); **Henco Adv., Inc. v. Geographics, Inc.**, 155 Ga. App. 571, 271

S.E.2d 704 (1980); **Hawkins v. UPM, Inc.**, 159 Ga. App. 231, 283 S.E.2d 87 (1981); **Lundy v. Low**, 200 Ga. App. 332, 408 S.E.2d 144 (1991); **Unipay, Inc. v. Lynk Sys.**, 251 Ga. App. 674, 555 S.E.2d 78 (2001).

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 67 Am. Jur. 2d, Sales, §§ 642-646.

**C.J.S.** — 77A C.J.S., Sales, §§ 189, 197.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 2-601.

**ALR.** — Contract for sale of goods as entire or divisible, 2 ALR 643.

Applicability of provision in contract of sale for return of article, where article delivered does not answer to description, 30 ALR 321.

Misrouting as affecting duty of the buyer to accept goods, 46 ALR 1120.

Sufficiency of buyer's attempt to rescind as affected by his apparent recognition of or insistence upon continuance of seller's obligation under the contract, 118 ALR 530.

Shipper's ratification of carrier's unauthorized delivery or misdelivery, 15 ALR2d 807.

Right of purchaser to decline performance of contract for sale of business or goods because of seller's failure to comply with bulk sales law, 24 ALR2d 1030.

Acceptance of some "commercial units" of goods purchased under UCC § 2-601(C), 41 ALR4th 396.

**11-2-602. Manner and effect of rightful rejection.**

(1) Rejection of goods must be within a reasonable time after their delivery or tender. It is ineffective unless the buyer seasonably notifies the seller.

(2) Subject to the provisions of Code Sections 11-2-603 and 11-2-604 on rejected goods:

(a) After rejection any exercise of ownership by the buyer with respect to any commercial unit is wrongful as against the seller; and

(b) If the buyer has before rejection taken physical possession of goods in which he does not have a security interest under the provisions of this article (subsection (3) of Code Section 11-2-711), he is under a duty after rejection to hold them with reasonable care at the seller's disposition for a time sufficient to permit the seller to remove them; but

(c) The buyer has no further obligations with regard to goods rightfully rejected.

(3) The seller's rights with respect to goods wrongfully rejected are governed by the provisions of this article on seller's remedies in general (Code Section 11-2-703). (Code 1933, § 109A-2—602, enacted by Ga. L. 1962, p. 156, § 1.)

**Law reviews.** — For article, "Buyer's Right of Rejection: A Quarter Century Under the Uniform Commercial Code, and Recent In-

ternational Developments," see 13 Ga. L. Rev. 805 (1979).

### JUDICIAL DECISIONS

**Rejection based on title.** — O.C.G.A. § 11-2-602 is intended to apply where quantity or quality of goods, or time of delivery, etc., do not conform to terms of sale, but even if this section also has relation to status of title and a rejection is made on that account, the question becomes one of whether rejection is rightful or wrongful, which determination will, of course, ultimately depend on whether or not seller had type of title seller warranted. *Cochran v. Horner*, 121 Ga. App. 297, 173 S.E.2d 448 (1970).

**O.C.G.A. § 11-2-602 recognizes that wrongful rejections may occur** and refers to O.C.G.A. § 11-2-703 for seller's remedies in such event, one of which is an action for price. *Cochran v. Horner*, 121 Ga. App. 297, 173 S.E.2d 448 (1970); *Lipsey Motors v. Karp Motors, Inc.*, 194 Ga. App. 15, 389 S.E.2d 537 (1989).

**Reacceptance of goods.** — A buyer who has attempted to reject rather than to accept goods may nonetheless accept them by virtue of buyer's post-rejection conduct with respect to them. Likewise, a buyer who purports to revoke acceptance of goods may be found to have reaccepted them if, after such

revocation, buyer performs acts which are inconsistent with the seller's ownership of the goods. *Griffith v. Stovall Tire & Marine, Inc.*, 174 Ga. App. 137, 329 S.E.2d 234 (1985).

A buyer reaccepted a motor vehicle after purported revocation of acceptance, even though the buyer gave sufficient notice that buyer revoked acceptance of the vehicle, when the buyer refused the seller access to it, persisted in efforts to have the vehicle repaired by entities other than the seller, and continued to possess and use the vehicle, which had been driven over 120,000 miles. *Griffith v. Stovall Tire & Marine, Inc.*, 174 Ga. App. 137, 329 S.E.2d 234 (1985).

**Rejection of nonconforming goods.** — Within a reasonable time after delivery or tender, the buyer is entitled to reject nonconforming goods under the provisions of O.C.G.A. § 11-2-602 if the buyer reasonably notifies the seller of the rejection. *Prudential Metal Supply Corp. v. Atlantic Freight Sales Co.*, 204 Ga. App. 439, 419 S.E.2d 520 (1992).

**Buyer's continued use of a defective copying machine** in furtherance of the efficient running of its business was a reacceptance of

the machine, and the buyer was not entitled to recover the full contract price of the machine in an action against the seller. *W.M. Hobbs, Ltd. v. Accusystems of Ga., Inc.*, 177 Ga. App. 432, 339 S.E.2d 646 (1986).

**Proper rejection of delivered peanuts.** — Seller breached the implied warranty of merchantability by delivering peanuts that were not fit for the ordinary purposes and did not run of even kind, quality, and quantity within each unit and among all units involved; buyer's rejection was proper because it came within a reasonable time, and seller was seasonably notified of the proper rejection. *Alimenta (U.S.A.), Inc. v. Anheuser-Busch Cos.*, 803 F.2d 1160 (11th Cir. 1986).

**Issues of fact for trial court.** — Issues such as whether an effective revocation of acceptance was made, whether reasonable notification of revocation was given to the seller, and whether the value of the goods was substantially impaired are ordinarily matters for determination by the trier of fact, even where the buyer has continued to use non-conforming goods after an alleged revocation of acceptance. *Griffith v. Stovall Tire &*

*Marine, Inc.*, 174 Ga. App. 137, 329 S.E.2d 234 (1985).

**Instructions.** — Where the court fully instructed the jury as to the determinative contract and warranty principles involved in the case, and the charge was adjusted to the evidence, it is not reversible error to fail to charge the precise language of provisions outlining rules and recourses for buyers and sellers. *Teledyne Indus., Inc. v. Patron Aviation, Inc.*, 161 Ga. App. 596, 288 S.E.2d 911 (1982).

**Cited in Tennessee-Virginia Constr. Co. v. Willingham**, 117 Ga. App. 290, 160 S.E.2d 444 (1968); *Trailmobile Div. of Pullman, Inc. v. Jones*, 118 Ga. App. 472, 164 S.E.2d 346 (1968); *Atlantic Aluminum & Metal Distribs. v. Adams*, 123 Ga. App. 387, 181 S.E.2d 101 (1971); *Clow Corp. v. Metro Pipeline Co.*, 442 F. Supp. 583 (N.D. Ga. 1977); *Jem Patents, Inc. v. Frost*, 147 Ga. App. 839, 250 S.E.2d 547 (1978); *Henco Adv., Inc. v. Geographics, Inc.*, 155 Ga. App. 571, 271 S.E.2d 704 (1980); *Bicknell v. B & S Enters.*, 160 Ga. App. 307, 287 S.E.2d 310 (1981).

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 67 Am. Jur. 2d, Sales, §§ 647-650.

**C.J.S.** — 77A C.J.S., Sales, §§ 189, 197.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 2-602.

**ALR.** — Contracts of sale or return as

distinguished from contracts for sale on approval, 52 ALR 589.

Time within which buyer must make inspection, trial, or test to determine whether goods are of requisite quality, 52 ALR2d 900.

#### 11-2-603. Merchant buyer's duties as to rightfully rejected goods.

(1) Subject to any security interest in the buyer (subsection (3) of Code Section 11-2-711), when the seller has no agent or place of business at the market of rejection a merchant buyer is under a duty after rejection of goods in his possession or control to follow any reasonable instructions received from the seller with respect to the goods and in the absence of such instructions to make reasonable efforts to sell them for the seller's account if they are perishable or threaten to decline in value speedily. Instructions are not reasonable if on demand indemnity for expenses is not forthcoming.

(2) When the buyer sells goods under subsection (1) of this Code section, he is entitled to reimbursement from the seller or out of the proceeds for reasonable expenses of caring for and selling them, and if the expenses include no selling commission then to such commission as is usual



in the trade or if there is none to a reasonable sum not exceeding 10 percent on the gross proceeds.

(3) In complying with this Code section the buyer is held only to good faith and good faith conduct hereunder is neither acceptance nor conversion nor the basis of an action for damages. (Code 1933, § 109A-2—603, enacted by Ga. L. 1962, p. 156, § 1.)

### JUDICIAL DECISIONS

**Cited** in *Clow Corp. v. Metro Pipeline Co.*,  
442 F. Supp. 583 (N.D. Ga. 1977).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 67 Am. Jur. 2d, Sales, §§ 656-658.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 2-603.

**ALR.** — Liability of purchaser under conditional-sale contract, or one claiming under him, as for conversion, 73 ALR 799.

### 11-2-604. Buyer's options as to salvage of rightfully rejected goods.

Subject to the provisions of Code Section 11-2-603 on perishables if the seller gives no instructions within a reasonable time after notification of rejection the buyer may store the rejected goods for the seller's account or reship them to him or resell them for the seller's account with reimbursement as provided in Code Section 11-2-603. Such action is not acceptance or conversion. (Code 1933, § 109A-2—604, enacted by Ga. L. 1962, p. 156, § 1.)

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 67 Am. Jur. 2d, Sales, §§ 659, 660.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 2-604.

**ALR.** — Liability of purchaser under conditional-sale contract, or one claiming under him, as for conversion, 73 ALR 799.

### 11-2-605. Waiver of buyer's objections by failure to particularize.

(1) The buyer's failure to state in connection with rejection a particular defect which is ascertainable by reasonable inspection precludes him from relying on the unstated defect to justify rejection or to establish breach:

(a) Where the seller could have cured it if stated seasonably; or

(b) Between merchants when the seller has after rejection made a request in writing for a full and final written statement of all defects on which the buyer proposes to rely.

(2) Payment against documents made without reservation of rights precludes recovery of the payment for defects apparent on the face of the

documents. (Code 1933, § 109A-2—605, enacted by Ga. L. 1962, p. 156, § 1.)

**Law reviews.** — For article, “Buyer’s Right of Rejection: A Quarter Century Under the Uniform Commercial Code, and Recent International Developments,” see 13 Ga. L. Rev. 805 (1979).

For note, “The Scope and Meaning of Waiver of Section 2-209 of the Uniform Commercial Code,” see 5 Ga. L. Rev. 783 (1971).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 67 Am. Jur. 2d, Sales, §§ 651-654.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 2-605.

**ALR.** — Right of party who has once refused to perform to have specific performance of contract, 2 ALR 416.

Applicability of provision in contract of sale for return of article, where article delivered does not answer to description, 30 ALR 321.

Contracts of sale or return as distinguished from contracts for sale on approval, 52 ALR 589.

### 11-2-606. What constitutes acceptance of goods.

(1) Acceptance of goods occurs when the buyer:

(a) After a reasonable opportunity to inspect the goods signifies to the seller that the goods are conforming or that he will take or retain them in spite of their nonconformity; or

(b) Fails to make an effective rejection (subsection (1) of Code Section 11-2-602), but such acceptance does not occur until the buyer has had a reasonable opportunity to inspect them; or

(c) Does any act inconsistent with the seller’s ownership; but if such act is wrongful as against the seller it is an acceptance only if ratified by him.

(2) Acceptance of a part of any commercial unit is acceptance of that entire unit. (Code 1933, § 109A-2—606, enacted by Ga. L. 1962, p. 156, § 1.)

**Law reviews.** — For article, “Buyer’s Right of Rejection: A Quarter Century Under the Uniform Commercial Code, and Recent International Developments,” see 13 Ga. L. Rev. 805 (1979).

For note, “Buyer’s Right to Revoke Acceptance Against the Automobile Manufacturer for Breach of its Continuing Warranty of Repair or Replacement,” see 7 Ga. L. Rev. 711 (1973).

### JUDICIAL DECISIONS

**When acceptance occurs.** — O.C.G.A. § 11-2-606 requires that acceptance of goods occurs when buyer has had reasonable opportunity to inspect them and signifies to seller that they are conforming or that buyer

will take or retain them in spite of their nonconformity. *Economy Forms Corp. v. Kandy, Inc.*, 391 F. Supp. 944 (N.D. Ga. 1974), *aff’d*, 511 F.2d 1400 (5th Cir. 1975).

**Notice of rejection not reasonable.** — See

*Economy Forms Corp. v. Kandy, Inc.*, 391 F. Supp. 944 (N.D. Ga. 1974), *aff'd*, 511 F.2d 1400 (5th Cir. 1975).

**No subsequent right to reject after inspection and acceptance.** — Where the plaintiff had ample opportunity to inspect the car to ascertain whether it had an operating air-conditioner and radio before plaintiff took possession of it and signed the bill of sale and the financing documents, plaintiff had no subsequent right to reject the vehicle for nonconformance. *Bicknell v. B & S Enters.*, 160 Ga. App. 307, 287 S.E.2d 310 (1981).

**Revocation of acceptance.** — Revocation of a contractor's acceptance of equipment could be found where there was evidence that the supplier was well aware of the problems with the equipment and made an adjustment to the contractor's account that the contractor did not find to be adequate. *Williams v. Crispaire Corp.*, 225 Ga. App. 172, 483 S.E.2d 653 (1997).

**Reacceptance of goods.** — A buyer who has attempted to reject rather than to accept goods may nonetheless accept them by virtue of buyer's post-rejection conduct with respect to them. Likewise, a buyer who purports to revoke acceptance of goods may be found to have reaccepted them if, after such revocation, the buyer performs acts which are inconsistent with the seller's ownership of the goods. *Griffith v. Stovall Tire & Marine, Inc.*, 174 Ga. App. 137, 329 S.E.2d 234 (1985).

A buyer reaccepted a motor vehicle after purported revocation of acceptance, even though the buyer gave sufficient notice that the buyer revoked acceptance of the vehicle, when the buyer refused the seller access to it, persisted in efforts to have the vehicle re-

paired by entities other than the seller, and continued to possess and use the vehicle, which had been driven over 120,000 miles. *Griffith v. Stovall Tire & Marine, Inc.*, 174 Ga. App. 137, 329 S.E.2d 234 (1985).

**Actions inconsistent with seller's ownership constituting acceptance by buyer.** — See *Economy Forms Corp. v. Kandy, Inc.*, 391 F. Supp. 944 (N.D. Ga. 1974), *aff'd*, 511 F.2d 1400 (5th Cir. 1975).

Installation by the buyer of heavy equipment supplied by the seller is an act inconsistent with the seller's ownership. *United States ex rel. Fram Corp. v. Crawford*, 443 F.2d 611 (5th Cir. 1971); *Clow Corp. v. Metro Pipeline Co.*, 442 F. Supp. 583 (N.D. Ga. 1977).

**Issues of fact for trial court.** — Issues such as whether an effective revocation of acceptance was made, whether reasonable notification of revocation was given to the seller, and whether the value of the goods was substantially impaired are ordinarily matters for determination by the trier of fact, even where the buyer has continued to use nonconforming goods after an alleged revocation of acceptance. *Griffith v. Stovall Tire & Marine, Inc.*, 174 Ga. App. 137, 329 S.E.2d 234 (1985).

**Cited in** *Trailmobile Div. of Pullman, Inc. v. Jones*, 118 Ga. App. 472, 164 S.E.2d 346 (1968); *Atlantic Aluminum & Metal Distribs. v. Adams*, 123 Ga. App. 387, 181 S.E.2d 101 (1971); *Jem Patents, Inc. v. Frost*, 147 Ga. App. 839, 250 S.E.2d 547 (1978); *Management Assistance, Inc. v. Computer Dimensions, Inc.*, 546 F. Supp. 666 (N.D. Ga. 1982); *W.M. Hobbs, Ltd. v. Accusystems of Ga., Inc.*, 177 Ga. App. 432, 339 S.E.2d 646 (1986); *Lundy v. Low*, 200 Ga. App. 332, 408 S.E.2d 144 (1991).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 67 Am. Jur. 2d, Sales, §§ 623-641. 72 Am. Jur. 2d, Statute of Frauds, §§ 109, 121 et seq.

**C.J.S.** — 77A C.J.S., Sales, § 190 et seq.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 2-606.

**ALR.** — Effect of delay of principal in disapproving or rejecting orders for goods taken by agent subject to approval, 7 ALR 1686.

Taking possession of property condition-

ally sold as affecting action previously commenced for purchase price, 23 ALR 1462.

Acceptance which will satisfy statute of frauds where purchaser of goods is in possession at time of sale, 36 ALR 649; 111 ALR 1312.

Validity and effect of provision in a contract of sale making acceptance of goods conditional on approval by, or satisfaction of, third person, 46 ALR 864.

Contracts of sale or return as distin-



guished from contracts for sale on approval, 52 ALR 589.

Use of article by buyer as waiver of right to rescind for fraud, breach of warranty, or failure of goods to comply with contract, 77 ALR 1165; 41 ALR2d 1173.

Estoppel of or waiver by buyer, in respect of shortage in commodity delivered and accepted as in full, as affecting his liability to

pay for shortage or his right to recover back amount paid therefor, 113 ALR 684.

Shipper's ratification of carrier's unauthorized delivery or misdelivery, 15 ALR2d 807.

Buyer's acceptance of delayed or defective instalment of goods as waiver of similar default as to later instalments, 32 ALR2d 1117.

**11-2-607. Effect of acceptance; notice of breach; burden of establishing breach after acceptance; notice of claim or litigation to person answerable over.**

(1) The buyer must pay at the contract rate for any goods accepted.

(2) Acceptance of goods by the buyer precludes rejection of the goods accepted and if made with knowledge of a nonconformity cannot be revoked because of it unless the acceptance was on the reasonable assumption that the nonconformity would be seasonably cured but acceptance does not of itself impair any other remedy provided by this article for nonconformity.

(3) Where a tender has been accepted:

(a) The buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy; and

(b) If the claim is one for infringement or the like (subsection (3) of Code Section 11-2-312) and the buyer is sued as a result of such a breach he must so notify the seller within a reasonable time after he receives notice of the litigation or be barred from any remedy over for liability established by the litigation.

(4) The burden is on the buyer to establish any breach with respect to the goods accepted.

(5) Where the buyer is sued for breach of a warranty or other obligation for which his seller is answerable over:

(a) He may give his seller written notice of the litigation. If the notice states that the seller may come in and defend and that if the seller does not do so he will be bound in any action against him by his buyer by any determination of fact common to the two litigations, then unless the seller after seasonable receipt of the notice does come in and defend he is so bound.

(b) If the claim is one for infringement or the like (subsection (3) of Code Section 11-2-312) the original seller may demand in writing that his buyer turn over to him control of the litigation including settlement or

else be barred from any remedy over and if he also agrees to bear all expense and to satisfy any adverse judgment, then unless the buyer after seasonable receipt of the demand does turn over control the buyer is so barred.

(6) The provisions of subsections (3), (4), and (5) of this Code section apply to any obligation of a buyer to hold the seller harmless against infringement or the like (subsection (3) of Code Section 11-2-312). (Code 1933, § 109A-2—607, enacted by Ga. L. 1962, p. 156, § 1.)

**Law reviews.** — For article, “Sales Warranties Under Georgia’s Uniform Commercial Code,” see 1 Ga. St. B.J. 191 (1964). For article, “Georgia’s New Statutory Liability for Manufacturers: An Inadequate Legislative Response,” see 2 Ga. L. Rev. 538 (1968). For article discussing applicability of “notice of breach” provision of Uniform Commercial Code to construction contracts, see 28

Emory L.J. 335 (1979). For article, “Buyer’s Right of Rejection: A Quarter Century Under the Uniform Commercial Code, and Recent International Developments,” see 13 Ga. L. Rev. 805 (1979). For article, “Impracticability As Risk Allocation: The Effect of Changed Circumstances upon Contract Obligations for the Sale of Goods,” see 22 Ga. L. Rev. 503 (1988).

## JUDICIAL DECISIONS

### ANALYSIS

#### GENERAL CONSIDERATION

##### NOTICE

1. IN GENERAL
2. TIME
3. CONTENT

#### General Consideration

**Editor’s notes.** — In light of the similarity of the issues dealt with, decisions under former Code 1933, § 96-305 are included in the annotations for this section.

**O.C.G.A. §§ 11-2-607 and 11-2-717 apply only to sales of goods.** *Fruin-Colnon Corp. v. Air Door, Inc.*, 157 Ga. App. 804, 278 S.E.2d 708 (1981).

**Evaluation of buyer’s conduct as a whole.** — A buyer’s conduct must be evaluated as a whole under O.C.G.A. § 11-2-607, which is designed to defeat commercial bad faith. *Clow Corp. v. Metro Pipeline Co.*, 442 F. Supp. 583 (N.D. Ga. 1977).

**Installation by buyer of heavy equipment supplied by seller** is an act inconsistent with seller’s ownership. *United States ex rel. Fram Corp. v. Crawford*, 443 F.2d 611 (5th Cir. 1971).

**Effect of acceptance of goods.** — Where property is brought under implied warranty that it is reasonably suited to use intended, acceptance by purchaser waives all defects

discovered by the purchaser, or which, by exercise of ordinary care and prudence, might have discovered before delivery. *Jones v. Knightstown Body Co.*, 52 Ga. App. 667, 184 S.E. 427 (1936) (decided under former Code 1933, § 96-305).

Where purchaser accepted and installed goods which were delivered late, subsequent attempts to revoke the purchase agreement were not effective. *Management Assistance, Inc. v. Computer Dimensions, Inc.*, 546 F. Supp. 666 (N.D. Ga. 1982), *aff’d sub nom. Computer Dimensions v. Basic Four*, 747 F.2d 708 (11th Cir. 1984).

**Acceptance does not foreclose suit for breach.** — Absent an explicit contract term so providing, even explicit acceptance does not foreclose buyer’s suit for breach of warranty. *International Multifoods Corp. v. Nat’l Egg Prods.*, 202 Ga. App. 263, 414 S.E.2d 253 (1991), *cert. denied*, 202 Ga. App. 906, 414 S.E.2d 253 (1992).

**Reacceptance of goods.** — A buyer who has attempted to reject rather than to accept goods may nonetheless accept them by vir-

**General Consideration** (Cont'd)

tue of buyer's post-rejection conduct with respect to them. Likewise, a buyer who purports to revoke acceptance of goods may be found to have reaccepted them if, after such revocation, buyer performs acts which are inconsistent with the seller's ownership of the goods. *Griffith v. Stovall Tire & Marine, Inc.*, 174 Ga. App. 137, 329 S.E.2d 234 (1985).

A buyer reaccepted a motor vehicle after purported revocation of acceptance, even though the buyer gave sufficient notice that buyer revoked acceptance of the vehicle, when the buyer refused the seller access to it, persisted in efforts to have the vehicle repaired by entities other than the seller, and continued to possess and use the vehicle, which had been driven over 120,000 miles. *Griffith v. Stovall Tire & Marine, Inc.*, 174 Ga. App. 137, 329 S.E.2d 234 (1985).

**Burden of showing breach of express warranty.** — After acceptance of personal property sold under express warranty, it is presumed that it is of the quality ordered, and burden is upon buyer in all cases to show that it was not. *Frick Co. v. Lawson*, 50 Ga. App. 511, 179 S.E. 274 (1935) (decided under former Code 1933, § 96-305).

**Questions of fact.** — Reasonableness of notice by buyer of defect and responsibility for defect are questions of fact. *Fruin-Colnon Corp. v. Air Door, Inc.*, 157 Ga. App. 804, 278 S.E.2d 708 (1981).

Issues such as whether an effective revocation of acceptance was made, whether reasonable notification of revocation was given to the seller, and whether the value of the goods was substantially impaired are ordinarily matters for determination by the trier of fact, even where the buyer has continued to use nonconforming goods after an alleged revocation of acceptance. *Griffith v. Stovall Tire & Marine, Inc.*, 174 Ga. App. 137, 329 S.E.2d 234 (1985).

**Cited** in *Systems Consultants v. Eng Enters., Inc.*, 123 Ga. App. 641, 182 S.E.2d 188 (1971); *Beavers v. Mastan Co.*, 124 Ga. App. 498, 184 S.E.2d 476 (1971); *Southern Concrete Prods. Co. v. Martin*, 126 Ga. App. 534, 191 S.E.2d 314 (1972); *Coast Scopitone, Inc. v. Self*, 127 Ga. App. 124, 192 S.E.2d 513 (1972); *Carr v. Jacuzzi Bros.*, 133 Ga. App. 70, 210 S.E.2d 16 (1974); *Romedey v. Willett*

*Lincoln-Mercury, Inc.*, 136 Ga. App. 67, 220 S.E.2d 74 (1975); *Dixie Lime & Stone Co. v. Wiggins Scale Co.*, 144 Ga. App. 145, 240 S.E.2d 323 (1977); *Pepsico Truck Rental, Inc. v. Eastern Foods, Inc.*, 145 Ga. App. 410, 243 S.E.2d 662 (1978); *Hawkins v. UPM, Inc.*, 159 Ga. App. 231, 283 S.E.2d 87 (1981); *Sires v. Luke*, 544 F. Supp. 1155 (S.D. Ga. 1982); *W.M. Hobbs, Ltd. v. Accusystems of Ga., Inc.*, 177 Ga. App. 432, 339 S.E.2d 646 (1986); *Warner Robins Tree Surgeons, Inc. v. Kolb & Co.*, 181 Ga. App. 20, 351 S.E.2d 486 (1986); *Amatulli Imports, Inc. v. House of Persia, Inc.*, 191 Ga. App. 827, 383 S.E.2d 192 (1989); *Regency Nissan, Inc. v. Taylor*, 194 Ga. App. 645, 391 S.E.2d 467 (1990); *Massey v. Thomaston Ford Mercury*, 196 Ga. App. 278, 395 S.E.2d 663 (1990); *Buford v. Toys R' Us, Inc.*, 217 Ga. App. 565, 458 S.E.2d 373 (1995); *Fried Group, Inc. v. Sundance Tractor & Mower*, 218 Bankr. 247 (Bankr. M.D. Ga. 1998).

**Notice****1. In General**

**Oral notification.** — Evidence that the buyer had complained about the quality of merchandise received and that the buyer told personnel of the seller that goods were defective, often immediately after inspecting the goods, presented an issue of material fact as to whether there was oral notification of defective accepted merchandise. *Atwood v. Southeast Bedding Co.*, 226 Ga. App. 50, 485 S.E.2d 217 (1997).

**Applicability to third-party beneficiary.** — Notice provisions of O.C.G.A. § 11-2-607 of a breach cannot apply to third-party beneficiary under O.C.G.A. § 11-2-318 where there has been no tender of goods by seller and no acceptance from seller by such third party. *Chaffin v. Atlanta Coca-Cola Bottling Co.*, 127 Ga. App. 619, 194 S.E.2d 513 (1972).

The notice requirement of O.C.G.A. § 11-2-607 applies only to the buyer and not to a third-party beneficiary. *Morgan v. Sears, Roebuck & Co.*, 693 F. Supp. 1154 (N.D. Ga. 1988); *Morgan v. Sears, Roebuck & Co.*, 700 F. Supp. 1574 (N.D. Ga. 1988).

**Applicable to breach of warranty of title.** — The notice of breach required in O.C.G.A. § 11-2-607(3)(a) applies in cases of breach of warranty of title. *Oden & Sims*



Used Cars, Inc. v. Thurman, 165 Ga. App. 500, 301 S.E.2d 673 (1983).

**Adequate notice may be dissipated by subsequent actions of buyer.** — A buyer's dealings must be evaluated under standard of commercial good faith, and while adequate notice might be given at one point in time, subsequent actions by the buyer might dissipate its effect. Clow Corp. v. Metro Pipeline Co., 442 F. Supp. 583 (N.D. Ga. 1977).

**Fact that defendant has actual notice of breach** does not waive or alleviate the requirement that plaintiff give notice of any breach within a reasonable time or otherwise be barred from any remedy for the breach. Oden & Sims Used Cars, Inc. v. Thurman, 165 Ga. App. 500, 301 S.E.2d 673 (1983).

## 2. Time

**Receipt and acceptance of goods required.** — Notice of breach under O.C.G.A. § 11-2-607 cannot be given until receipt and acceptance of goods. Warren's Kiddie Shoppe, Inc. v. Casual Slacks, Inc., 120 Ga. App. 578, 171 S.E.2d 643 (1969).

**Adequacy of notice.** — No formality is required as to notice, and it is adequate if it merely informs seller within a reasonable time after goods are received and accepted by buyer. Holiday Homes, Inc. v. Bragg, 132 Ga. App. 594, 208 S.E.2d 608 (1974).

**Failure to notify seller within reasonable time is a bar against recovery** for all damages including any breaches of warranties which were caused by a difference in any characteristics or by any other apparent or obvious qualities of the goods. Economy Forms Corp. v. Kandy, Inc., 391 F. Supp. 944 (N.D. Ga. 1974), *aff'd*, 511 F.2d 1400 (5th Cir. 1975).

**Reasonable time for notification for retail consumer.** — Time of notification required by O.C.G.A. § 11-2-607(3)(a) is to be determined by applying commercial standards to merchant buyer. Consequently, "a reasonable time" for notification from retail consumer is to be judged by different standards so that in this case it will be extended, since rule of requiring notification is designed to defeat commercial bad faith, not to deprive a good faith consumer of remedy. Jones v. Cranman's Sporting Goods, 142 Ga. App. 838, 237 S.E.2d 402 (1977).

**Notice after relationship terminated and goods retrieved by seller.** — Written notice that goods were unacceptable sent only after the relationship had been terminated and all goods had been either sold or retrieved by the seller was not sufficient. Atwood v. Southeast Bedding Co., 226 Ga. App. 50, 485 S.E.2d 217 (1997).

**Where vehicles in possession of buyer were confiscated** as stolen property, service of the original suit, made eight months after confiscation removed the vehicles from control of either party, was reasonable notice under the circumstances. Hudson v. Gaines, 199 Ga. App. 70, 403 S.E.2d 852 (1991).

**Summary judgment.** — The question of reasonableness of notice is ordinarily a factual one, although summary adjudication is appropriate if the uncontroverted facts establish that a plaintiff is not entitled to recover. International Multifoods Corp. v. Nat'l Egg Prods., 202 Ga. App. 263, 414 S.E.2d 253 (1991), *cert. denied*, 202 Ga. App. 906, 414 S.E.2d 253 (1992).

Where there was a material fact question as to whether a purchaser gave the manufacturer reasonable notice of defective goods, summary adjudication was precluded. Great W. Press, Inc. v. Atlanta Film Converting Co., 223 Ga. App. 861, 479 S.E.2d 143 (1996).

Whether purchaser acted unreasonably in not notifying seller, a defunct company, that it was dissatisfied that seller would not be providing the support services allegedly agreed upon was properly a question for the jury, and summary judgment on the basis of lack of notice was improperly granted to the seller. BDI Distribs. v. Beaver Computer Corp., 232 Ga. App. 316, 501 S.E.2d 839 (1998).

## 3. Content

**Notice need only let seller know transaction is troublesome.** — Content of notification required under O.C.G.A. § 11-2-607 need only be sufficient to let seller know transaction is still troublesome and must be watched. Jones v. Cranman's Sporting Goods, 142 Ga. App. 838, 237 S.E.2d 402 (1977); Clow Corp. v. Metro Pipeline Co., 442 F. Supp. 583 (N.D. Ga. 1977).

**Notice need only inform seller of claimed breach.** — Notification which saves buyer's rights under O.C.G.A. § 11-2-607 need only be such as informs seller that transaction is

**Notice** (Cont'd)**3. Content** (Cont'd)

claimed to involve a breach, thus opening way for normal settlement through negotiation. *Clow Corp. v. Metro Pipeline Co.*, 442 F. Supp. 583 (N.D. Ga. 1977).

**What notice need not contain.** — There is no reason to require that notification which saves buyer's rights under O.C.G.A.

§ 11-2-607 must include a clear statement of all objections that will be relied on by buyer, as is required under that section covering statements of defects upon rejection. Nor is there reason for requiring the notification to be a claim for damages or of any threatened litigation or other resort to remedy. *Clow Corp. v. Metro Pipeline Co.*, 442 F. Supp. 583 (N.D. Ga. 1977).

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 17A Am. Jur. 2d, Contracts, § 639. 63 Am. Jur. 2d, Products Liability, §§ 659 et seq., 840 et seq., 868. 67 Am. Jur. 2d, Sales, §§ 661-665.

**C.J.S.** — 42 C.J.S., Indemnity, §§ 15, 26. 77A C.J.S., Sales, § 192.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 2-607.

**ALR.** — Resale by buyer where seller has refused to receive the property rejected for breach of warranty, 24 ALR 1445.

Loss of profits as elements of damages for fraud of seller, as to quality of goods purchased for resale, 28 ALR 354.

Acceptance of instalment of goods as affecting buyer's right to rescind because of defects in that instalment, 29 ALR 1517.

Effect of premature tender of goods which is refused by the buyer, 47 ALR 193.

Contracts of sale or return as distinguished from contracts for sale on approval, 52 ALR 589.

Use of article by buyer as waiver of right to rescind for fraud, breach of warranty, or failure of goods to comply with contract, 77 ALR 1165; 41 ALR2d 1173.

Estoppel of or waiver by buyer, in respect of shortage in commodity delivered and accepted as in full, as affecting his liability to pay for shortage or his right to recover back amount paid therefor, 113 ALR 684.

Breach of warranty as to title as within statutory provision requiring notice of breach of warranty on sale of goods, 114 ALR 707.

"Vouching in" of one who is not liable over to defendant but is liable over to one whom the defendant has vouched in, 123 ALR 1153.

Deposit in mail of notice of claim required as condition of action against, or liability of, governmental body, as a giving of notice within required period, 175 ALR 299.

Shipper's ratification of carrier's unauthorized delivery or misdelivery, 15 ALR2d 807.

Buyer's acceptance of delayed or defective instalment of goods as waiver of similar default as to later instalments, 32 ALR2d 1117.

Time within which buyer of goods must give notice in order to recover damages for seller's breach of express warranty, 41 ALR2d 812.

Form and substance of notice which buyer of goods must give in order to recover damages for seller's breach of warranty, 53 ALR2d 270.

Requirement of notice, by buyer of goods, of breach of warranty as applicable to actions for personal injury, 6 ALR3d 1371.

Seller's promises or attempts to repair article sold as affecting buyer's duty to minimize damages for breach of sale contract or of warranty, 66 ALR3d 1162.

Necessity that buyer of goods give notice of breach of warranty to manufacturer under UCC § 2-607, requiring notice to seller of breach, 24 ALR4th 277.

Products liability: seller's right to indemnity from manufacturer, 79 ALR4th 278.

Products liability: manufacturer's postsale obligation to modify, repair, or recall product, 47 ALR5th 395.

Sufficiency and timeliness of buyer's notice under UCC § 607(3)(a) of seller's breach of warranty, 89 ALR5th 319.

**11-2-608. Revocation of acceptance in whole or in part.**

(1) The buyer may revoke his acceptance of a lot or commercial unit whose nonconformity substantially impairs its value to him if he has accepted it:

(a) On the reasonable assumption that its nonconformity would be cured and it has not been seasonably cured; or

(b) Without discovery of such nonconformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.

(2) Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects. It is not effective until the buyer notifies the seller of it.

(3) A buyer who so revokes has the same rights and duties with regard to the goods involved as if he had rejected them. (Code 1933, § 109A-2—608, enacted by Ga. L. 1962, p. 156, § 1.)

**Law reviews.** — For article, "Buyer's Right of Rejection: A Quarter Century Under the Uniform Commercial Code, and Recent International Developments," see 13 Ga. L. Rev. 805 (1979). For annual survey of commercial law, see 38 Mercer L. Rev. 85 (1986).

For note, "Buyer's Right to Revoke Acceptance Against the Automobile Manufacturer for Breach of its Continuing Warranty of Repair or Replacement," see 7 Ga. L. Rev. 711 (1973).

**JUDICIAL DECISIONS**

**Authority to revoke acceptance in certain circumstances.** — Buyer who has accepted goods may under certain conditions enumerated in O.C.G.A. § 11-2-608 revoke acceptance. *Clow Corp. v. Metro Pipeline Co.*, 442 F. Supp. 583 (N.D. Ga. 1977).

O.C.G.A. § 11-2-608 gives buyer right to revoke acceptance within reasonable time for nonconformity not within purchaser's knowledge at time of acceptance if such nonconformity substantially impairs its value to the buyer. *Jacobs v. Metro Chrysler-Plymouth, Inc.*, 125 Ga. App. 462, 188 S.E.2d 250 (1972).

Even after acceptance, the buyer has a right to revoke acceptance under the provisions of O.C.G.A. § 11-2-608 for nonconformance that substantially impairs the value of the goods. *Prudential Metal Supply Corp. v. Atlantic Freight Sales Co.*, 204 Ga. App. 439, 419 S.E.2d 520 (1992).

**O.C.G.A. § 11-2-608(1)(b) refers to situa-**

**tions where nonconformity was discovered after acceptance.** *Trailmobile Div. of Pullman, Inc. v. Jones*, 118 Ga. App. 472, 164 S.E.2d 346 (1968).

**No revocation after acceptance and installation.** — Once buyer has accepted and installed supplied units, any subsequent attempt at revocation is ineffective. *United States ex rel. Fram Corp. v. Crawford*, 443 F.2d 611 (5th Cir. 1971).

**Continued use is inconsistent with a revocation of acceptance.** See *Jenkins v. GMC*, 240 Ga. App. 636, 524 S.E.2d 324 (1999).

**Remedy available despite warranties limitation.** — Buyer's revocation of acceptance of lot or commercial unit whose nonconformity substantially impairs its value to the buyer is, under O.C.G.A. § 11-2-608, an available remedy even where seller has attempted to limit its warranties. *Hub Motor Co. v. Zurawski*, 157 Ga. App. 850, 278 S.E.2d 689 (1981).



Revocation of acceptance under O.C.G.A. § 11-2-608 is an available remedy even where the seller has attempted to limit its warranties. *Esquire Mobile Homes, Inc. v. Arrendale*, 182 Ga. App. 528, 356 S.E.2d 250 (1987).

Revocation is an available remedy even where the seller has attempted to limit its warranties by use of "as is" language under O.C.G.A. § 11-2-316. *Prudential Metal Supply Corp. v. Atlantic Freight Sales Co.*, 204 Ga. App. 439, 419 S.E.2d 520 (1992).

Revocation of acceptance is an available remedy even where the dealer has attempted to limit warranties. *Reeb v. Daniels Lincoln-Mercury Co.*, 193 Ga. App. 817, 389 S.E.2d 367 (1989).

**Reacceptance of goods.** — A buyer who has attempted to reject rather than to accept goods may nonetheless accept them by virtue of the buyer's post-rejection conduct with respect to them. Likewise, a buyer who purports to revoke acceptance of goods may be found to have reaccepted them if, after such revocation, the buyer performs acts which are inconsistent with the seller's ownership of the goods. *Griffith v. Stovall Tire & Marine, Inc.*, 174 Ga. App. 137, 329 S.E.2d 234 (1985).

A buyer reaccepted a motor vehicle after purported revocation of acceptance, even though the buyer gave sufficient notice that the buyer revoked acceptance of the vehicle, when the buyer refused the seller access to it, persisted in efforts to have the vehicle repaired by entities other than the seller, and continued to possess and use the vehicle, which had been driven over 120,000 miles. *Griffith v. Stovall Tire & Marine, Inc.*, 174 Ga. App. 137, 329 S.E.2d 234 (1985).

**Breach of warranty to replace defective parts.** — Where in standard form new car warranty manufacturer and dealer expressly disclaim all warranties except that "any part of this vehicle found defective under this warranty will be repaired or replaced," the Uniform Commercial Code requires that a defect first be called to the attention of entities designated in the warranty, but does not prevent revocation of acceptance of vehicle by buyer after seller refuses to repair or replace defective parts. *Jacobs v. Metro Chrysler-Plymouth, Inc.*, 125 Ga. App. 462, 188 S.E.2d 250 (1972).

**Revocation of acceptance of peanuts, after blanching.** — The act of blanching pe-

anuts, perfected by raising the temperature to a certain degree, thus causing the outer red hulls to fall off, constituted an acceptance of the goods pursuant to O.C.G.A. § 11-2-606(1)(c), as an "act inconsistent with the seller's ownership," but the blanching process did not substantially change the peanuts, so the buyer's revocation of acceptance of the peanuts, after the blanching process, was effective. *Alimenta (U.S.A.), Inc. v. Anheuser-Busch Cos.*, 803 F.2d 1160 (11th Cir. 1986).

**Seller's knowledge of problem and adjustment to account.** — Revocation of a contractor's acceptance of equipment could be found where there was evidence that the supplier was well aware of the problems with the equipment and made an adjustment to the contractor's account that the contractor did not find to be adequate. *Williams v. Crispaire Corp.*, 225 Ga. App. 172, 483 S.E.2d 653 (1997).

**Issues of fact.** — Issues such as whether an effective revocation of acceptance was made, whether reasonable notification of revocation was given to the seller, and whether the value of the goods was substantially impaired are ordinarily matters for determination by the trier of fact, even where the buyer has continued to use nonconforming goods after an alleged revocation of acceptance. *Griffith v. Stovall Tire & Marine, Inc.*, 174 Ga. App. 137, 329 S.E.2d 234 (1985).

Question of substantial impairment sufficient to authorize revocation is for jury, as well as question of reasonable time allowed seller to comply with warranty provision of sales contract. *Hub Motor Co. v. Zurawski*, 157 Ga. App. 850, 278 S.E.2d 689 (1981).

**Factors considered in determining whether revocation made in reasonable time.** — In determining whether revocation was made within a reasonable time after the buyer discovered or should have discovered the nonconformity, it is proper to consider all the surrounding circumstances, including the nature of the defect, the sophistication of the buyer, and the difficulty of its discovery. *Bicknell v. B & S Enters.*, 160 Ga. App. 307, 287 S.E.2d 310 (1981).

**Cited in** *Systems Consultants v. Eng Enters., Inc.*, 123 Ga. App. 641, 182 S.E.2d 188 (1971); *Solomon Refrigeration, Inc. v. Osburn*, 148 Ga. App. 772, 252 S.E.2d 686 (1979); *Atlanta Cutlery Corp. v. Queen Cut-*

lery Co., 168 Ga. App. 584, 309 S.E.2d 691 (1983); *Freeman v. Hubco Leasing, Inc.*, 253 Ga. 698, 324 S.E.2d 462 (1985); *Bakery Servs., Inc. v. Thornton Chevrolet, Inc.*, 224

Ga. App. 31, 479 S.E.2d 363 (1996); *BDI Distribs. v. Beaver Computer Corp.*, 232 Ga. App. 316, 501 S.E.2d 839 (1998).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 67A Am. Jur. 2d, Sales, §§ 1192-1215.

**C.J.S.** — 77A C.J.S., Sales, § 192.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 2-608.

**ALR.** — Buyer's acceptance of part of goods as affecting right to damages for failure to complete delivery, 169 ALR 595.

Buyer's acceptance of delayed or defective instalment of goods as waiver of similar default as to later instalments, 32 ALR2d 1117.

Time for revocation of acceptance of goods under UCC § 2-608(2), 65 ALR3d 354.

Measure and elements of buyer's recovery upon revocation of acceptance of goods under UCC § 2-608(1), 65 ALR3d 388.

What constitutes "substantial impairment" entitling buyer to revoke his acceptance of goods under UCC § 2-608(1), 38 ALR5th 191.

### 11-2-609. Right to adequate assurance of performance.

(1) A contract for sale imposes an obligation on each party that the other's expectation of receiving due performance will not be impaired. When reasonable grounds for insecurity arise with respect to the performance of either party the other may in writing demand adequate assurance of due performance and until he receives such assurance may if commercially reasonable suspend any performance for which he has not already received the agreed return.

(2) Between merchants the reasonableness of grounds for insecurity and the adequacy of any assurance offered shall be determined according to commercial standards.

(3) Acceptance of any improper delivery or payment does not prejudice the aggrieved party's right to demand adequate assurance of future performance.

(4) After receipt of a justified demand failure to provide within a reasonable time not exceeding 30 days such assurance of due performance as is adequate under the circumstances of the particular case is a repudiation of the contract. (Code 1933, § 109A-2—609, enacted by Ga. L. 1962, p. 156, § 1.)

**Law reviews.** — For article discussing applicability of right to adequate assurance of performance provision of Uniform Commercial Code to construction contracts, see

28 Emory L.J. 335 (1979). For article, "Contract Litigation and the Elite Bar in New York City, 1960-1980," see 39 Emory L.J. 413 (1990).

## JUDICIAL DECISIONS

**Party-to-the-transaction rule.** — For a discussion of the party-to-the-transaction rule as a defense to the holder in due course status, see *Design Eng'g, Constr. Int'l, Inc. v. Cessna Fin. Corp.*, 164 Ga. App. 159, 296 S.E.2d 195 (1982).

**Finance company furnishing forms to dealer.** — A finance company which, although furnishing forms and instructions to the dealer, had no other connection with the dealer and through whom the dealer was not required to finance the equipment, was not a party to the transaction and there was no breach of warranty under O.C.G.A. § 11-2-609. *Design Eng'g, Constr. Int'l, Inc. v. Cessna Fin. Corp.*, 164 Ga. App. 159, 296 S.E.2d 195 (1982).

**Oral request by seller that appellee sign financing statements** which would have materially altered terms of contract by placing a lien on equipment being sold did not constitute compliance with O.C.G.A. § 11-2-609, and, consequently, appellee's refusal to comply with request did not authorize appellant to suspend delivery of equipment. *Automated Energy Sys. v. Fibers & Fabrics of Ga., Inc.*, 164 Ga. App. 772, 298 S.E.2d 328 (1982).

**Attempt to cancel order as anticipatory breach of contract.** — A buyer's attempt to cancel a sale order is not an anticipatory breach of the contract where the seller refuses to cancel and asks for adequate assurance of performance, both parties proceed as if the attempt to cancel has never taken place, the seller does not pursue any of its remedies under O.C.G.A. § 11-2-610, and the conduct of the parties over the ensuing months manifests an implicit understanding that such a repudiation has been retracted without injury. *Wahnschaff Corp. v. O.E. Clark Paper Box Co.*, 166 Ga. App. 242, 304 S.E.2d 91 (1983).

**Anticipatory repudiation not found.** — Swearing out criminal warrant against buyer of ship as result of buyer's unauthorized cruise and obtaining restraining order prohibiting buyer from boarding ship does not amount to anticipatory repudiation. *R.C. Craig, Ltd. v. Ships of Sea, Inc.*, 345 F. Supp. 1066 (S.D. Ga. 1972), later proceeding, 401 F. Supp. 1051 (S.D. Ga. 1975).

**Cited in** *Harris v. Hine*, 232 Ga. 183, 205 S.E.2d 847 (1974); *Financial Bldg. Consultants, Inc. v. St. Charles Mfg. Co.*, 145 Ga. App. 768, 244 S.E.2d 877 (1978).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 67 Am. Jur. 2d, Sales, §§ 511-519.

**C.J.S.** — 77A C.J.S., Sales, § 208.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 2-609.

**ALR.** — Right of party who has once refused to perform to have specific performance of contract, 2 ALR 416.

Right of seller to rescind or refuse further deliveries upon the buyer's failure to pay for instalments, 14 ALR 1209; 75 ALR 609.

Sales: what constitutes "reasonable grounds for insecurity" justifying demand for adequate assurance of performance under UCC § 2-609, 37 ALR5th 459.

**11-2-610. Anticipatory repudiation.**

When either party repudiates the contract with respect to a performance not yet due the loss of which will substantially impair the value of the contract to the other, the aggrieved party may:

(a) For a commercially reasonable time await performance by the repudiating party; or

(b) Resort to any remedy for breach (Code Section 11-2-703 or Code Section 11-2-711), even though he has notified the repudiating party that he would await the latter's performance and has urged retraction; and



(c) In either case suspend his own performance or proceed in accordance with the provisions of this article on the seller's right to identify goods to the contract notwithstanding breach or to salvage unfinished goods (Code Section 11-2-704). (Code 1933, § 109A-2—610, enacted by Ga. L. 1962, p. 156, § 1.)

### JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity in the provisions, decisions under former Code 1933, § 20-1106 are included in the annotations for this section.

**Implied contract created.** — Plaintiff's acceptance of defendant's continuing offer of sewer services created an enforceable implied contract between the parties. *Georgia v. City of E. Ridge*, 949 F. Supp. 1571 (N.D. Ga. 1996).

**Refusal to perform constituting anticipatory breach.** — Absolute refusal by one party to perform executory contract containing mutual obligations, prior to date or dates fixed for performance, if such repudiation goes to whole contract, amounts to tender of breach of contract; and if accepted as such by opposite party to contract, constitutes an anticipatory breach, and injured party may at that party's election sue and recover entire damages at once. *Jinright v. Russell*, 123 Ga. App. 706, 182 S.E.2d 328 (1971).

**A buyer's attempt to cancel a sale order** is not an anticipatory breach of the contract where the seller refuses to cancel and asks for adequate assurance of performance, both parties proceed as if the attempt to cancel has never taken place, the seller does not pursue any of its remedies under O.C.G.A. § 11-2-610 and the conduct of the

parties over the ensuing months manifests an implicit understanding that such a repudiation has been retracted without injury. *Wahnschaff Corp. v. O.E. Clark Paper Box Co.*, 166 Ga. App. 242, 304 S.E.2d 91 (1983).

**Party may not repudiate contract and at same time seek advantage** of stipulation in same contract. *Jinright v. Russell*, 123 Ga. App. 706, 182 S.E.2d 328 (1971).

**It is unnecessary to make tender where** party to whom offer is made states it will be refused. *Carnation v. Pridgen*, 84 Ga. App. 768, 67 S.E.2d 485 (1951) (decided under former Code 1933, § 20-1106).

**Lack of delivery as defense.** — Defendant, maker of note, having breached contract by refusing to accept goods purchased thereunder, contract being by its terms not subject to cancellation, and vendor having elected to store goods for vendee, and having notified vendee of disposition of the goods, defendant cannot set up as a defense to suit on the note that merchandise was not delivered to vendee according to terms of contract. *Carnation v. Pridgen*, 84 Ga. App. 768, 67 S.E.2d 485 (1951) (decided under former Code 1933, § 20-1106).

**Cited in** *Henco Adv., Inc. v. Geographics, Inc.*, 155 Ga. App. 571, 271 S.E.2d 704 (1980).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 67A Am. Jur. 2d, Sales, §§ 861-881.

**C.J.S.** — 77A C.J.S., Sales, §§ 99, 105, 119, 125, 126, 327, 395, 406.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 2-610.

**ALR.** — Anticipatory repudiation of contract for sale of goods by buyer as affecting time as of which damages are to be computed, 34 ALR 114.

Anticipatory breach of executory contract as starting running of statute of limitations, 94 ALR 455.

Doctrine of anticipatory breach as applicable to a contract which the complaining party has fully performed, 105 ALR 460.

Uniform Commercial Code: measure of recovery where buyer repudiates contract for goods to be manufactured to special order, before completion of manufacture, 42 ALR3d 182.

What constitutes anticipatory repudiation of sales contract under UCC § 2-610, 1 ALR4th 527.

**11-2-611. Retraction of anticipatory repudiation.**

(1) Until the repudiating party's next performance is due he can retract his repudiation unless the aggrieved party has since the repudiation canceled or materially changed his position or otherwise indicated that he considers the repudiation final.

(2) Retraction may be by any method which clearly indicates to the aggrieved party that the repudiating party intends to perform, but must include any assurance justifiably demanded under the provisions of this article (Code Section 11-2-609).

(3) Retraction reinstates the repudiating party's rights under the contract with due excuse and allowance to the aggrieved party for any delay occasioned by the repudiation. (Code 1933, § 109A-2—611, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 2002, p. 415, § 11.)

The 2002 amendment, effective April 18, 2002, part of an Act to revise, modernize, and correct the Code, substituted "canceled" for "cancelled" in subsection (1).

**JUDICIAL DECISIONS**

**Implied contract created.** — Plaintiff's acceptance of defendant's continuing offer of sewer services created an enforceable implied contract between the parties. *Georgia v. City of E. Ridge*, 949 F. Supp. 1571 (N.D. Ga. 1996).

**Conduct of parties evidencing retraction of repudiation.** — A buyer's attempt to cancel a sale order is not an anticipatory breach of the contract where the seller refuses to cancel and asks for adequate assur-

ance of performance, both parties proceed as if the attempt to cancel has never taken place, the seller does not pursue any of its remedies under O.C.G.A. § 11-2-610, and the conduct of the parties over the ensuing months manifests an implicit understanding that such a repudiation has been retracted without injury. *Wahnschaff Corp. v. O.E. Clark Paper Box Co.*, 166 Ga. App. 242, 304 S.E.2d 91 (1983).

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 67A Am. Jur. 2d, Sales, §§ 882-887.

**C.J.S.** — 77A C.J.S., Sales, §§ 99, 105, 119, 141 et seq.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 2-611.

**ALR.** — Anticipatory breach of executory contract as starting running of statute of limitations, 94 ALR 455.

**11-2-612. "Installment contract"; breach.**

(1) An "installment contract" is one which requires or authorizes the delivery of goods in separate lots to be separately accepted, even though the contract contains a clause "each delivery is a separate contract" or its equivalent.

(2) The buyer may reject any installment which is nonconforming if the nonconformity substantially impairs the value of that installment and

cannot be cured or if the nonconformity is a defect in the required documents; but if the nonconformity does not fall within subsection (3) of this Code section and the seller gives adequate assurance of its cure the buyer must accept that installment.

(3) Whenever nonconformity or default with respect to one or more installments substantially impairs the value of the whole contract there is a breach of the whole. But the aggrieved party reinstates the contract if he accepts a nonconforming installment without seasonably notifying of cancellation or if he brings an action with respect only to past installments or demands performance as to future installments. (Code 1933, § 109A-2 — 612, enacted by Ga. L. 1962, p. 156, § 1.)

**Law reviews.** — For article, “Buyer’s Right of Rejection: A Quarter Century Under the Uniform Commercial Code, and Recent In-

ternational Developments,” see 13 Ga. L. Rev. 805 (1979).

### JUDICIAL DECISIONS

**Jury issue.** — Whether plaintiff-buyer has made cover purchases in reasonable manner poses classic jury issue. *American Carpet Mills v. Gunny Corp.*, 649 F.2d 1056 (5th Cir. 1981).

**Cited** in *Bigelow-Sanford, Inc. v. Gunny Corp.*, 649 F.2d 1060 (5th Cir. 1981).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 67 Am. Jur. 2d, Sales, §§ 681-689.

**C.J.S.** — 77 C.J.S., Sales, §§ 102 et seq., 181.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 2-612.

**ALR.** — Contract for sale of goods as entire or divisible, 2 ALR 643.

Divisibility of contract to furnish material for a specific construction, 2 ALR 687.

Right of seller to rescind or refuse further

deliveries upon the buyer’s failure to pay for instalments, 14 ALR 1209; 75 ALR 609.

Acceptance of instalment of goods as affecting buyer’s right to rescind because of defects in that instalment, 29 ALR 1517.

Severability of invalid arbitration provisions of contract, 90 ALR 1305.

Sales: construction and application of UCC § 2-612(2), dealing with rejection of goods under installment contracts, 61 ALR5th 611.

### 11-2-613. Casualty to identified goods.

Where the contract requires for its performance goods identified when the contract is made, and the goods suffer casualty without fault of either party before the risk of loss passes to the buyer, or in a proper case under a “no arrival, no sale” term (Code Section 11-2-324) then:

(a) If the loss is total the contract is avoided; and

(b) If the loss is partial or the goods have so deteriorated as no longer to conform to the contract the buyer may nevertheless demand inspection and at his option either treat the contract as avoided or accept the goods with due allowance from the contract price for the deterioration or



the deficiency in quantity but without further right against the seller. (Code 1933, § 109A-2—613, enacted by Ga. L. 1962, p. 156, § 1.)

**Law reviews.** — For article, “Impracticability As Risk Allocation: The Effect of Changed Circumstances upon Contract Ob-

ligations for the Sale of Goods,” see 22 Ga. L. Rev. 503 (1988).

### JUDICIAL DECISIONS

**Editor’s notes.** — In light of the similarity of the provisions, decisions under former Code 1933, § 96-108 are included under the annotations for this section.

**Stipulation regarding delays or damages beyond vendor’s control.** — Contract stipulation that “vendor shall not be held liable for any loss or damage arising from delays or damages caused by fire or strikes, delays in

transportation, or other causes beyond vendor’s control,” is not such an agreement as would come within the proviso “unless it is otherwise agreed in the contract” of former Code 1933, § 96-108. *Wood v. Phoenix Ins. Co.*, 199 Ga. 461, 34 S.E.2d 688 (1945) (decided under former Code 1933, § 96-108).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 67 Am. Jur. 2d, Sales, §§ 585-587.

**C.J.S.** — 77A C.J.S., Sales, §§ 121 et seq., 214.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 2-613.

**ALR.** — Construction and effect of UCC § 2-613 governing casualty to goods identified to a contract, without fault of buyer or seller, 51 ALR4th 537.

### 11-2-614. Substituted performance.

(1) Where without fault of either party the agreed berthing, loading, or unloading facilities fail or an agreed type of carrier becomes unavailable or the agreed manner of delivery otherwise becomes commercially impracticable but a commercially reasonable substitute is available, such substitute performance must be tendered and accepted.

(2) If the agreed means or manner of payment fails because of domestic or foreign governmental regulation, the seller may withhold or stop delivery unless the buyer provides a means or manner of payment which is commercially a substantial equivalent. If delivery has already been taken, payment by the means or in the manner provided by the regulation discharges the buyer’s obligation unless the regulation is discriminatory, oppressive, or predatory. (Code 1933, § 109A-2—614, enacted by Ga. L. 1962, p. 156, § 1.)

**Law reviews.** — For article, “Impracticability As Risk Allocation: The Effect of Changed Circumstances upon Contract Ob-

ligations for the Sale of Goods,” see 22 Ga. L. Rev. 503 (1988).

## JUDICIAL DECISIONS

**Government regulations rendering performance impossible.** — Contractual duty generally excused when government regulations subsequent to making of contract render performance impossible. *R.C. Craig, Ltd. v. Ships of Sea, Inc.*, 345 F. Supp. 1066 (S.D. Ga. 1972), later proceeding, 401 F. Supp. 1051 (S.D. Ga. 1975).

O.C.G.A. § 11-2-614 deals with instances in international trade where buyer cannot make payment in seller's currency as a result of governmental regulation. *R.C. Craig, Ltd. v. Ships of Sea, Inc.*, 345 F. Supp. 1066 (S.D. Ga. 1972), later proceeding, 401 F. Supp. 1051 (S.D. Ga. 1975).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 67 Am. Jur. 2d, Sales, §§ 588-590. 401 F. Supp. 1051 (S.D. Ga. 1975), later proceeding.

**C.J.S.** — 77A C.J.S., Sales, §§ 208, 209.  
**U.L.A.** — Uniform Commercial Code (U.L.A.) § 2-614.

**11-2-615. Excuse by failure of presupposed conditions.**

Except so far as a seller may have assumed a greater obligation and subject to Code Section 11-2-614 on substituted performance:

(a) Delay in delivery or nondelivery in whole or in part by a seller who complies with paragraphs (b) and (c) of this Code section is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the nonoccurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.

(b) Where the clauses mentioned in paragraph (a) of this Code section affect only a part of the seller's capacity to perform, he must allocate production and deliveries among his customers but may at his option include regular customers not then under contract as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable.

(c) The seller must notify the buyer seasonably that there will be delay or nondelivery and, when allocation is required under paragraph (b) of this Code section, of the estimated quota thus made available for the buyer. (Code 1933, § 109A-2—615, enacted by Ga. L. 1962, p. 156, § 1.)

**Law reviews.** — For article discussing the anachronistic nature of the Georgia contracts Code as dramatized by comparing the doctrine of consideration as it is formulated in the restatements of contracts and in former Title 20 of the Georgia Code of 1933, and the interpretative approach Georgia courts have taken in dealing with such Code,

see 13 Ga. L. Rev. 449 (1979). For article, "Impracticability As Risk Allocation: The Effect of Changed Circumstances upon Contract Obligations for the Sale of Goods," see 22 Ga. L. Rev. 503 (1988). For article, "The Future Use of Unconscionability and Impracticability as Contract Doctrines," see 40 Mercer L. Rev. 937 (1989).

## JUDICIAL DECISIONS

## ANALYSIS

## GENERAL CONSIDERATION

## APPLICATION

## ALLOCATION

## SELLER'S ASSUMPTION OF GREATER LIABILITY

## General Consideration

**Wide and flexible application intended.** —

No exact definition of range of excusing contingencies is possible, O.C.G.A. § 11-2-615 being intentionally drawn in general terms to permit wide and flexible application. *Swift Textiles, Inc. v. Lawson*, 135 Ga. App. 799, 219 S.E.2d 167 (1975).

**Cited in** *R.C. Craig, Ltd. v. Ships of Sea, Inc.*, 345 F. Supp. 1066 (S.D. Ga. 1972); *R.C. Craig, Ltd. v. Ships of Sea, Inc.*, 401 F. Supp. 1051 (S.D. Ga. 1975); *Fratelli Gardino v. Caribbean Lumber Co.*, 587 F.2d 204 (5th Cir. 1979).

## Application

**Section requires proof of commercial impracticability of performance.** — The Uniform Commercial Code does not require proof of impossibility of performance but merely that of impracticability, which term must be interpreted as commercial impracticability. To that extent the Uniform Commercial Code makes contract less binding on parties by widening grounds for which a seller may be relieved of the seller's obligation. *Swift Textiles, Inc. v. Lawson*, 135 Ga. App. 799, 219 S.E.2d 167 (1975).

**Standard by which impracticability should be judged** is an objective one. Under this objective standard, the focus of the impracticability analysis is upon the nature of the agreement and the expectations of the parties, not to the size and financial ability of the parties. *Alimenta (U.S.A.), Inc. v. Cargill, Inc.*, 861 F.2d 650 (11th Cir. 1988).

**Severe shortage of raw materials or supplies due to unforeseen contingency.** — Severe shortage of raw materials or supplies due to contingency such as war, embargo, local crop failure, unforeseen shutdown or major sources of supply, or the like, which either causes a marked increase in cost or altogether prevents seller from securing supplies necessary to performance, is within the contemplation of O.C.G.A. § 11-2-615. *Swift*

*Textiles, Inc. v. Lawson*, 135 Ga. App. 799, 219 S.E.2d 167 (1975).

**Mere unexpected difficulty or unforeseen expense encountered by seller** does not excuse seller's performance. *Swift Textiles, Inc. v. Lawson*, 135 Ga. App. 799, 219 S.E.2d 167 (1975).

Difficulty, inconvenience, or unusual cost in performing, though it may make performance hardship, does not excuse a party from performance of an absolute, unqualified undertaking to do a thing that is possible and lawful. *Swift Textiles, Inc. v. Lawson*, 135 Ga. App. 799, 219 S.E.2d 167 (1975).

Increased cost alone does not excuse performance unless due to unforeseen contingency which alters essential nature of performance. *Swift Textiles, Inc. v. Lawson*, 135 Ga. App. 799, 219 S.E.2d 167 (1975).

**Rise or collapse in market** in itself is not justification for nonperformance, for that is exactly the type of business risk which business contracts made at fixed prices are intended to cover. *Swift Textiles, Inc. v. Lawson*, 135 Ga. App. 799, 219 S.E.2d 167 (1975).

**Unforeseeable drought.** — Seller was entitled to be excused from performing contracts for the sale of peanuts because such performance had become commercially impractical due to the occurrence of a drought whose effects were not foreseeable when the contracts had been made. *Alimenta (U.S.A.), Inc. v. Gibbs Nathaniel (Can.) Ltd.*, 802 F.2d 1362 (11th Cir. 1986).

## Allocation

**"Fair and reasonable".** — The language "fair and reasonable" in O.C.G.A. § 11-2-615(b) means that amount allocated must be fair and reasonable, and price charged for amount allocated must be in accordance with provisions of the contract. *Mansfield Propane Gas Co. v. Folger Gas Co.*, 231 Ga. 868, 204 S.E.2d 625 (1974).



### **Seller's Assumption of Greater Liability**

**O.C.G.A. § 11-2-615 will not apply where seller has assumed a greater obligation,** which occurs when a contract contains an affirmative provision that seller will perform contract even though contingencies might occur. *Gold Kist, Inc. v. Stokes*, 138 Ga. App. 482, 226 S.E.2d 268 (1976).

**Parties, by terms of contract, may impose greater obligation upon seller.** — O.C.G.A. § 11-2-615 expressly recognizes right to impose, by terms of contract, a higher standard upon seller, with result that parties may restrict excusing contingencies to those specified in the contract or may eliminate protection given by O.C.G.A. § 11-2-615 by imposing upon seller an absolute contractual duty to make delivery. *Swift Textiles, Inc. v. Lawson*, 135 Ga. App. 799, 219 S.E.2d 167 (1975).

**Affirmative provision in contract required.** — For there to be exception to and exemption from rule of allocation applicable to contract of sale, such contract must contain

affirmative provision that seller will perform contract even though contingencies which permit allocation might occur. *Mansfield Propane Gas Co. v. Folger Gas Co.*, 231 Ga. 868, 204 S.E.2d 625 (1974).

**Agreement to pay damages if event making performance impossible occurs.** — An affirmative provision in contract that seller agrees to pay stipulated damages upon occurrence of an event making performance impossible necessarily implies that a breach of contract under those conditions is conceded, and places upon seller a greater obligation than might otherwise exist. *Gold Kist, Inc. v. Stokes*, 138 Ga. App. 482, 226 S.E.2d 268 (1976).

**Question of fact may arise** as to whether nonoccurrence of given contingency was a basic assumption, and fact that the contingency was contemplated by parties indicates either that seller assumed liability therefor or that by definition it was not an excusing contingency within O.C.G.A. § 11-2-615. *Swift Textiles, Inc. v. Lawson*, 135 Ga. App. 799, 219 S.E.2d 167 (1975).

### **RESEARCH REFERENCES**

**Am. Jur. 2d.** — 67 Am. Jur. 2d, Sales, §§ 591-606.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 2-615.

**ALR.** — Destruction or loss of specific property which is the subject or basis of a contract, after the inception of the contract, as excuse for nonperformance, 12 ALR 1273; 74 ALR 1289.

Meaning of words "commercially impracticable" in contract of sale, 38 ALR 215.

Express provisions in contract of sale, or for supply of a commodity, for relief from the obligation in certain event, 51 ALR 990.

Pro rata distribution by seller to buyers, 74 ALR 995.

Destruction or loss of specific property which is the subject or basis of a contract, after the inception of the contract, as excuse for nonperformance, 74 ALR 1289.

Inability of a seller of a commodity manufactured or produced by a third person to obtain the same from the latter as a defense to an action by the buyer for breach of the contract, 80 ALR 1177.

Insolvency of insurer as affecting liability of one under duty by statute or contract to carry or maintain insurance for another's protection, 106 ALR 248.

Rights of parties to contract the performance of which is interfered with or prevented by war conditions or acts of government in prosecution of war, 137 ALR 1199; 147 ALR 1273; 148 ALR 1382; 149 ALR 1447; 150 ALR 1413; 151 ALR 1447; 152 ALR 1447; 153 ALR 1417; 154 ALR 1445; 155 ALR 1447; 156 ALR 1446; 157 ALR 1446; 158 ALR 1446.

Impracticability of performance of sales contract under UCC § 2-615, 55 ALR5th 1.

### **11-2-616. Procedure on notice claiming excuse.**

(1) Where the buyer receives notification of a material or indefinite delay or an allocation justified under Code Section 11-2-615 he may by written notification to the seller as to any delivery concerned, and where the

prospective deficiency substantially impairs the value of the whole contract under the provisions of this article relating to breach of installment contracts (Code Section 11-2-612), then also as to the whole:

(a) Terminate and thereby discharge any unexecuted portion of the contract; or

(b) Modify the contract by agreeing to take his available quota in substitution.

(2) If after receipt of such notification from the seller the buyer fails so to modify the contract within a reasonable time not exceeding 30 days the contract lapses with respect to any deliveries affected.

(3) The provisions of this Code section may not be negated by agreement except insofar as the seller has assumed a greater obligation under Code Section 11-2-615. (Code 1933, § 109A-2—616, enacted by Ga. L. 1962, p. 156, § 1.)

**Law reviews.** — For article, “Impracticability As Risk Allocation: The Effect of Changed Circumstances upon Contract Ob-

ligations for the Sale of Goods,” see 22 Ga. L. Rev. 503 (1988).

### JUDICIAL DECISIONS

**Cited in** *Fratelli Gardino v. Caribbean Lumber Co.*, 587 F.2d 204 (5th Cir. 1979).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 67 Am. Jur. 2d, Sales, §§ 607-609.

**C.J.S.** — 77A C.J.S., Sales, §§ 109 et seq., 125 et seq.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 2-616.

**ALR.** — Destruction or loss of specific property which is the subject or basis of a contract, after the inception of the contract, as excuse for nonperformance, 74 ALR 1289.

## PART 7

### REMEDIES

**Law reviews.** — For article discussing and comparing remedies set out for breach of contract under Article 2 of the Uniform Commercial Code with corresponding remedies provided by the Uniform Land Transaction Act for real estate transactions, see 11 Ga. L. Rev. 275 (1977). For article critically

analyzing the distinction in theories of recovery of damages caused by defective products between personal injuries cases and economic losses and suggesting a policy basis for deciding the latter, see 29 Mercer L. Rev. 493 (1978).

**11-2-701. Remedies for breach of collateral contracts not impaired.**

Remedies for breach of any obligation or promise collateral or ancillary to a contract for sale are not impaired by the provisions of this article. (Code 1933, § 109A-2—701, enacted by Ga. L. 1962, p. 156, § 1.)

**Cross references.** — Damages for breach of contract generally, Ch. 6, T. 13.

**RESEARCH REFERENCES**

**C.J.S.** — 77A C.J.S., Sales, §§ 278 et seq., 326.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 2-701.

**11-2-702. Seller's remedies on discovery of buyer's insolvency.**

(1) Where the seller discovers the buyer to be insolvent he may refuse delivery except for cash including payment for all goods theretofore delivered under the contract, and stop delivery under this article (Code Section 11-2-705).

(2) Where the seller discovers that the buyer has received goods on credit while insolvent he may reclaim the goods upon demand made within ten days after the receipt, but if misrepresentation of solvency has been made to the particular seller in writing within three months before delivery the ten-day limitation does not apply. Except as provided in this subsection the seller may not base a right to reclaim goods on the buyer's fraudulent or innocent misrepresentation of solvency or of intent to pay.

(3) The seller's right to reclaim under subsection (2) of this Code section is subject to the rights of a buyer in ordinary course or other good faith purchaser or lien creditor under this article (Code Section 11-2-403). Successful reclamation of goods excludes all other remedies with respect to them. (Code 1933, § 109A-2—702, enacted by Ga. L. 1962, p. 156, § 1.)

**Law reviews.** — For article discussing the resolution of conflicting claims to goods between an unsecured seller of goods and a creditor of a buyer claiming under an

after-acquired property clause, see 28 Mercer L. Rev. 625 (1977). For article surveying recent judicial developments in commercial law, see 31 Mercer L. Rev. 13 (1979).

**JUDICIAL DECISIONS**

**Right of reclamation subject to rights of good faith purchasers.** — Right to reclamation of delivered goods by seller on discovery of purchaser's insolvency is primarily a right between seller and purchaser, and is subject to paramount rights of a buyer in ordinary course of business or other good faith purchaser. *B & P Lumber Co. v. First Nat'l Bank*, 147 Ga. App. 762, 250 S.E.2d 505 (1978).

**Good faith purchaser defeats seller's reclamation rights.** — Where the record contained nothing to refute the affidavit of the defendant company's president to the effect that it had no actual knowledge of facts which would prevent it from being considered a good faith purchaser, pursuant to the clear and unequivocal language of O.C.G.A. § 11-2-702(3), whatever reclamation rights



the plaintiff might have had in the property were cut off by the foreclosure sale at which the defendant purchased the appliances and furnishings. *Weinberg/Matheson Equities, Inc. v. Charles S. Martin Distrib. Co.*, 180 Ga. App. 182, 348 S.E.2d 723 (1986).

**Reclamation rights not extended to proceeds.** — A seller, who has foregone the available option of perfecting its own interests under the UCC, enjoys a remedy under O.C.G.A. § 11-2-702 only to the extent that the provision grants such a seller a right to reclaim the goods from the buyer or purchasers who have proceeded other than in good faith; the UCC creates no reclamation rights which extend to proceeds. *Dixie Bonded Whse. & Grain Co. v. Allstate Fin. Corp.*, 755 F. Supp. 1543 (M.D. Ga.), *aff'd*, 944 F.2d 819 (11th Cir. 1991).

**Reclamation where secured creditor with prior claim exists.** — A seller may have a

right to reclaim pursuant to O.C.G.A. § 11-2-702, notwithstanding the existence of a secured creditor with a prior claim, in which case, the seller may then be entitled to a lien or administrative priority claim, pursuant to 11 U.S.C.S. § 546(c)(2), but only if the seller can establish that the seller's right to reclaim has some value outside of the bankruptcy context. *In re Leeds Bldg. Prods., Inc.*, 141 Bankr. 265 (Bankr. N.D. Ga. 1992).

**Cited in** *Chastain-Roberts Co. v. Better Brands, Inc.*, 141 Ga. App. 186, 233 S.E.2d 5 (1977); *Northwestern Nat'l Sales, Inc. v. Commercial Cold Storage, Inc.*, 162 Ga. App. 741, 293 S.E.2d 30 (1982); *Graniteville Co. v. Bleckley Lumber Co.*, 944 F.2d 819 (11th Cir. 1991); *Eastman Cutting Room Sales Corp. v. Ottenheimer & Co.*, 221 Ga. App. 659, 472 S.E.2d 494 (1996).

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 67 Am. Jur. 2d, Sales, § 673. 67A Am. Jur. 2d, Sales, §§ 1025-1050. 68A Am. Jur. 2d, Secured Transactions, § 867.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 2-702.

**ALR.** — Duty of purchaser on credit to accept seller's offer to deliver for cash, 1 ALR 436; 46 ALR 1192.

Right of seller to rescind or refuse further deliveries upon the buyer's failure to pay for instalments, 14 ALR 1209; 75 ALR 609.

Right of seller to enforce contract for sale on credit as contract for cash because of buyer's insolvency, 58 ALR 1301; 117 ALR 1105.

Right to rescind sale and reclaim goods for buyer's fraud as to his financial condition as against trustee in bankruptcy under American act, 59 ALR 418.

Buyer's insolvency as affecting rights and obligations of parties to sale of goods on credit before delivery thereof, 117 ALR 1105.

### 11-2-703. Seller's remedies in general.

Where the buyer wrongfully rejects or revokes acceptance of goods or fails to make a payment due on or before delivery or repudiates with respect to a part or the whole, then with respect to any goods directly affected and, if the breach is of the whole contract (Code Section 11-2-612), then also with respect to the whole undelivered balance, the aggrieved seller may:

- (a) Withhold delivery of such goods;
- (b) Stop delivery by any bailee as hereafter provided (Code Section 11-2-705);
- (c) Proceed under Code Section 11-2-704 respecting goods still unidentified to the contract;
- (d) Resell and recover damages as hereafter provided (Code Section 11-2-706);

(e) Recover damages for nonacceptance (Code Section 11-2-708) or in a proper case the price (Code Section 11-2-709);

(f) Cancel. (Code 1933, § 109A-2—703, enacted by Ga. L. 1962, p. 156, § 1.)

### JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity in the provisions, decisions under former Code 1933, §§ 96-107 and 96-113 are included in the annotations for this section.

**Action for price as remedy for wrongful rejection.** — O.C.G.A. § 11-2-602 recognizes that wrongful rejections may occur and refers to O.C.G.A. § 11-2-703 for seller's remedies in such event, one of which is an action for the price. *Cochran v. Horner*, 121 Ga. App. 297, 173 S.E.2d 448 (1970); *Lipsev Motors v. Karp Motors, Inc.*, 194 Ga. App. 15, 389 S.E.2d 537 (1989).

**Nondelivery as defense.** — Defendant, maker of note, having breached contract by refusing to accept goods purchased thereunder, the contract by its terms not subject to cancellation, and vendor having elected to store goods for vendee, and having notified

vendee of disposition of the goods, defendant cannot set up as a defense to suit on the note that merchandise was not delivered to vendee according to contract terms. *Carnation v. Pridgen*, 84 Ga. App. 768, 67 S.E.2d 485 (1951) (decided under former Code 1933, § 96-107).

**Proving that measure of damages is incorrect.** — In suit brought by vendor on contract for sale of grapevines where the buyer refused to accept the vines, measure of damages, and often amount of damages, will vary with plaintiff's election, and defendant has right to deny this and prove that measure of damages sued for is not correct under the evidence. *Hester v. Love*, 84 Ga. App. 765, 67 S.E.2d 481 (1951) (decided under former Code 1933, § 96-113).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 13 Am. Jur. 2d, Carriers, § 438 et seq. 67A Am. Jur. 2d, Sales, §§ 986-1163.

**C.J.S.** — 77A C.J.S., Sales, § 326.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 2-703.

**ALR.** — Remedy of contractor, who has partially performed before discovering fraud, as to character or amount of work, 2 ALR 1396.

Right of seller to rescind or refuse further deliveries upon the buyer's failure to pay for instalments, 14 ALR 1209; 75 ALR 609.

Right of seller to ship goods after notice of repudiation by buyer, 27 ALR 1230.

Expense of caring for personal property prior to its resale upon failure of sale contract, 29 ALR 61.

Liability of labor organization for inducing breach of contract to furnish or accept material, 29 ALR 562.

Rights of parties to a timber contract upon failure of purchaser to remove timber within time fixed or within a reasonable time, 31

ALR 944; 42 ALR 641; 71 ALR 143; 164 ALR 423.

Anticipatory repudiation of contract for sale of goods by buyer as affecting time as of which damages are to be computed, 34 ALR 114.

Measure of damages for buyer's repudiation of or failure to accept goods under executory contract, 44 ALR 215; 108 ALR 1482.

Rights and remedies upon cancellation of sales agency, 52 ALR 546; 89 ALR 252.

Bringing action for price as waiver by conditional vendor of right to reclaim property, 56 ALR 238; 113 ALR 653.

Rights and remedies as between parties to a conditional sale after the seller has repossessed himself of the property, 83 ALR 959; 99 ALR 1288; 49 ALR2d 15.

Guaranty as covering buyer's liability for goods which he refused to accept, 94 ALR 548.

Performance by vendor of covenant to make improvement as condition of his right

to recover purchase price or instalment thereof, 104 ALR 1062.

Return of chattel to seller after delivery to buyer as revival of seller's lien; and its effect upon conditions of enforcing lien, 118 ALR 564.

Seller's right to retain down payment on buyer's unjustified refusal to accept goods, 11 ALR2d 701.

Rights and duties of parties to conditional

sales contract as to resale of repossessed property, 49 ALR2d 15.

Infant's liability for use or depreciation of subject matter, in action to recover purchase price upon his disaffirmance of contract to purchase goods, 12 ALR3d 1174.

Repossession by secured seller as affecting his right to recover on note or other obligation given as a down payment, 49 ALR3d 364.

### **11-2-704. Seller's right to identify goods to the contract notwithstanding breach or to salvage unfinished goods.**

(1) An aggrieved seller under Code Section 11-2-703 may:

(a) Identify to the contract conforming goods not already identified if at the time he learned of the breach they are in his possession or control;

(b) Treat as the subject of resale goods which have demonstrably been intended for the particular contract even though those goods are unfinished.

(2) Where the goods are unfinished an aggrieved seller may in the exercise of reasonable commercial judgment for the purposes of avoiding loss and of effective realization either complete the manufacture and wholly identify the goods to the contract or cease manufacture and resell for scrap or salvage value or proceed in any other reasonable manner. (Code 1933, § 109A-2—704, enacted by Ga. L. 1962, p. 156, § 1.)

#### **RESEARCH REFERENCES**

**Am. Jur. 2d.** — 67A Am. Jur. 2d, Sales, §§ 1105-1108.

**C.J.S.** — 77A C.J.S., Sales, § 326.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 2-704.

**ALR.** — Uniform Commercial Code: measure of recovery where buyer repudiates contract for goods to be manufactured to special order, before completion of manufacture, 42 ALR3d 182.

### **11-2-705. Seller's stoppage of delivery in transit or otherwise.**

(1) The seller may stop delivery of goods in the possession of a carrier or other bailee when he discovers the buyer to be insolvent (Code Section 11-2-702) and may stop delivery of carload, truckload, planeload, or larger shipments of express or freight when the buyer repudiates or fails to make a payment due before delivery or if for any other reason the seller has a right to withhold or reclaim the goods.

(2) As against such buyer the seller may stop delivery until:

(a) Receipt of the goods by the buyer; or

(b) Acknowledgment to the buyer by any bailee of the goods except a carrier that the bailee holds the goods for the buyer; or



(c) Such acknowledgment to the buyer by a carrier by reshipment or as warehouseman; or

(d) Negotiation to the buyer of any negotiable document of title covering the goods.

(3) (a) To stop delivery the seller must so notify as to enable the bailee by reasonable diligence to prevent delivery of the goods.

(b) After such notification the bailee must hold and deliver the goods according to the directions of the seller but the seller is liable to the bailee for any ensuing charges or damages.

(c) If a negotiable document of title has been issued for goods the bailee is not obliged to obey a notification to stop until surrender of the document.

(d) A carrier who has issued a nonnegotiable bill of lading is not obliged to obey a notification to stop received from a person other than the consignor. (Code 1933, § 109A-2—705, enacted by Ga. L. 1962, p. 156, § 1.)

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 13 Am. Jur. 2d, Carriers, § 473. 67A Am. Jur. 2d, Sales, §§ 1051-1072. 78 Am. Jur. 2d, Warehouses, § 203.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 2-705.

**ALR.** — When right of stoppage in transitu terminates, 7 ALR 1374.

Right of seller to rescind or refuse further deliveries upon the buyer's failure to pay for instalments, 14 ALR 1209; 75 ALR 609.

Measure of damages for buyer's repudiation of or failure to accept goods under executory contract, 44 ALR 215; 108 ALR 1482.

#### 11-2-706. Seller's resale including contract for resale.

(1) Under the conditions stated in Code Section 11-2-703 on seller's remedies, the seller may resell the goods concerned or the undelivered balance thereof. Where the resale is made in good faith and in a commercially reasonable manner the seller may recover the difference between the resale price and the contract price together with any incidental damages allowed under the provisions of this article (Code Section 11-2-710), but less expenses saved in consequence of the buyer's breach.

(2) Except as otherwise provided in subsection (3) of this Code section or unless otherwise agreed resale may be at public or private sale including sale by way of one or more contracts to sell or of identification to an existing contract of the seller. Sale may be as a unit or in parcels and at any time and place and on any terms but every aspect of the sale including the method, manner, time, place, and terms must be commercially reasonable. The resale must be reasonably identified as referring to the broken contract, but it is not necessary that the goods be in existence or that any or all of them have been identified to the contract before the breach.

(3) Where the resale is at private sale the seller must give the buyer reasonable notification of his intention to resell.

(4) Where the resale is at public sale:

(a) Only identified goods can be sold except where there is a recognized market for a public sale of futures in goods of the kind; and

(b) It must be made at a usual place or market for public sale if one is reasonably available and except in the case of goods which are perishable or threaten to decline in value speedily the seller must give the buyer reasonable notice of the time and place of the resale; and

(c) If the goods are not to be within the view of those attending the sale the notification of sale must state the place where the goods are located and provide for their reasonable inspection by prospective bidders; and

(d) The seller may buy.

(5) A purchaser who buys in good faith at a resale takes the goods free of any rights of the original buyer even though the seller fails to comply with one or more of the requirements of this Code section.

(6) The seller is not accountable to the buyer for any profit made on any resale. A person in the position of a seller (Code Section 11-2-707) or a buyer who has rightfully rejected or justifiably revoked acceptance must account for any excess over the amount of his security interest, as hereinafter defined (subsection (3) of Code Section 11-2-711). (Code 1933, § 109A-2—706, enacted by Ga. L. 1962, p. 156, § 1.)

### JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Code 1933, § 96-113 are included in the annotations for this section.

**Requirements for notice of intention to resell.** — Notice of intention to resell should be given a reasonable time before resale, and must contain a definite statement of vendor's election. *Abercrombie v. Georgia Distrib. Co.*, 43 Ga. App. 258, 158 S.E. 530 (1931) (decided under former Code 1933, § 96-113).

**Jury question.** — What is reasonable time for notice of intention to resell is usually a

jury question, but where it is clear and manifest that no sufficient time had elapsed for a given action, the court may so hold as a matter of law. *Abercrombie v. Georgia Distrib. Co.*, 43 Ga. App. 258, 158 S.E. 530 (1931) (decided under former Code 1933, § 96-113).

**Cited in** *Steelman v. Associates Disc. Corp.*, 121 Ga. App. 649, 175 S.E.2d 62 (1970); *Geohagan v. Commercial Credit Corp.*, 130 Ga. App. 828, 204 S.E.2d 784 (1974); *Ryder Truck Lines v. Goren Equip. Co.*, 576 F. Supp. 1348 (N.D. Ga. 1983).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 7 Am. Jur. 2d, Auctions and Auctioneers, § 60. 22 Am. Jur. 2d, Damages, § 509. 67A Am. Jur. 2d, Sales, §§ 1081-1104.

**C.J.S.** — 77A C.J.S., Sales, § 326.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 2-706.

**ALR.** — Expense of caring for personal property prior to its resale upon failure of sale contract, 29 ALR 61.

Rights and remedies upon cancellation of sales agency, 32 ALR 209; 52 ALR 546; 89 ALR 252.

Measure of damages for buyer's repudia-

tion of or failure to accept goods under executory contract, 44 ALR 215; 108 ALR 1482.

Measure of seller's damages under executory contract as affected by his resale of the property, 119 ALR 1141.

### 11-2-707. "Person in the position of a seller."

(1) A "person in the position of a seller" includes as against a principal an agent who has paid or become responsible for the price of goods on behalf of his principal or anyone who otherwise holds a security interest or other right in goods similar to that of a seller.

(2) A person in the position of a seller may as provided in this article withhold or stop delivery (Code Section 11-2-705) and resell (Code Section 11-2-706) and recover incidental damages (Code Section 11-2-710). (Code 1933, § 109A-2—707, enacted by Ga. L. 1962, p. 156, § 1.)

### JUDICIAL DECISIONS

**Cited** in *Chrysler Credit Corp. v. Barnes*, 126 Ga. App. 444, 191 S.E.2d 121 (1972).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 50 Am. Jur. 2d, Letters of Credit, and Credit Cards, § 75 et seq. 68A Am. Jur. 2d, Secured Transactions, § 13.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 2-707.

**ALR.** — Measure of damages for buyer's repudiation of or failure to accept goods under executory contract, 44 ALR 215; 108 ALR 1482.

### 11-2-708. Seller's damages for nonacceptance or repudiation.

(1) Subject to subsection (2) of this Code section and to the provisions of this article with respect to proof of market price (Code Section 11-2-723), the measure of damages for nonacceptance or repudiation by the buyer is the difference between the market price at the time and place for tender and the unpaid contract price together with any incidental damages provided in this article (Code Section 11-2-710), but less expenses saved in consequence of the buyer's breach.

(2) If the measure of damages provided in subsection (1) of this Code section is inadequate to put the seller in as good a position as performance would have done then the measure of damages is the profit (including reasonable overhead) which the seller would have made from full performance by the buyer, together with any incidental damages provided in this article (Code Section 11-2-710), due allowance for costs reasonably incurred and due credit for payments or proceeds of resale. (Code 1933, § 109A-2—708, enacted by Ga. L. 1962, p. 156, § 1.)



## JUDICIAL DECISIONS

**Purpose of section.** — O.C.G.A. § 11-2-708 was intended to provide an adequate remedy for the “lost volume dealer” or “lost volume seller,” which refers to a seller who, due to the nature of its business, is damaged by a buyer’s breach to the extent that it loses the entire profit from the sale. *Unique Designs, Inc. v. Pittard Mach. Co.*, 200 Ga. App. 647, 409 S.E.2d 241, cert. denied, 200 Ga. App. 897, 409 S.E.2d 241 (1991).

**Arithmetical accuracy in determining damages not required.** — The evidence clearly established a breach of an agreement to buy/sell electronic circuit boards and a resulting right to damages even though the amount of damages was arrived at by use of a complex and confusing mathematical methodology which did not produce exact

arithmetical accuracy. *Franklin v. Demico, Inc.*, 179 Ga. App. 775, 347 S.E.2d 718 (1986).

**Proof required to establish “lost volume dealer.”** — In order for seller to establish that seller is a “lost volume dealer,” seller must prove that even though the repudiated contract goods were later resold by the seller, the sale to the third party would have been made regardless of the buyer’s breach so that the seller would have realized two profits from two sales. *Unique Designs, Inc. v. Pittard Mach. Co.*, 200 Ga. App. 647, 409 S.E.2d 241, cert. denied, 200 Ga. App. 897, 409 S.E.2d 241 (1991).

**Cited in** *Tennessee-Virginia Constr. Co. v. Willingham*, 117 Ga. App. 290, 160 S.E.2d 444 (1968).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 22 Am. Jur. 2d, Damages, §§ 509, 642-647. 67A Am. Jur. 2d, Sales, §§ 1109-1134.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 2-708.

**ALR.** — Time as of which damages are to be determined where broker, before expiration of credit period, repudiates contract to purchase stock for customer on partial payment plan, 31 ALR 1179.

Rights and remedies upon cancelation of sales agency, 32 ALR 209; 52 ALR 546; 89 ALR 252.

Valuation clause in carrier’s contract as limit, or as ratio, of recovery in case of partial loss, 41 ALR 450.

Measure of damages for buyer’s breach of contract to purchase article of dealer, 44 ALR 349; 24 ALR2d 1008.

Measure of damages for buyer’s repudiation of or failure to accept goods under executory contract, 44 ALR 215; 108 ALR 1482.

Rate of exchange to be taken into account in assessing damages for breach of contract or nonpayment of money obligation payable in foreign currency, 105 ALR 640.

Measure of damages for buyer’s breach of contract to purchase article from dealer or manufacturer’s agent, 24 ALR2d 1008.

Uniform Commercial Code: measure of recovery where buyer repudiates contract for goods to be manufactured to special order, before completion of manufacture, 42 ALR3d 182.

## 11-2-709. Action for the price.

(1) When the buyer fails to pay the price as it becomes due the seller may recover, together with any incidental damages under Code Section 11-2-710, the price:

(a) Of goods accepted or of conforming goods lost or damaged within a commercially reasonable time after risk of their loss has passed to the buyer; and

(b) Of goods identified to the contract if the seller is unable after reasonable effort to resell them at a reasonable price or the circumstances reasonably indicate that such effort will be unavailing.

(2) Where the seller sues for the price he must hold for the buyer any goods which have been identified to the contract and are still in his control except that if resale becomes possible he may resell them at any time prior to the collection of the judgment. The net proceeds of any such resale must be credited to the buyer and payment of the judgment entitles him to any goods not resold.

(3) After the buyer has wrongfully rejected or revoked acceptance of the goods or has failed to make a payment due or has repudiated (Code Section 11-2-610), a seller who is held not entitled to the price under this Code section shall nevertheless be awarded damages for nonacceptance under Code Section 11-2-708. (Code 1933, § 109A-2—709, enacted by Ga. L. 1962, p. 156, § 1.)

**Law reviews.** — For comment on Schuler v. Dearing Chevrolet Co., 76 Ga. App. 570, 46 S.E.2d 611 (1948), see 11 Ga. B.J. 72 (1948).

### JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the issues dealt with under the sections, decisions under former Code 1933, § 96-101 are included in the annotations for this section.

**Proof of price required.** — Price was one of the essentials of contract for sale of goods giving rise to alleged indebtedness, which was denied by defendant in its answer, and proof of price, as amount sued for, was necessary to prove case as alleged; where evidence was insufficient to establish that defendant owed plaintiff any definite amount, as contract price of goods or as market value of goods, nonsuit was proper. *Wolfe v. Brown-Wright Hotel Supply Corp.*, 87 Ga. App. 12, 73 S.E.2d 82 (1952) (decided under former Code 1933, § 96-101).

**Suit on open account** may be maintained for price of goods sold under contract where price has been agreed upon by seller and

purchaser and where seller has performed seller's part of the agreement and nothing remains to be done except for purchaser to make payment. *Wolfe v. Brown-Wright Hotel Supply Corp.*, 87 Ga. App. 12, 73 S.E.2d 82 (1952) (decided under former Code 1933, § 96-101).

**Jury issues.** — Language of O.C.G.A. § 11-2-709(1)(b) clearly evinces legislative intent that these matters ordinarily should be subject to determination by a jury and not by the court. *Multi-Line Mfg., Inc. v. Greenwood Mills, Inc.*, 123 Ga. App. 372, 180 S.E.2d 917 (1971).

**Cited in** *Kamlapat v. Purvis-Wade Carpet Mills*, 112 Ga. App. 781, 146 S.E.2d 138 (1965); *Murray v. Americare-Medical Designs, Inc.*, 123 Ga. App. 557, 181 S.E.2d 871 (1971); *Cornell Indus., Inc. v. Colonial Bank*, 162 Ga. App. 822, 293 S.E.2d 370 (1982).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 67A Am. Jur. 2d, Sales, §§ 1135-1154.

**C.J.S.** — 77A C.J.S., Sales, § 326.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 2-709.

**ALR.** — Bringing action for price as waiver by conditional vendor of right to reclaim property, 12 ALR 503; 56 ALR 238; 113 ALR 653.

Taking possession of property condition-

ally sold as affecting action previously commenced for purchase price, 23 ALR 1462.

Right to recover purchase price of articles or substances susceptible of illegal use in manufacture of beverages, 29 ALR 1058.

Provision in land contract for pecuniary forfeiture or penalty upon default of the purchaser as affecting the vendor's right to maintain an action for the purchase price, 32 ALR 617.

Vendor's default in payment of taxes or discharge of encumbrance as affecting his

right to maintain action for purchase money, 101 ALR 526.

Seller's, bailor's, lessor's, or lender's knowledge of the other party's intention to put the property or money to an illegal use as defense to action for purchase price, rent, or loan, 166 ALR 1353.

Measure of damages for buyer's breach of contract to purchase article from dealer or manufacturer's agent, 24 ALR2d 1008.

Seller's recovery of price of goods from buyer under UCC § 2-709, 90 ALR3d 1141.

### 11-2-710. Seller's incidental damages.

Incidental damages to an aggrieved seller include any commercially reasonable charges, expenses, or commissions incurred in stopping delivery, in the transportation, care, and custody of goods after the buyer's breach, in connection with return or resale of the goods or otherwise resulting from the breach. (Code 1933, § 109A-2—710, enacted by Ga. L. 1962, p. 156, § 1.)

## JUDICIAL DECISIONS

**Test of commercial reasonableness.** — Incidental damages include all commercially reasonable expenditures. The test of commercial reasonableness is a practical one, requiring primarily honesty and good faith in attempting to minimize damages. What is commercially reasonable is to be determined from all facts and circumstances of each case, and must be judged in light of one viewing situation at time problem was presented. *Beckman Cotton Co. v. First Nat'l Bank*, 666 F.2d 181 (5th Cir. 1982).

**Payment to purchaser representing difference between contract and market prices.** — Payment to foreign purchaser, where it was merely refund of difference between original contract price of cotton and then prevailing international market price of cotton, was appropriate and commercially reasonable. *Beckman Cotton Co. v. First Nat'l Bank*, 666 F.2d 181 (5th Cir. 1982).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 50 Am. Jur. 2d, Letter of Credit, and Credit Cards, § 75 et seq. 67A Am. Jur. 2d, Sales, §§ 997-1001.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 2-710.

**ALR.** — Expense of caring for personal property prior to its resale upon failure of sale contract, 29 ALR 61.

Valuation clause in carrier's contract as limit, or as ratio, of recovery in case of partial loss, 41 ALR 450.

Rights and remedies upon cancelation of sales agency, 52 ALR 546; 89 ALR 252.

Measure of damages for buyer's repudiation of or failure to accept goods under executory contract, 108 ALR 1482.

Interest as element of damages recoverable in action for breach of contract for the sale of a commodity, 4 ALR2d 1388.

Measure of damages for buyer's breach of contract to purchase article from dealer or manufacturer's agent, 24 ALR2d 1008.



### 11-2-711. Buyer's remedies in general; buyer's security interest in rejected goods.

(1) Where the seller fails to make delivery or repudiates or the buyer rightfully rejects or justifiably revokes acceptance then with respect to any goods involved, and with respect to the whole if the breach goes to the whole contract (Code Section 11-2-612), the buyer may cancel and whether or not he has done so may in addition to recovering so much of the price as has been paid:

(a) "Cover" and have damages under Code Section 11-2-712 as to all the goods affected whether or not they have been identified to the contract; or

(b) Recover damages for nondelivery as provided in this article (Code Section 11-2-713).

(2) Where the seller fails to deliver or repudiates the buyer may also:

(a) If the goods have been identified recover them as provided in this article (Code Section 11-2-502); or

(b) In a proper case obtain specific performance or replevy the goods as provided in this article (Code Section 11-2-716).

(3) On rightful rejection or justifiable revocation of acceptance a buyer has a security interest in goods in his possession or control for any payments made on their price and any expenses reasonably incurred in their inspection, receipt, transportation, care, and custody and may hold such goods and resell them in like manner as an aggrieved seller (Code Section 11-2-706). (Code 1933, § 109A-2—711, enacted by Ga. L. 1962, p. 156, § 1.)

**Law reviews.** — For article discussing the applicability of warranty provisions under the Uniform Commercial Code to domestic solar energy devices, see 30 Mercer L. Rev. 547 (1979).

For comment, "Damage Awards and Computer Systems — Trends," see 35 Emory L.J. 255 (1986).

### JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the issues dealt with under the provisions, decisions under former Code 1933, § 96-306 are included in the annotations for this section.

**Right to return purchase price.** — Upon cancellation, buyer is entitled under O.C.G.A. § 11-2-711(1), to return of purchase price. *Jacobs v. Metro Chrysler-Plymouth, Inc.*, 125 Ga. App. 462, 188 S.E.2d 250 (1972).

**Election between revocation and damages**

**for breach.** — A buyer is no longer required to elect between revocation and damages for breach, but this does not mean that the buyer cannot elect if the buyer so chooses. *Jacobs v. Metro Chrysler-Plymouth, Inc.*, 125 Ga. App. 462, 188 S.E.2d 250 (1972).

**Revocation of acceptance does not constitute a cancellation** of a contract. *Poultry Health Serv. of Ga., Inc. v. Moxley*, 538 F. Supp. 276 (S.D. Ga. 1982).

Cancellation is merely a remedy for the revoking buyer and not an unavoidable re-

sult of revocation. *Poultry Health Serv. of Ga., Inc. v. Moxley*, 538 F. Supp. 276 (S.D. Ga. 1982).

**Reacceptance of goods.** — A buyer who has attempted to reject rather than to accept goods may nonetheless accept them by virtue of buyer's post-rejection conduct with respect to them. Likewise, a buyer who purports to revoke acceptance of goods may be found to have reaccepted them if, after such revocation, the buyer performs acts which are inconsistent with the seller's ownership of the goods. *Griffith v. Stovall Tire & Marine, Inc.*, 174 Ga. App. 137, 329 S.E.2d 234 (1985).

**Recovery of automobile's purchase price and interest.** — Cause of action for breach of implied warranty that automobile was reasonably suited for purpose intended, permitted recovery of total purchase price paid plus interest only in event the merchandise was completely worthless. *Brown v. Moore*, 103 Ga. App. 111, 118 S.E.2d 591 (1961) (decided under former Code 1933, § 96-306).

**Issues of fact.** — Issues such as whether an effective revocation of acceptance was made, whether reasonable notification of revocation was given to the seller, and whether the value of the goods was substantially impaired are ordinarily matters for determination by the trier of fact, even where the buyer has continued to use nonconforming goods af-

ter an alleged revocation of acceptance. *Griffith v. Stovall Tire & Marine, Inc.*, 174 Ga. App. 137, 329 S.E.2d 234 (1985).

Whether plaintiff-buyer has made cover purchases in reasonable manner poses classic jury issue. *American Carpet Mills v. Gunny Corp.*, 649 F.2d 1056 (5th Cir. 1981).

**Instructions.** — Where the court fully instructed the jury as to the determinative contract and warranty principles involved in the case, and the charge was adjusted to the evidence, it is not reversible error to fail to charge the precise language of UCC provisions outlining rules and recourses for buyers and sellers. *Teledyne Indus., Inc. v. Patron Aviation, Inc.*, 161 Ga. App. 596, 288 S.E.2d 911 (1982).

**Cited in** *Byrd v. Moore Ford Co.*, 116 Ga. App. 292, 157 S.E.2d 41 (1967); *Systems Consultants v. Eng Enters., Inc.*, 123 Ga. App. 641, 182 S.E.2d 188 (1971); *Swift Textiles, Inc. v. Lawson*, 135 Ga. App. 799, 219 S.E.2d 167 (1975); *Duval & Co. v. Malcom*, 233 Ga. 784, 214 S.E.2d 356 (1975); *Solomon Refrigeration, Inc. v. Osburn*, 148 Ga. App. 772, 252 S.E.2d 686 (1979); *Bigelow-Sanford, Inc. v. Gunny Corp.*, 649 F.2d 1060 (5th Cir. 1981); *Hill Aircraft & Leasing Corp. v. Planes, Inc.*, 169 Ga. App. 161, 312 S.E.2d 119 (1983); *Hudson v. Gaines*, 199 Ga. App. 70, 403 S.E.2d 852 (1991).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 67A Am. Jur. 2d, Sales, §§ 1164-1166.

**C.J.S.** — 77A C.J.S., Sales, §§ 121 et seq., 278 et seq., 375, 389, 395, 406.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 2-711.

**ALR.** — Duty of purchaser on credit to accept seller's offer to deliver for cash, 1 ALR 436; 46 ALR 1192.

Remedy of contractor, who has partially performed before discovering fraud, as to character or amount of work, 2 ALR 1396.

Rights and remedies of purchaser under seller's agreement to assist him in reselling the goods, 29 ALR 666.

Acceptance of instalment of goods as affecting buyer's right to rescind because of defects in that instalment, 29 ALR 1517.

Rights of parties to a timber contract upon

failure of purchaser to remove timber within time fixed or within a reasonable time, 31 ALR 944; 42 ALR 641; 71 ALR 143; 164 ALR 423.

Loss of anticipated profits as damages for breach of seller's contract as to machine for buyer's use, 32 ALR 120.

Anticipatory repudiation of contract for sale of goods by buyer as affecting time as of which damages are to be computed, 34 ALR 114.

Time for rescission by purchaser of chattel for fraud or breach of warranty, 72 ALR 726.

Sufficiency of buyer's attempt to rescind as affected by his apparent recognition of or insistence upon continuance of seller's obligation under the contract, 118 ALR 530.

Abandonment of possession as prerequisite to vendee's suit to obtain a rescission or

to recover back money paid, 142 ALR 582.

Vendor's willingness and ability to perform contract which does not satisfy statute of frauds as precluding purchaser's recovery back of payments made thereon, 169 ALR 187.

Necessity that buyer, relying on market price as measure of damages for seller's breach of sale contract, show that goods in question were available for market at price shown, 20 ALR2d 819.

Purchaser's use or attempted use of articles known to be defective as affecting damages recoverable for breach of warranty, 33 ALR2d 511.

Measure and elements of recovery of

buyer rescinding sale of domestic animal for seller's breach of warranty, 35 ALR2d 1273.

Use of article by buyer as waiver of right to rescind for fraud, breach of warranty, or failure of goods to comply with contract, 41 ALR2d 1173.

Allegation of buyer's ability and willingness to perform, in action for damages for failure to deliver goods purchased, 94 ALR2d 1215.

Measure and elements of buyer's recovery upon revocation of acceptance of goods under UCC § 2-608(1), 65 ALR3d 388.

Extent of liability of seller of livestock infected with communicable disease, 14 ALR4th 1096.

## 11-2-712. "Cover"; buyer's procurement of substitute goods.

(1) After a breach within Code Section 11-2-711 the buyer may "cover" by making in good faith and without unreasonable delay any reasonable purchase of or contract to purchase goods in substitution for those due from the seller.

(2) The buyer may recover from the seller as damages the difference between the cost of cover and the contract price together with any incidental or consequential damages as hereinafter defined (Code Section 11-2-715), but less expenses saved in consequence of the seller's breach.

(3) Failure of the buyer to effect cover within this Code section does not bar him from any other remedy. (Code 1933, § 109A-2—712, enacted by Ga. L. 1962, p. 156, § 1.)

**Law reviews.** — For article discussing the applicability of warranty provisions under the Uniform Commercial Code to domestic

solar energy devices, see 30 Mercer L. Rev. 547 (1979).

## JUDICIAL DECISIONS

**Whether plaintiff-buyer has made cover purchases in reasonable manner** poses classic jury issue. *American Carpet Mills v. Gunny Corp.*, 649 F.2d 1056 (5th Cir. 1981).

**Evidence of cost of bedspreads purchased to replace defective spreads** is admissible to prove cover. *Austin Lee Corp. v. Cascades Motel, Inc.*, 123 Ga. App. 642, 182 S.E.2d 173 (1971).

**Labor and repair expenses** incurred by buyer who chooses remedy of cover under O.C.G.A. § 11-2-711(1)(a) are properly recoverable as incidental and consequential damages. *Poultry Health Serv. of Ga., Inc. v. Moxley*, 538 F. Supp. 276 (S.D. Ga. 1982).

**Cited in** *Bigelow-Sanford, Inc. v. Gunny Corp.*, 649 F.2d 1060 (5th Cir. 1981).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 22 Am. Jur. 2d, Damages, § 509. 67A Am. Jur. 2d, Sales, §§ 1171-1178.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 2-712.



**ALR.** — Loss of anticipated profits as damages for breach of seller's contract as to machine for buyer's use, 32 ALR 120.

Necessity that buyer, relying on market price as measure of damages for seller's breach of sale contract, show that goods in question were available for market at price shown, 20 ALR2d 819.

Measure and elements of recovery of buyer rescinding sale of domestic animal for seller's breach of warranty, 35 ALR2d 1273.

Measure and elements of buyer's recovery upon revocation of acceptance of goods under UCC § 2-608(1), 65 ALR3d 388.

What constitutes "cover" upon breach by seller under UCC § 2-712(1), 79 ALR4th 844.

What constitutes warranty explicitly extending to "future performance" for purposes of UCC § 2-725(2), 81 ALR5th 483.

### 11-2-713. Buyer's damages for nondelivery or repudiation.

(1) Subject to the provisions of this article with respect to proof of market price (Code Section 11-2-723), the measure of damages for nondelivery or repudiation by the seller is the difference between the market price at the time when the buyer learned of the breach and the contract price together with any incidental and consequential damages provided in this article (Code Section 11-2-715), but less expenses saved in consequence of the seller's breach.

(2) Market price is to be determined as of the place for tender or, in cases of rejection after arrival or revocation of acceptance, as of the place of arrival. (Code 1933, § 109A-2—713, enacted by Ga. L. 1962, p. 156, § 1.)

**Law reviews.** — For article discussing the applicability of warranty provisions under the Uniform Commercial Code to domestic solar energy devices, see 30 Mercer L. Rev. 547 (1979).

For note, "Uniform Commercial Code

Section 2-713 and the Time for Measuring Market-Contract Damages: *Cosden Oil & Chem. Co. v. Karl O. Helm Aktiengesellschaft*," see 2 Ga. St. U.L. Rev. 49 (1986).

## JUDICIAL DECISIONS

**Proper elements of damages.** — An award representing market-price contract-price differential as well as consequential damages in form of lost resale profits simply combined in category "loss of profits" are proper elements of damages. *Fratelli Gardino v. Caribbean Lumber Co.*, 447 F. Supp. 1337 (S.D. Ga. 1978), *aff'd in part and rev'd in part*, *Fratelli Gardino v. Caribbean Lumber Co.*, 587 F.2d 204 (5th Cir. 1979).

**Delivery of inferior product.** — Buyer of a custom machine presented sufficient evidence of the market price of a similar, though less desirable, machine, and evi-

dence of expenses incurred due to the seller's failure to deliver the machine as ordered and was entitled to damages. *Latex Equip. Sales & Serv., Inc. v. Apache Mills, Inc.*, 225 Ga. App. 516, 484 S.E.2d 274 (1997).

**Cited in** *Swift Textiles, Inc. v. Lawson*, 135 Ga. App. 799, 219 S.E.2d 167 (1975); *Anderson v. Gold Kist, Inc.*, 138 Ga. App. 19, 225 S.E.2d 487 (1976); *Gold Kist, Inc. v. Stokes*, 138 Ga. App. 482, 226 S.E.2d 268 (1976); *Fratelli Gardino v. Caribbean Lumber Co.*, 587 F.2d 204 (5th Cir. 1979); *Bigelow-Sanford, Inc. v. Gunny Corp.*, 649 F.2d 1060 (5th Cir. 1981).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 67A Am. Jur. 2d, Sales, §§ 1290-1296.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 2-713.

**ALR.** — Loss of anticipated profits as damages for breach of seller's contract as to machine for buyer's use, 32 ALR 120.

Inability of a seller of a commodity manufactured or produced by a third person to obtain the same from the latter as a defense to an action by the buyer for breach of the contract, 80 ALR 1177.

Rate of exchange to be taken into account in assessing damages for breach of contract or nonpayment of money obligation payable in foreign currency, 105 ALR 640.

Necessity that buyer, relying on market price as measure of damages for seller's breach of sale contract, show that goods in question were available for market at price shown, 20 ALR2d 819.

Allegation of buyer's ability and willingness to perform, in action for damages for failure to deliver goods purchased, 94 ALR2d 1215.

Measure and elements of buyer's recovery upon revocation of acceptance of goods under UCC § 2-608(1), 65 ALR3d 388.

Failure to deliver ordered merchandise to customer on date promised as unfair or deceptive trade practice, 7 ALR4th 1257.

## 11-2-714. Buyer's damages for breach in regard to accepted goods.

(1) Where the buyer has accepted goods and given notification (subsection (3) of Code Section 11-2-607) he may recover as damages for any nonconformity of tender the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable.

(2) The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.

(3) In a proper case any incidental and consequential damages under Code Section 11-2-715 may also be recovered. (Code 1933, § 109A-2—714, enacted by Ga. L. 1962, p. 156, § 1.)

**Law reviews.** — For article comparing consumer remedies under the Magnuson-Moss Act (15 U.S.C. §§ 2301-2312) and the U.C.C., see 27 Mercer L. Rev. 1111 (1976). For article discussing the applicability of warranty provisions under the Uniform Commercial Code to domestic solar energy devices, see 30 Mercer L. Rev. 547 (1979).

For note, "Buyer's Right to Revoke Accep-

tance Against the Automobile Manufacturer for Breach of its Continuing Warranty of Repair or Replacement," see 7 Ga. L. Rev. 711 (1973).

For comment on *Felder v. Neeves*, 36 Ga. App. 41, 135 S.E. 219 (1926), see 1 Ga. L. Rev. No. 1 P. 51 (1927). For comment, "Damage Awards and Computer Systems — Trends," see 35 Emory L.J. 255 (1986).

## JUDICIAL DECISIONS

## ANALYSIS

GENERAL CONSIDERATION  
BREACH OF WARRANTY  
CONSEQUENTIAL DAMAGES

### General Consideration

**Editor's notes.** — In light of the similarity of the issues dealt with under the provisions, decisions under former Code 1933, §§ 96-201 and 96-301 are included in the annotations for this section.

**Applicability of section.** — O.C.G.A. § 11-2-714 applies only where a buyer claims breach of contract regarding accepted goods; breaches based on grounds of rejection, revocation of acceptance, or rescission of agreement are not covered by that section. *Wolfe v. Terrell*, 173 Ga. App. 835, 328 S.E.2d 569 (1985).

O.C.G.A. § 11-2-714 applies only when time for revocation has passed. *Solomon Refrigeration, Inc. v. Osburn*, 148 Ga. App. 772, 252 S.E.2d 686 (1979).

**Repurchase offer agreed to as part of agreement.** — Where it was determined that parties had agreed upon repurchase offer of seller in event of dissatisfaction of buyer as part of enforceable agreement, enforcement of such offer was reasonable measure of recovery under O.C.G.A. § 11-2-714(1). *All-Co Drainage & Bldg. Prods., Inc. v. Umstead Enters., Inc.*, 123 Ga. App. 244, 180 S.E.2d 250 (1971).

**Suit based on contract and warranty grounds.** — Buyers of an irrigation system who did not frame their suit or their proof merely on grounds of breach of warranty, but pleaded breach of contract as well, were therefore not restricted to the requirements of O.C.G.A. § 11-2-714(2) as to proof of damages in cases of breach of warranty in commercial transactions. *Dick 'N Dale Sys., Inc. v. Danwil Int'l Trading Co.*, 199 Ga. App. 840, 406 S.E.2d 270 (1991).

**Distinction between contract induced by fraud and breach of warranty.** — There is a distinction to be drawn between a contract induced by fraud and mere breach of warranty; in the former case title does not pass, and contract may be rescinded, and in the latter case title does pass, and purchaser is relegated to a claim for damages. *Dove v. W.L. Roberts & Co.*, 50 Ga. App. 321, 178 S.E. 169 (1935) (decided under former Code 1933, § 96-201).

**Cited in** *John Deere Co. v. Lindsey Landclearing Co.*, 122 Ga. App. 827, 178 S.E.2d 917 (1970); *Austin Lee Corp. v. Cascades Motel, Inc.*, 123 Ga. App. 642, 182 S.E.2d 173 (1971); *Beavers v. Mastan Co.*,

124 Ga. App. 498, 184 S.E.2d 476 (1971); *Southern Concrete Prods. Co. v. Martin*, 126 Ga. App. 534, 191 S.E.2d 314 (1972); *Carr v. Jacuzzi Bros.*, 133 Ga. App. 70, 210 S.E.2d 16 (1974); *Ogden Equip. Co. v. Talmadge Farms, Inc.*, 141 Ga. App. 813, 234 S.E.2d 367 (1977); *Shuniak v. AAA Well Drilling & Boring Co.*, 146 Ga. App. 785, 247 S.E.2d 601 (1978); *Moister v. National Bank* (In re *Guaranteed Muffler Supply Co.*), 1 Bankr. 324 (Bankr. N.D. Ga. 1979); *Murdock v. Godwin*, 154 Ga. App. 824, 269 S.E.2d 905 (1980); *Hill Aircraft & Leasing Corp. v. Planes, Inc.*, 169 Ga. App. 161, 312 S.E.2d 119 (1983); *Hightower v. GMC*, 175 Ga. App. 112, 332 S.E.2d 336 (1985); *W.M. Hobbs, Ltd. v. Accusystems of Ga., Inc.*, 177 Ga. App. 432, 339 S.E.2d 646 (1986); *American Aluminum Prods. Co. v. Binswanger Glass Co.*, 194 Ga. App. 703, 391 S.E.2d 688 (1990); *Mumford v. Phillips*, 195 Ga. App. 782, 395 S.E.2d 45 (1990); *BCS Fin. Corp. v. Sorbo*, 213 Ga. App. 259, 444 S.E.2d 85 (1994); *Cobb County Sch. Dist. v. MAT Factory, Inc.*, 215 Ga. App. 697, 452 S.E.2d 140 (1994); *BDI Distribs. v. Beaver Computer Corp.*, 232 Ga. App. 316, 501 S.E.2d 839 (1998); *Atwood v. Southeast Bedding Co.*, 236 Ga. App. 116, 511 S.E.2d 232 (1999).

### Breach of Warranty

**Having rescinded or abandoned contract, buyer could not recover for breach of warranty under it.** *Allen Housemovers, Inc. v. Allen*, 135 Ga. App. 837, 219 S.E.2d 489 (1975).

**Proof of defect and resulting damages is prerequisite to recovery.** — To recover in warranty, it is necessary that plaintiff show: (1) goods in question were defective upon delivery, and (2) such defect caused damage claimed. In cases of this type, proof of defective quality of goods is prerequisite to recovery. *Multivision N.W., Inc. v. Jerrold Elecs. Corp.*, 356 F. Supp. 207 (N.D. Ga. 1972).

**Defect alone not enough.** — Evidence that goods were defective cannot alone establish evidence of damages. *Dixon Dairy Farms, Inc. v. Conagra Feed Co.*, 245 Ga. App. 836, 538 S.E.2d 897 (2000).

**Goods confiscated as stolen property.** — Where plaintiff proved not only the price paid for two trucks and the lending bank's appraisal of value, but also that what plaintiff accepted were stolen trucks for which plain-



tiff owed an interest-bearing note to the bank, undifferentiated damages awarded as the foreseeable and logical consequence of the breach were authorized. *Hudson v. Gaines*, 199 Ga. App. 70, 403 S.E.2d 852 (1991).

**Counterclaim for breach of warranty and refusal to pay for nonconformity not redundant.** — In suit to recover on purchase order, the trial court errs in striking a counterclaim for breach of warranty because it is allegedly redundant in view of an affirmative defense of right to refuse payment because of nonconformity. *Bingham, Ltd. v. Tool Technology, Inc.*, 166 Ga. App. 220, 303 S.E.2d 761 (1983).

**Value for allegedly defective goods required.** — An award of damages for breach of warranty could not be sustained, where plaintiff was never able to establish any value for an allegedly defective van at the time and place of delivery except that value indicated by the price that plaintiff paid for it. *Chrysler Corp. v. Marinari*, 177 Ga. App. 304, 339 S.E.2d 343 (1985).

**Damages for breach of new car warranty.** See *Horne v. Claude Ray Ford Sales, Inc.*, 162 Ga. App. 329, 290 S.E.2d 497 (1982).

**Damages for breach of implied warranty of merchantability.** — For breach of seller's implied warranty of merchantability purchaser may recover: (a) reasonable expense of operating or attempting to operate the machine or equipment, provided none of the expense is incurred after discovery of fact that it could not be made to operate properly; (b) reasonable cost of making repairs or correcting defects if incurred by seller, or if, by reason of breach or defects the machine or equipment cannot be made

to operate properly by making repairs or correcting defects; (c) difference between amount paid and value of the chattel; (d) loss of profits resulting from breach, if not speculative; and (e) any damage to person or property directly traceable to the breach. *Taylor v. Wilson*, 109 Ga. App. 658, 137 S.E.2d 353 (1964) (decided under former Code 1933, § 96-301).

**Repair costs.** — While some cases hold that repair costs are a sufficient measure of damages, there are others holding the opposite view; the basic rule is that the measure of damages for breach of warranty is to be determined by O.C.G.A. § 11-2-714. Whether repair costs can satisfy the proof requirement depends entirely on the sufficiency and reliability of the evidence presented in the context of the individual case. *Fried Group, Inc. v. Sundance Tractor & Mower*, 218 Bankr. 247 (Bankr. M.D. Ga. 1998).

### Consequential Damages

**Lost profits.** — Loss of profits from destruction or interruption of established business may be recovered if amount of actual loss is rendered reasonably certain by competent proof. Each case must be examined to see if under its particular facts the profits involved are capable of reasonable ascertainment. *United States ex rel. Fram Corp. v. Crawford*, 443 F.2d 611 (5th Cir. 1971).

Lost profits, if supported by proper proof, are recoverable as consequential damages from a breach of warranty. *Multivision N.W., Inc. v. Jerrold Elecs. Corp.*, 356 F. Supp. 207 (N.D. Ga. 1972).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 63 Am. Jur. 2d, Products Liability, §§ 217, 218. 63B Am. Jur. 2d, Products Liability, §§ 1881, 1883, 1931, 1932. 67A Am. Jur. 2d, Sales, §§ 1297-1309.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 2-714.

**ALR.** — Right of dealer against his vendor in case of breach of warranty as to article purchased for resale and resold, 64 ALR 883.

Acceptance after agreed time of delivery as waiver of damages on account of seller's delay, 80 ALR 322.

Rights of parties to conditional sale as affected by breach of warranty, 130 ALR 753.

Buyer's acceptance of part of goods as affecting right to damages for failure to complete delivery, 169 ALR 595.

Measure and elements of recovery of buyer rescinding sale of domestic animal for seller's breach of warranty, 35 ALR2d 1273.

Application of warranty provisions of Uniform Commercial Code to bailments, 48 ALR3d 668.

Measure and elements of buyer's recovery

upon revocation of acceptance of goods under UCC § 2-608(1), 65 ALR3d 388.

Elements and measure of damages for breach of warranty in sale of horse, 91 ALR3d 419.

Measure of damages in action for breach of warranty of title to personal property under UCC § 2-714, 94 ALR3d 583.

Modern status of rule as to whether cost of correction or difference in value of structures is proper measure of damages for breach of construction contract, 41 ALR4th 131.

### 11-2-715. Buyer's incidental and consequential damages.

(1) Incidental damages resulting from the seller's breach include expenses reasonably incurred in inspection, receipt, transportation, and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses, or commissions in connection with effecting cover, and any other reasonable expense incident to the delay or other breach.

(2) Consequential damages resulting from the seller's breach include:

(a) Any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and

(b) Injury to person or property proximately resulting from any breach of warranty. (Code 1933, § 109A-2—715, enacted by Ga. L. 1962, p. 156, § 1.)

**Law reviews.** — For article comparing consumer remedies under the Magnuson-Moss Act (15 U.S.C. §§ 2301-2312) and the U.C.C., see 27 Mercer L. Rev. 1111 (1976). For article discussing the applicability of warranty provisions under the Uniform Commercial Code to domestic solar energy devices, see 30 Mercer L. Rev. 547 (1979).

For note, "Buyer's Right to Revoke Acceptance Against the Automobile Manufacturer for Breach of its Continuing Warranty of Repair or Replacement," see 7 Ga. L. Rev. 711 (1973).

For comment, "Damage Awards and Computer Systems — Trends," see 35 Emory L.J. 255 (1986).

## JUDICIAL DECISIONS

### ANALYSIS

#### GENERAL CONSIDERATION

#### LOST PROFITS

#### General Consideration

**Editor's notes.** — In light of the similarity of issues dealt with under the provisions, decisions under former Code 1933, § 96-301 are included in the annotations for this section.

**O.C.G.A. § 11-2-715 does not displace principles of law and equity concerning contribution and indemnity,** being silent on that subject; and consequently, general law on

contribution and indemnity found in cases and in other provisions of the Georgia Code continues to supplement provisions of the Uniform Commercial Code. *Wilson v. Dodge Trucks, Inc.*, 238 Ga. 636, 235 S.E.2d 142 (1977).

**"Consequential damages" result from a breach of contract or warranty.** *Cash v. Armco Steel Corp.*, 462 F. Supp. 272 (N.D. Ga. 1978).

**Rule against recovery of vague, speculative, or uncertain damages** relates primarily to uncertainty as to cause, rather than uncertainty as to measure or extent of damages. *B & D Carpet Finishing Co. v. Gunny Corp.*, 158 Ga. App. 621, 281 S.E.2d 354 (1981).

**Damages recoverable for breach of implied warranty of merchantability.** — For breach of the seller's implied warranty of merchantability purchaser may recover: (a) reasonable expense of operating or attempting to operate the machine or equipment, provided none of the expense is incurred after discovery of fact that it could not be made to operate properly; (b) the reasonable cost of making repairs or correcting defects if incurred by purchaser, or if, by reason of breach or defects the machine or equipment cannot be made to operate properly by making repairs or correcting defects; (c) difference between amount paid and value of the chattel; (d) loss of profits resulting from breach, if not speculative; and (e) any damage to person or property directly traceable to the breach. *Taylor v. Wilson*, 109 Ga. App. 658, 137 S.E.2d 353 (1964).

**Duty to prevent foreseeable damage in event of breach.** — If there was a breach of implied warranty that incubator was merchantable and reasonably suited to use intended by reason of a latent defect which might reasonably be expected to endanger safety of eggs therein, then if such defect became known to plaintiff, the plaintiff was bound to exercise reasonable care and diligence to lessen damage which might result therefrom; the duty imposed on the plaintiff was to use ordinary care to prevent foreseeable damage. *Henley v. Sears-Roebuck & Co.*, 84 Ga. App. 723, 67 S.E.2d 171 (1951).

**Measure of damages for the breach of the warranty to repair** is not in contravention of the warranty's exclusion of incidental or consequential damages. *Teledyne Indus., Inc. v. Patron Aviation, Inc.*, 161 Ga. App. 596, 288 S.E.2d 911 (1982).

Labor and repair expenses incurred by buyer who chooses remedy of cover under O.C.G.A. § 11-2-711(1)(a) are properly recoverable as incidental and consequential damages. *Poultry Health Serv. of Ga., Inc. v. Moxley*, 538 F. Supp. 276 (S.D. Ga. 1982).

**Goods confiscated as stolen property.** — Where plaintiff proved not only the price

paid for two trucks and the lending bank's appraisal of value, but also that what plaintiff accepted were stolen trucks for which plaintiff owed an interest-bearing note to the bank, undifferentiated damages awarded as the foreseeable and logical consequence of the breach were authorized. *Hudson v. Gaines*, 199 Ga. App. 70, 403 S.E.2d 852 (1991).

**Increased labor and storage costs.** — Buyer's increased labor and inventory storage costs incurred as the result of seller's failure to deliver and install machinery were recoverable as incidental damages. *Latex Equip. Sales & Serv., Inc. v. Apache Mills, Inc.*, 225 Ga. App. 516, 484 S.E.2d 274 (1997).

**Drug distributor liability for user suicide.** — The manufacturer and distributor of an anti-psychotic drug were not liable for the suicide of a patient because of failure to warn the patient of the dangers of discontinuing use of the drug where plaintiffs relied on the advice of a physician in the use of the drug, and could not show any breach of warranty caused by inadequate package labeling. *Presto v. Sandoz Pharmaceuticals Corp.*, 226 Ga. App. 547, 487 S.E.2d 70 (1997).

**Attorney's fees recoverable.** — Using the general law of indemnity to supplement Georgia's commercial code, a retailer was allowed to recover attorney's fees as consequential damages from manufacturer when buyer incurred such fees to defend a personal injury action brought by a consumer due to manufacturer's breach of warranty. *Alterman Foods, Inc. v. G.C.C. Beverages, Inc.*, 168 Ga. App. 921, 310 S.E.2d 755 (1983).

**Remand for reconsideration.** — In action by carpet manufacturer for consequential damages representing loss of efficiency, excess down time, and additional adhesive materials expended in attempting to utilize defective jute, the circuit court remanded for more specific findings concerning the adequacy of proof of damages, and instructed the district court to enter an award if such damages could be ascertained with reasonable certainty. *Hawthorne Indus., Inc. v. Balfour MacLaine Int'l, Ltd.*, 676 F.2d 1385 (11th Cir. 1982).

**Cited in** *John Deere Co. v. Lindsey Landclearing Co.*, 122 Ga. App. 827, 178 S.E.2d 917 (1970); *Austin Lee Corp. v. Cas-*



**General Consideration** (Cont'd)

cadec Motel, Inc., 123 Ga. App. 642, 182 S.E.2d 173 (1971); *Beavers v. Mastan Co.*, 124 Ga. App. 498, 184 S.E.2d 476 (1971); *Southern Concrete Prods. Co. v. Martin*, 126 Ga. App. 534, 191 S.E.2d 314 (1972); *Weaver v. Ralston Motor Hotel, Inc.*, 135 Ga. App. 536, 218 S.E.2d 260 (1975); *Swift Textiles, Inc. v. Lawson*, 135 Ga. App. 799, 219 S.E.2d 167 (1975); *Trawick v. Trax, Inc.*, 136 Ga. App. 62, 220 S.E.2d 70 (1975); *Dodge Trucks, Inc. v. Wilson*, 140 Ga. App. 743, 231 S.E.2d 818 (1976); *Fratelli Gardino v. Caribbean Lumber Co.*, 447 F. Supp. 1337 (S.D. Ga. 1978); *Fratelli Gardino v. Caribbean Lumber Co.*, 587 F.2d 204 (5th Cir. 1979); *Patron Aviation, Inc. v. Teledyne Indus., Inc.*, 154 Ga. App. 13, 267 S.E.2d 274 (1980); *Murdock v. Godwin*, 154 Ga. App. 824, 269 S.E.2d 905 (1980); *Bigelow-Sanford, Inc. v. Gunny Corp.*, 649 F.2d 1060 (5th Cir. 1981); *Billy Cain Ford Lincoln Mercury, Inc. v. Kaminski*, 230 Ga. App. 598, 496 S.E.2d 521

(1998); *Fried Group, Inc. v. Sundance Tractor & Mower*, 218 Bankr. 247 (Bankr. M.D. Ga. 1998).

**Lost Profits**

**Recoverable as consequential damages.** — Lost profits, if supported by proper proof, are recoverable as consequential damages from breach of warranty. *Multivision N.W., Inc. v. Jerrold Elecs. Corp.*, 356 F. Supp. 207 (N.D. Ga. 1972).

**Profits must be capable of reasonable ascertainment.** — Loss of profits from destruction or interruption of established business may be recovered if amount of actual loss is rendered reasonably certain by competent proof. Each case must be examined to see if under its particular facts the profits involved are capable of reasonable ascertainment. *United States ex rel. Fram Corp. v. Crawford*, 443 F.2d 611 (5th Cir. 1971).

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 22 Am. Jur. 2d, Damages, §§ 456-459. 63 Am. Jur. 2d, Products Liability, § 659 et seq. 63B Am. Jur. 2d, Products Liability, § 1882. 67A Am. Jur. 2d, Sales, §§ 1310-1380.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 2-715.

**ALR.** — Loss of anticipated profits as damages for breach of seller's contract as to machine for buyer's use, 32 ALR 120.

Rights and remedies upon cancellation of sales agency, 52 ALR 546; 89 ALR 252.

Liability of seller for special damages based on resale by buyer, as affected by his knowledge or ignorance of the resale, 88 ALR 1439.

Interest as element of damages recoverable in action for breach of contract for the sale of a commodity, 4 ALR2d 1388.

Recovery by contractor or artisan, suing for breach of warranty, of damages for loss of good will occasioned by use in his business of unfit materials, 28 ALR2d 591.

Measure and elements of recovery of buyer rescinding sale of domestic animal for seller's breach of warranty, 35 ALR2d 1273.

Rescue doctrine: applicability to situation created by breach of warranty, 44 ALR3d 473.

Application of warranty provisions of Uniform Commercial Code to bailments, 48 ALR3d 668.

Products liability: liability for injury or death allegedly caused by defective tire, 81 ALR3d 318.

Products liability: liability for injury or death allegedly caused by defect in snowmobile or other recreational-purpose vehicle, 81 ALR3d 394; 66 ALR4th 622.

Products liability: liability for injury or death allegedly caused by defect in mobile home or trailer, 81 ALR3d 421.

Products liability: drain cleaners, 85 ALR3d 727.

Liability of manufacturer or seller for personal injury or property damage caused by television set, 89 ALR3d 210.

Elements and measure of damages for breach of warranty in sale of horse, 91 ALR3d 419.

Buyers incidental and consequential damages from seller's breach under UCC § 2-715, 96 ALR3d 299.

Failure to deliver ordered merchandise to customer on date promised as unfair or deceptive trade practice, 7 ALR4th 1257.

Bystander recovery for emotional distress

at witnessing another's injury under strict products liability or breach of warranty, 31 ALR4th 162.

### 11-2-716. Buyer's right to specific performance or replevin.

(1) Specific performance may be decreed where the goods are unique or in other proper circumstances.

(2) The decree for specific performance may include such terms and conditions as to payment of the price, damages, or other relief as the court may deem just.

(3) The buyer has a right of replevin for goods identified to the contract if after reasonable effort the buyer is unable to effect cover for such goods or the circumstances reasonably indicate that such effort will be unavailing or if the goods have been shipped under reservation and satisfaction of the security interest in them has been made or tendered. In the case of goods bought for personal, family, or household purposes, the buyer's right of replevin vests upon acquisition of a special property, even if the seller had not then repudiated or failed to deliver. (Code 1933, § 109A-2—716, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 2001, p. 362, § 8.)

**The 2001 amendment**, effective July 1, 2001, in subsection (3), substituted "the buyer" for "he" in the first sentence and added the last sentence.

**Cross references.** — Specific performance generally, § 23-2-130 et seq.

**Law reviews.** — For article discussing the applicability of warranty provisions under

the Uniform Commercial Code to domestic solar energy devices, see 30 Mercer L. Rev. 547 (1979).

For note, "David Tunick, Inc. v. Kornfield: Applying U.C.C. Section 2-716 and Uniqueness to a Section 2-508 Analysis," see 45 Mercer L. Rev. 1407 (1994).

### JUDICIAL DECISIONS

**Cited in** R.C. Craig, Ltd. v. Ships of Sea, Inc., 345 F. Supp. 1066 (S.D. Ga. 1972); Duval & Co. v. Malcom, 233 Ga. 784, 214

S.E.2d 356 (1975); R.L. Kimsey Cotton Co. v. Ferguson, 233 Ga. 962, 214 S.E.2d 360 (1975).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 71 Am. Jur. 2d, Specific Performance, § 172.

**C.J.S.** — 77 C.J.S., Replevin, § 27 et seq. 77A C.J.S., Sales, §§ 375, 389. 81 C.J.S., Specific Performance, § 80 et seq.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 2-716.

**ALR.** — Right of party who has once refused to perform to have specific performance of contract, 2 ALR 416.

Specific performance of written executory

contract for lease of real property, 31 ALR 502; 173 ALR 1161.

Loss or destruction of property pending replevin action as affecting liability under bond given therein, 31 ALR 1290.

A provision in land contract for pecuniary forfeiture or penalty by a party in default as affecting the right of the other party to specific performance, 32 ALR 584; 98 ALR 877.

Valuation clause in carrier's contract as

limit, or as ratio, of recovery in case of partial loss, 41 ALR 450.

Right to litigate rescission of contract in replevin action, 94 ALR 960.

Right of one seeking specific performance to recover as damages an amount measured by depreciation in value of property itself, or in its market price or value, subsequent to defendant's default, 105 ALR 1421.

Remedy of specific performance as available to vendee's assignee, 138 ALR 205.

Claim of interest in property or other conduct of defendant, after commencement of replevin action, as excusing or waiving demand, 145 ALR 743.

Persons not in possession at commencement of action at law to recover personal property as necessary or proper parties defendant, 145 ALR 905.

Sale price of property as sufficient evidence of value to support alternative money judgment in replevin action between the parties to the sale or between one of the parties and a third person, 149 ALR 1027.

Right to satisfy judgment requiring return of property in defendant's possession by payment of damages, where return would subject defendant to loss, 159 ALR 546.

Right of plaintiff in replevin to damages for detention of property during pendency of action as affected by his failure to claim immediate possession by complying with

statutory provisions in that regard, 164 ALR 758.

Specific performance of contract or option as affected by unexecuted provision for determination of price by arbitrators or appraisers, 167 ALR 727.

Right of purchaser in making tender to deduct from agreed purchase price amount of obligations which it is the vendor's duty to satisfy, 173 ALR 1309.

Recovery of damages in replevin for usable value of property detained, by successful party having only security interest as conditional vendor, chattel mortgagee, or the like, 33 ALR2d 774.

Allowance, in replevin action, of loss of profits from deprivation of use of detained property, 48 ALR2d 1053.

Proper county for bringing replevin, or similar possessory action, 60 ALR2d 487.

Recovery of attorney's fees as damages by successful litigant in replevin or detinue action, 60 ALR2d 945.

Maintainability of replevin or similar possessory action where defendant, at time action is brought, is no longer in possession of property, 97 ALR2d 896.

Specific performance of agreement for sale of private franchise, 82 ALR3d 1102.

Specific performance of sale of goods under UCC § 2-716, 26 ALR4th 294.

## 11-2-717. Deduction of damages from the price.

The buyer on notifying the seller of his intention to do so may deduct all or any part of the damages resulting from any breach of the contract from any part of the price still due under the same contract. (Code 1933, § 109A-2—717, enacted by Ga. L. 1962, p. 156, § 1.)

**Law reviews.** — For article comparing consumer remedies under the Magnuson-Moss Act (15 U.S.C. §§ 2301-2312) and the U.C.C., see 27 Mercer L. Rev. 1111 (1976). For article discuss-

ing the applicability of warranty provisions under the Uniform Commercial Code to domestic solar energy devices, see 30 Mercer L. Rev. 547 (1979).

## JUDICIAL DECISIONS

**O.C.G.A. §§ 11-2-607 and 11-2-717 apply only to sales of goods.** *Fruin-Colnon Corp. v. Air Door, Inc.*, 157 Ga. App. 804, 278 S.E.2d 708 (1981).

**Cited in** *Warren's Kiddie Shoppe, Inc. v. Casual Slacks, Inc.*, 120 Ga. App. 578, 171

S.E.2d 643 (1969); *Beavers v. Mastan Co.*, 124 Ga. App. 498, 184 S.E.2d 476 (1971); *Southern Concrete Prods. Co. v. Martin*, 126 Ga. App. 534, 191 S.E.2d 314 (1972); *International Computer Group, Inc. v. Data Gen. Corp.*, 159 Ga. App. 169, 283 S.E.2d 12



(1981); BDI Distribs. v. Beaver Computer Corp., 232 Ga. App. 316, 501 S.E.2d 839 (1998).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 67A Am. Jur. 2d, Sales, §§ 1270-1274.

**C.J.S.** — 77A C.J.S., Sales, § 209.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 2-717.

**ALR.** — Rights and remedies upon cancelation of sales agency, 52 ALR 546; 89 ALR 252.

Estoppel of or waiver by buyer, in respect of shortage in commodity delivered and

accepted as in full, as affecting his liability to pay for shortage or his right to recover back amount paid therefor, 113 ALR 684.

Right of purchaser in making tender to deduct from agreed purchase price amount of obligations which it is the vendor's duty to satisfy, 173 ALR 1309.

Measure and elements of recovery of buyer rescinding sale of domestic animal for seller's breach of warranty, 35 ALR2d 1273.

### 11-2-718. Liquidation or limitation of damages; deposits.

(1) Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty.

(2) Where the seller justifiably withholds delivery of goods because of the buyer's breach, the buyer is entitled to restitution of any amount by which the sum of his payments exceeds:

(a) The amount to which the seller is entitled by virtue of terms liquidating the seller's damages in accordance with subsection (1) of this Code section; or

(b) In the absence of such terms, 20 percent of the value of the total performance for which the buyer is obligated under the contract or \$500.00, whichever is smaller.

(3) The buyer's right to restitution under subsection (2) of this Code section is subject to offset to the extent that the seller establishes:

(a) A right to recover damages under the provisions of this article other than subsection (1) of this Code section; and

(b) The amount or value of any benefits received by the buyer directly or indirectly by reason of the contract.

(4) Where a seller has received payment in goods their reasonable value or the proceeds of their resale shall be treated as payments for the purposes of subsection (2) of this Code section; but if the seller has notice of the buyer's breach before reselling goods received in part performance, his resale is subject to the conditions laid down in this article on resale by an

aggrieved seller (Code Section 11-2-706). (Code 1933, § 109A-2—718, enacted by Ga. L. 1962, p. 156, § 1.)

**Law reviews.** — For article, “Consumer Protection Against Sellers Misrepresentations,” see 20 Mercer L. Rev. 414 (1969). For article discussing the applicability of warranty provisions under the Uniform Commercial Code to domestic solar energy devices, see 30 Mercer L. Rev. 547 (1979).

For note, “Buyer’s Right to Revoke Acceptance Against the Automobile Manufacturer for Breach of its Continuing Warranty of

Repair or Replacement,” see 7 Ga. L. Rev. 711 (1973).

For comment on *Felder v. Neeves*, 36 Ga. App. 41, 135 S.E. 219 (1926), see 1 Ga. L. Rev. No. 1 P. 51 (1927). For comment, “Refocusing Liquidated Damages Law for Real Estate Contracts: Returning to the Historical Roots of the Penalty Doctrine,” see 39 Emory L.J. 267 (1990).

### JUDICIAL DECISIONS

**Repurchase offer agreed to as part of agreement.** — Where it was determined that parties had agreed upon repurchase offer of seller in event of dissatisfaction of buyer as part of enforceable agreement, enforcement of such offer was reasonable measure of recovery under O.C.G.A. § 11-2-718(1).

*All-Co Drainage & Bldg. Prods., Inc. v. Umstead Enters., Inc.*, 123 Ga. App. 244, 180 S.E.2d 250 (1971).

**Cited in** *Jefferson Randolph Corp. v. Progressive Data Sys.*, 251 Ga. App. 1, 553 S.E.2d 304 (2001).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 63 Am. Jur. 2d, Products Liability, § 659 et seq. 67A Am. Jur. 2d, Sales, §§ 894-903.

**C.J.S.** — 25 C.J.S., Damages, § 113.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 2-718.

**ALR.** — Effect of stipulation for return of deposit or advance payment if the order is not accepted, 1 ALR 1513.

A provision in land contract for pecuniary forfeiture or penalty by a party in default as affecting the right of the other party to specific performance, 32 ALR 584; 98 ALR 877.

Provision in land contract for pecuniary forfeiture or penalty upon default of the purchaser as affecting the vendor’s right to maintain an action for the purchase price, 32 ALR 617.

Validity and effect of provision in contract of sale, with reservation of title, for collection of unpaid purchase money after retaking the property, 43 ALR 1243.

Provision for liquidated damages in contract for sale of goods, 138 ALR 594.

Necessity of buyer’s actual knowledge of disclaimer of warranty of personal property, 160 ALR 357.

Contractual liquidated damages provisions under UCC Article 2, 98 ALR3d 586.

Modern status of defaulting vendee’s right to recover contractual payments withheld by vendor as forfeited, 4 ALR4th 993.

Contractual provision for per diem payments for delay in performance as one for liquidated damages or penalty, 12 ALR4th 891.

### 11-2-719. Contractual modification or limitation of remedy.

(1) Subject to the provisions of subsections (2) and (3) of this Code section and of Code Section 11-2-718 on liquidation and limitation of damages:

(a) The agreement may provide for remedies in addition to or in substitution for those provided in this article and may limit or alter the

measure of damages recoverable under this article, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of nonconforming goods or parts; and

(b) Resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.

(2) Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this title.

(3) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not. (Code 1933, § 109A-2—719, enacted by Ga. L. 1962, p. 156, § 1.)

**Law reviews.** — For article, "Consumer Protection Against Sellers Misrepresentations," see 20 Mercer L. Rev. 414 (1969). For article comparing consumer remedies under the Magnuson-Moss Act (15 U.S.C. §§ 2301-2312) and the U.C.C., see 27 Mercer L. Rev. 1111 (1976). For article discussing the applicability of warranty provisions under the Uniform Commercial Code to domestic solar energy devices, see 30 Mercer L. Rev. 547 (1979). For article, "Impracticability As Risk Allocation: The Effect of Changed Circumstances upon Contract Obligations for the Sale of Goods," see 22 Ga. L. Rev. 503 (1988). For article, "Contractual Limitations of Remedy and the Failure of

Essential Purpose Doctrine," see 26 Ga. St. B.J. 113 (1990).

For note, "Buyer's Right to Revoke Acceptance Against the Automobile Manufacturer for Breach of its Continuing Warranty of Repair or Replacement," see 7 Ga. L. Rev. 711 (1973). For note, "Enforcing Manufacturers' Warranty Exclusions Against Non-Privy Commercial Purchasers: The Need for Uniform Guidelines," see 20 Ga. L. Rev. 461 (1986).

For comment on *Felder v. Neeves*, 36 Ga. App. 41, 135 S.E. 219 (1926), see 1 Ga. L. Rev. No. 1 P. 51 (1927). For comment, "Damage Awards and Computer Systems — Trends," see 35 Emory L.J. 255 (1986).

## JUDICIAL DECISIONS

**Contracts against liability for negligence are not favored by the law**, and will be strictly construed, with every doubt resolved against party seeking their protection. *Cash v. Armco Steel Corp.*, 462 F. Supp. 272 (N.D. Ga. 1978).

**Parties cannot bar all remedies, avoid all damages.** — O.C.G.A. § 11-2-719 allows the parties to provide substitute remedies and limit damages but not to bar all remedies and avoid all damages. *Freeman v. Hubco Leasing, Inc.*, 253 Ga. 698, 324 S.E.2d 462 (1985); *Esquire Mobile Homes, Inc. v. Arrendale*, 182 Ga. App. 528, 356 S.E.2d 250 (1987).

**O.C.G.A. § 11-2-719 does not require that a limitation of remedy be conspicuous**, and in determining the validity of a limitation under that section conspicuousness is irrel-

evant. *Apex Supply Co. v. Benbow Indus., Inc.*, 189 Ga. App. 598, 376 S.E.2d 694 (1988).

O.C.G.A. § 11-2-719, which explicitly permits the exclusion of consequential damages, does not impose any requirement of a conspicuous writing analogous to that of O.C.G.A. § 11-2-316(2). *Webster v. Sensormatic Elec. Corp.*, 193 Ga. App. 654, 389 S.E.2d 15 (1989); *McCrimmon v. Tandy Corp.*, 202 Ga. App. 233, 414 S.E.2d 15 (1991).

**Modification need not be in writing.** — Modification or restitution of the remedy available for breach of warranty need not be in writing. Parole evidence to show the usage of the trade to explain or supplement the available remedies for breach of warranty was improperly excluded. *Topeka Mach.*



Exch., Inc. v. Stoler Indus., Inc., 220 Ga. App. 799, 470 S.E.2d 250 (1996).

**Defects in machinery.** — Where contract for machinery stated that the seller would repair or replace defective parts only and explicitly disallowed all other warranties, the buyer was bound by the contract and could not maintain an action for lost revenues resulting from defects in the machinery. Frick Forest Prods., Inc. v. International Hardwoods, Inc., 161 Ga. App. 359, 288 S.E.2d 625 (1982).

**Consequential damages excluded by warranty limited to repair or replacement of defective goods.** — Seller was not liable for consequential damages resulting from alleged breach of warranty arising from defects in its goods where seller's written warranty specifically limited any liability to repairing or replacing any defective goods and where buyer had notice of the existence of the written warranty but never requested or saw a copy of the written warranty. A-Larms, Inc. v. Alarms Device Mfg. Co., 165 Ga. App. 382, 300 S.E.2d 311 (1983).

**Warranty excluding consequential damages not unconscionable.** — A warranty on a television set which excluded all incidental

and consequential damages was not unconscionable under both a procedural and substantive analysis. NEC Technologies, Inc. v. Nelson, 267 Ga. 390, 478 S.E.2d 769 (1996).

**Repurchase offer agreed to as part of agreement.** — Where it was determined that parties had agreed upon repurchase offer of seller in event of enforceable agreement, enforcement of such offer was reasonable measure of recovery under O.C.G.A. § 11-2-719(1). All-Co Drainage & Bldg. Prods., Inc. v. Umstead Enters., Inc., 123 Ga. App. 244, 180 S.E.2d 250 (1971).

**Cited in** John Deere Co. v. Lindsey Landclearing Co., 122 Ga. App. 827, 178 S.E.2d 917 (1970); Jacobs v. Metro Chrysler-Plymouth, Inc., 125 Ga. App. 462, 188 S.E.2d 250 (1972); White Farm Equip. Co. v. Jarrell & Clifton Equip. Co., 139 Ga. App. 632, 229 S.E.2d 113 (1976); Patron Aviation, Inc. v. Teledyne Indus., Inc., 154 Ga. App. 13, 267 S.E.2d 274 (1980); Teledyne Indus., Inc. v. Patron Aviation, Inc., 161 Ga. App. 596, 288 S.E.2d 911 (1982); Bamm, Inc. v. GAF Corp., 651 F.2d 389 (5th Cir. 1981); Hightower v. GMC, 175 Ga. App. 112, 332 S.E.2d 336 (1985).

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 63 Am. Jur. 2d, Products Liability, §§ 217 et seq., 659 et seq. 67A Am. Jur. 2d, Sales, §§ 908-927.

**C.J.S.** — 77A C.J.S., Sales, §§ 68, 73, 261, 262.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 2-719.

**ALR.** — Necessity of buyer's actual knowledge of disclaimer of warranty of personal property, 160 ALR 357.

Validity of disclaimer of warranty clauses in sale of new automobile, 54 ALR3d 1217.

Construction and effect of UCC § 2-316(2) providing that implied warranty disclaimer must be "conspicuous," 73 ALR3d 248.

Products liability insurance coverage as extending only to product-caused injury to person or other property, as distinguished from mere product failure, 91 ALR3d 921.

#### 11-2-720. Effect of "cancellation" or "rescission" on claims for antecedent breach.

Unless the contrary intention clearly appears, expressions of "cancellation" or "rescission" of the contract or the like shall not be construed as a renunciation or discharge of any claim in damages for an antecedent breach. (Code 1933, § 109A-2—720, enacted by Ga. L. 1962, p. 156, § 1.)

**Law reviews.** — For article discussing the applicability of warranty provisions under the Uniform Commercial Code to domestic

solar energy devices, see 30 Mercer L. Rev. 547 (1979).

JUDICIAL DECISIONS

**Effect of cancellation.** — Even if cancellation occurs, unless it is done with a waiver of rights, a claim for damages is not necessarily barred. *Poultry Health Serv. of Ga., Inc. v. Moxley*, 538 F. Supp. 276 (S.D. Ga. 1982).

**Cited in** *Waller v. Scheer*, 175 Ga. App. 1, 332 S.E.2d 293 (1985).

RESEARCH REFERENCES

**Am. Jur. 2d.** — 67A Am. Jur. 2d, Sales, §§ 856, 857.

**C.J.S.** — 77A C.J.S., Sales, §§ 114, 147 et seq.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 2-720.

**ALR.** — Remedy of contractor, who has partially performed before discovering fraud, as to character or amount of work, 2 ALR 1396.

Repossession of chattels by seller upon their return or abandonment by buyer as effecting a mutual rescission or as evidence thereof, 106 ALR 703.

Abandonment of possession as prerequisite to vendee's suit to obtain a rescission or to recover back money paid, 142 ALR 582.

11-2-721. Remedies for fraud.

Remedies for material misrepresentation or fraud include all remedies available under this article for nonfraudulent breach. Neither rescission or a claim for rescission of the contract for sale nor rejection or return of the goods shall bar or be deemed inconsistent with a claim for damages or other remedy. (Code 1933, § 109A-2—721, enacted by Ga. L. 1962, p. 156, § 1.)

**Cross references.** — Rescission of contracts generally, § 13-4-60 et seq.

**Law reviews.** — For article discussing *ex parte* rescission of sales contract for fraud and suit for fraud and deceit, in light of *City Dodge, Inc. v. Gardner*, 232 Ga. 766, 208 S.E.2d 794 (1974), see 11 Ga. St. B.J. 172 (1975). For article, "Buyer's Right of Rejection: A Quarter Century Under the Uniform Commercial Code, and Recent International Developments," see 13 Ga. L. Rev. 805 (1979). For article discussing the applicability of warranty provisions under the Uniform Commercial Code to domestic solar energy devices, see 30 Mercer L. Rev. 547 (1979).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION  
ACTIONS

General Consideration

**Uniform Commercial Code not intended to erase tort remedy for fraud.** — Neither draftsmen nor legislature intended to erase tort remedy for fraud and deceit with adoption of Uniform Commercial Code in Georgia. *City Dodge, Inc. v. Gardner*, 232 Ga. 766, 208 S.E.2d 794 (1974).

**Fraud in procurement justifies rescission at option of injured party.** — If charge of fraud in procurement of contract is substantiated, the written contract itself is voidable and subject to rescission at election of injured party. *Cone Mills Corp. v. A.G. Estes, Inc.*, 399 F. Supp. 938 (N.D. Ga. 1975).

**General Consideration (Cont'd)**

**Failure to perform coupled with present intention not to perform is fraud.** — When failure to perform promised act is coupled with present intention not to perform, inceptive fraud is present and is sufficient to support action for cancellation of written instrument. *Cone Mills Corp. v. A.G. Estes, Inc.*, 399 F. Supp. 938 (N.D. Ga. 1975).

**Actual fraud cannot arise from mere promissory statements about future acts or events.** — Actual fraud can arise only when representations made relate to then existing or past facts, and cannot be predicated upon statements which are merely promissory in nature, referring to future acts or events. *Cone Mills Corp. v. A.G. Estes, Inc.*, 399 F. Supp. 938 (N.D. Ga. 1975).

**Where both parties expect buyer to live up to promise, there is no fraudulent inducement.** — Where parties to contract fully contemplated and expected that buyer would live up to a promise, whether or not it was ever reduced to writing, a charge of fraudulent inducement is not supported by evidence. *Cone Mills Corp. v. A.G. Estes, Inc.*, 399 F. Supp. 938 (N.D. Ga. 1975).

**Tort action not controlled by terms of contract.** — Uniform Commercial Code does not preclude action in tort based upon fraudulent misrepresentation inducing the sale where plaintiff proves by preponder-

ance of evidence the elements of fraud and deceit recognized under Georgia law, and such a tort action cannot be controlled by terms of contract itself. *City Dodge, Inc. v. Gardner*, 232 Ga. 766, 208 S.E.2d 794 (1974); *Massey v. Stenbridge*, 177 Ga. App. 791, 341 S.E.2d 247 (1986).

**Cited in** *F.N. Roberts Pest Control Co. v. McDonald*, 132 Ga. App. 257, 208 S.E.2d 13 (1974); *Waller v. Scheer*, 175 Ga. App. 1, 332 S.E.2d 293 (1985).

**Actions**

**Elements of claim for fraud and deceit.** — Defendant seeking damages or rescission by way of counterclaim in nature of a tort claim for fraud and deceit must show that plaintiff (or someone acting for plaintiff) made representations, which at time made were known to be false, or what the law regards as equivalent of knowledge, that representations were for purpose of deceiving defendant, that defendant relied on the representations, and that defendant sustained loss or damage as proximate result of the representations. *Cone Mills Corp. v. A.G. Estes, Inc.*, 399 F. Supp. 938 (N.D. Ga. 1975).

**Precise allegations and proof required.** — Georgia courts require precise allegations and particular proof of all necessary elements of fraud. *Cone Mills Corp. v. A.G. Estes, Inc.*, 399 F. Supp. 938 (N.D. Ga. 1975).

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 67A Am. Jur. 2d, Sales, §§ 858, 859, 1161, 1216-1225, 1278, 1279.

**C.J.S.** — 77A C.J.S., § 50 et seq.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 2-721.

**ALR.** — Remedy of contractor, who has partially performed before discovering fraud, as to character or amount of work, 2 ALR 1396.

Validity and effect of stipulation to the effect that vendee or purchaser does not rely upon representations of vendor or seller, or the latter's agent, 10 ALR 1472.

Election of remedies: inconsistency of action for damages for fraud and suit to establish constructive trust based on same transaction, 35 ALR 1175; 43 ALR 177.

Fraud of vendee or buyer inducing vendor or seller to accept less favorable terms as sustaining an action in tort, 52 ALR 1153.

Dealings between seller and buyer after latter's knowledge of former's fraud as waiver of claim for damages on account of fraud, 106 ALR 172.

Seller's liability for fraud in connection with contract for the sale of long-term dancing lessons, 28 ALR3d 1412.

Validity of express statutory grant of power to state to seek, or to court to grant, restitution of fruits of consumer fraud, 59 ALR3d 1222.

Fraud actions: right to recover for mental or emotional distress, 11 ALR5th 88.



**11-2-722. Who can sue third parties for injury to goods.**

Where a third party so deals with goods which have been identified to a contract for sale as to cause actionable injury to a party to that contract:

(a) A right of action against the third party is in either party to the contract for sale who has title to or a security interest or a special property or an insurable interest in the goods; and if the goods have been destroyed or converted a right of action is also in the party who either bore the risk of loss under the contract for sale or has since the injury assumed that risk as against the other;

(b) If at the time of the injury the party plaintiff did not bear the risk of loss as against the other party to the contract for sale and there is no arrangement between them for disposition of the recovery, his suit or settlement is, subject to his own interest, as a fiduciary for the other party to the contract;

(c) Either party may with the consent of the other sue for the benefit of whom it may concern. (Code 1933, § 109A-2—722, enacted by Ga. L. 1962, p. 156, § 1.)

**JUDICIAL DECISIONS**

**Applicability.** — O.C.G.A. § 11-2-722 merely determines which party to a contract may bring an action against a third party who has otherwise committed an actionable injury against identifiable property that is the subject of the contract; it did not apply in an action for damages, arising from delay in delivery of a machine, against a defendant

which had agreed to sell the machine to a third company which would sell it to the plaintiff. *Philips Medical Sys. N. Am. Co. v. Diagnostic Equip. Servs., Inc.*, 213 Ga. App. 236, 444 S.E.2d 345 (1994).

**Cited in** *Holiday Homes, Inc. v. Bragg*, 132 Ga. App. 594, 208 S.E.2d 608 (1974).

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 67 Am. Jur. 2d, Sales, § 409.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 2-722.

**11-2-723. Proof of market price: time and place.**

(1) If an action based on anticipatory repudiation comes to trial before the time for performance with respect to some or all of the goods, any damages based on market price (Code Section 11-2-708 or Code Section 11-2-713) shall be determined according to the price of such goods prevailing at the time when the aggrieved party learned of the repudiation.

(2) If evidence of a price prevailing at the times or places described in this article is not readily available the price prevailing within any reasonable time before or after the time described or at any other place which in commercial judgment or under usage of trade would serve as a reasonable

substitute for the one described may be used, making any proper allowance for the cost of transporting the goods to or from such other place.

(3) Evidence of a relevant price prevailing at a time or place other than the one described in this article offered by one party is not admissible unless and until he has given the other party such notice as the court finds sufficient to prevent unfair surprise. (Code 1933, § 109A-2—723, enacted by Ga. L. 1962, p. 156, § 1.)

**Law reviews.** — For note, “The Law of Evidence in the Uniform Commercial Code,” see 1 Ga. L. Rev. 44 (1966).

### JUDICIAL DECISIONS

**Cited** in *Swift Textiles, Inc. v. Lawson*, 135 Ga. App. 799, 219 S.E.2d 167 (1975); *Bigelow-Sanford, Inc. v. Gunny Corp.*, 649 F.2d 1060 (5th Cir. 1981).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 67A Am. Jur. 2d, Sales, §§ 890-893, 1114-1124.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 2-723.

**ALR.** — Presumption and burden of proof as to market price or value of goods in action by seller against buyer who refuses to accept goods, 130 ALR 1336.

### 11-2-724. Admissibility of market quotations.

Whenever the prevailing price or value of any goods regularly bought and sold in any established commodity market is in issue, reports in official publications or trade journals or in newspapers or periodicals of general circulation published as the reports of such market shall be admissible in evidence. The circumstances of the preparation of such a report may be shown to affect its weight but not its admissibility. (Code 1933, § 109A-2—724, enacted by Ga. L. 1962, p. 156, § 1.)

**Law reviews.** — For note, “The Law of Evidence in the Uniform Commercial Code,” see 1 Ga. L. Rev. 44 (1966).

### JUDICIAL DECISIONS

**Cited** in *Chrysler Credit Corp. v. Cooper*, 7 Bankr. 537 (N.D. Ga. 1980).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 67A Am. Jur. 2d, Sales, §§ 888, 889.

**C.J.S.** — 32A C.J.S., Evidence, § 1003 et seq. 77A C.J.S., Sales, § 369.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 2-724.

**ALR.** — Newspapers and trade journals as evidence of market prices or quotations, 43 ALR 1192.

11-2-725. Statute of limitations in contracts for sale.

- (1) An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.
- (2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.
- (3) Where an action commenced within the time limited by subsection (1) of this Code section is so terminated as to leave available a remedy by another action for the same breach such other action may be commenced after the expiration of the time limited and within six months after the termination of the first action unless the termination resulted from voluntary discontinuance or from dismissal for failure or neglect to prosecute.
- (4) This Code section does not alter the law on tolling of the statute of limitations nor does it apply to causes of action which have accrued before January 1, 1964. (Code 1933, § 109A-2—725, enacted by Ga. L. 1962, p. 156, § 1.)

**Cross references.** — Limitations of actions on contracts generally, § 9-3-26.

**Law reviews.** — For article discussing applicability of Uniform Commercial Code provision concerning statute of limitations

to construction contracts, see 28 Emory L.J. 335 (1979). For article, "Products Liability Law in Georgia Including Recent Developments," see 43 Mercer L. Rev. 27 (1991).

JUDICIAL DECISIONS

ANALYSIS

- GENERAL CONSIDERATION
- TIME OF BREACH
- FACT/LAW QUESTIONS
- APPLICATION

General Consideration

**Distinguished from O.C.G.A. § 9-3-24.** — O.C.G.A. § 11-2-725 applies to sales contracts, while O.C.G.A. § 9-3-24 covers all other simple written contracts. *Cleveland Lumber Co. v. Proctor & Schwartz, Inc.*, 397 F. Supp. 1088 (N.D. Ga. 1975).

**Sealed contract to purchase inventory.** — An action for breach of a written contract,

under seal, to purchase the inventory of a retail business was governed by the four-year limitation period under the UCC and not by the 20 year limitation period applicable to actions on sealed instruments. *McLean v. Gray*, 180 Ga. App. 794, 350 S.E.2d 815 (1986).

**Services incidental to sales contract.** — Where clauses in contract which may amount to services are merely incidental to



**General Consideration (Cont'd)**

main purpose of contract and do not take it out of sales provisions of the Uniform Commercial Code, its statute of limitations appears to apply rather than the general Georgia statute of limitations on contracts. *Cleveland Lumber Co. v. Proctor & Schwartz, Inc.*, 397 F. Supp. 1088 (N.D. Ga. 1975).

**Mixed contract for sale of goods and services.** — When the predominant element of a contract is the sale of goods, the contract is viewed as a sales contract and O.C.G.A. § 11-2-725 is the applicable statute of limitations even though a substantial amount of service is to be rendered in installing the goods. When the predominant element of a contract is the furnishing of services, O.C.G.A. § 9-3-24 applies. Factors to be considered in determining the predominant element include the proportion of the total contract cost allocated to the goods and whether the price of the goods are segregated from the price for services. *Southern Tank Equip. Co. v. Zartic, Inc.*, 221 Ga. App. 503, 471 S.E.2d 587 (1996).

**Where manufacturer/seller of windows is sued for property damage to home**, and, the windows were part of the initial construction of the home, the cause of action would have accrued at the time of the allegedly defective construction. *Kemp v. Bell-View, Inc.*, 179 Ga. App. 577, 346 S.E.2d 923 (1986).

**Cited in** *Moody v. Sears, Roebuck & Co.*, 324 F. Supp. 844 (S.D. Ga. 1971); *Everhart v. Rich's, Inc.*, 128 Ga. App. 319, 196 S.E.2d 475 (1973); *U.S. Indus., Inc. v. Mitchell*, 148 Ga. App. 770, 252 S.E.2d 672 (1979); *General Tire & Rubber Co. v. Alex*, 149 Ga. App. 393, 254 S.E.2d 509 (1979); *Landon v. Williams Bros. Concrete Co.*, 149 Ga. App. 699, 256 S.E.2d 99 (1979); *Smith v. Dixon Ford Tractor Co.*, 160 Ga. App. 885, 288 S.E.2d 599 (1982); *Ballew v. A.H. Robins Co.*, 688 F.2d 1325 (11th Cir. 1982); *Adair v. Baker Bros.*, 185 Ga. App. 807, 366 S.E.2d 164 (1988); *Davis v. Brunswick Corp.*, 854 F. Supp. 1574 (N.D. Ga. 1993); *State Line Metals v. ALCOA*, 216 Ga. App. 14, 453 S.E.2d 474 (1995); *AAA Truck Sales, Inc. v. Mershon Tractor Co.*, 239 Ga. App. 469, 521 S.E.2d 403 (1999).

**Time of Breach**

**Breach warranty to repair or replace.** — Under O.C.G.A. § 11-2-725, while a breach of warranty generally occurs upon delivery of goods regardless of time of discovery of breach, where there is an agreement to repair or replace, warranty is not breached until there is refusal or failure to repair. *Space Leasing Assocs. v. Atlantic Bldg. Sys.*, 144 Ga. App. 320, 241 S.E.2d 438 (1977).

Where a warranty included an agreement to replace or repair, the trial court correctly ruled that defendant breached its warranty when it refused to conduct further warranty repairs and that the complaint was filed well within the limitation period which did not commence running until the breach. *Versico, Inc. v. Engineered Fabrics Corp.*, 238 Ga. App. 837, 520 S.E.2d 505 (1999).

**Breach by supplier.** — For purpose of O.C.G.A. § 11-2-725, breach of contract by subcontractor who supplied glass and labor for construction of overhead bridge occurred at time glass was installed and accepted by owner. *PPG Indus., Inc. v. Genson*, 135 Ga. App. 248, 217 S.E.2d 479 (1975).

**Fact/Law Questions**

**Whether action is barred by lapse of time.** — If sole question is one as to length of time which has elapsed between accrual of right and institution of action, question as to whether action is barred is one of law. *Cleveland Lumber Co. v. Proctor & Schwartz, Inc.*, 397 F. Supp. 1088 (N.D. Ga. 1975).

**Case involving fraud and excuse for delayed discovery.** — Where facts indicate fraud and excuses for delay in its discovery, question is one of mixed law and fact, and is a proper question for determination by jury under proper instructions from the court. *Cleveland Lumber Co. v. Proctor & Schwartz, Inc.*, 397 F. Supp. 1088 (N.D. Ga. 1975).

**Application**

**Agreement not governed by O.C.G.A. § 9-3-24.** — The release agreement which by its terms superseded the lease and maintenance agreements, and provided for the mutual release of all claims arising out of the prior agreements was a contract for sale of

the offspring of the leased cattle, and the action was barred by the four-year limitation period of the sales article, rather than the six-year limitation period for written con-

tracts under O.C.G.A. § 9-3-24. *Embryo Progeny Assocs. v. Lovana Farms, Inc.*, 203 Ga. App. 447, 416 S.E.2d 833, cert. denied, 203 Ga. App. 906, 416 S.E.2d 833 (1992).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 1 Am. Jur. 2d, Accounts and Accounting, § 21. 63B Am. Jur. 2d, Products Liability, §§ 1571 et seq., 1601 et seq. 67A Am. Jur. 2d, Sales, §§ 928-953.

**C.J.S.** — 54 C.J.S., Limitations of Actions, § 61. 77A C.J.S., Sales, § 377.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 2-725.

**ALR.** — What constitutes an open, current account within the statute of limitations, 39 ALR 369; 57 ALR 201.

When “sale” deemed to have taken place for purposes of statute of limitations which fixes commencement of period at time of foreclosure sale or other judicial sale, 101 ALR 1348.

Validity of contractual waiver of statute of limitations, 1 ALR2d 1445.

Limitation of actions as applied to account stated, 51 ALR2d 331.

Validity, and applicability to causes of action not already barred, of a statute enlarging limitation period, 79 ALR2d 1080.

Validity of contractual time period, shorter than statute of limitations, for bringing action, 6 ALR3d 1197.

Application to period of limitations fixed by contract, of statute permitting new action to be brought within specified time after failure of prior action for cause other than on the merits, 16 ALR3d 452.

Statute of limitations: effect of delay in appointing administrator or other representative on cause of action accruing at or after death of person in whose favor it would have accrued, 28 ALR3d 1141.

Settlement negotiations as estopping reliance on statute of limitations, 39 ALR3d 127.

Promises or attempts by seller to repair goods as tolling statute of limitations for breach of warranty, 68 ALR3d 1277.

Validity of contractual provision establishing period of limitations longer than that provided by state statute of limitations, 84 ALR3d 1172.

Products liability: what statute of limitations governs actions based on strict liability in tort, 91 ALR3d 455.

What constitutes warranty explicitly extending to “future performance” for purposes of UCC § 2-725(2), 93 ALR3d 690.

Computer sales and leases: time when cause of action for failure of performance accrues, 90 ALR4th 298.

Validity and construction of statute terminating right of action for product-caused injury at fixed period after manufacture, sale, or delivery of product, 30 ALR5th 1.

Causes of action governed by limitations period in UCC § 2-725, 49 ALR5th 1.

Products liability: ladders, 81 ALR5th 245.

## ARTICLE 2A

### LEASES

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11-2A-512.	Lessee's duties as to rightfully rejected goods.		
11-2A-513.	Cure by lessor of improper tender or delivery; replacement.		
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**Effective date.** — Ga. L. 1993, p. 633, § 5, provides: "This [article] shall become effective on July 1, 1993, for all lease contracts that are first made or that first become effective between the parties on or after that date. This [article] shall not apply to any lease first made or that first became effective between the parties before July 1, 1993, or to any extension, amendment, modification, re-

newal, or supplement of or to any such lease contract, unless the parties thereto specifically agree in writing that such lease contract, as extended, amended, modified, renewed, or supplemented, shall be governed by this [article]."

**Law reviews.** — For annual survey article discussing developments in commercial law, see 51 Mercer L. Rev. 165 (1999).

PART 1  
GENERAL PROVISIONS

**11-2A-101. Short title.**

This article shall be known and may be cited as “Uniform Commercial Code — Leases.” (Code 1981, § 11-2A-101, enacted by Ga. L. 1993, p. 633, § 1.)

**Law reviews.** — For note on 1993 enactment of this article, see 10 Ga. St. U.L. Rev. 34 (1993).

For comment, “Electronic Self-Help Re-

possession and You: A Computer Software Vendor’s Guide to Staying Out of Jail,” see 48 Emory L.J. 1477 (1999).

**RESEARCH REFERENCES**

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 2A-101.

**11-2A-102. Scope.**

This article applies to any transaction, regardless of form, that creates a lease. (Code 1981, § 11-2A-102, enacted by Ga. L. 1993, p. 633, § 1.)

**RESEARCH REFERENCES**

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 2A-102.

**11-2A-103. Definitions and index of definitions.**

(1) In this article unless the context otherwise requires:

(a) “Buyer in ordinary course of business” means a person who in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest or leasehold interest of a third party in the goods buys in ordinary course from a person in the business of selling goods of that kind but does not include a pawnbroker. “Buying” may be for cash or by exchange of other property or on secured or unsecured credit and includes receiving goods or documents of title under a pre-existing contract for sale but does not include a transfer in bulk or as security for or in total or partial satisfaction of a money debt.

(b) “Cancellation” occurs when either party puts an end to the lease contract for default by the other party.

(c) “Commercial unit” means such a unit of goods as by commercial usage is a single whole for purposes of lease and division of which materially impairs its character or value on the market or in use. A

commercial unit may be a single article, as a machine, or a set of articles, as a suite of furniture or a line of machinery, or a quantity, as a gross or carload, or any other unit treated in use or in the relevant market as a single whole.

(d) “Conforming” goods or performance under a lease contract means goods or performance that are in accordance with the obligations under the lease contract.

(e) “Consumer lease” means a lease that a lessor regularly engaged in the business of leasing or selling makes to a lessee who is an individual and who takes under the lease primarily for a personal, family, or household purpose.

(f) “Fault” means wrongful act, omission, breach, or default.

(g) “Finance lease” means a lease with respect to which:

(i) The lessor does not select, manufacture, or supply the goods;

(ii) The lessor acquires the goods or the right to possession and use of the goods in connection with the lease; and

(iii) One of the following occurs:

(A) The lessee receives a copy of the contract by which the lessor acquired the goods or the right to possession and use of the goods before signing the lease contract;

(B) The lessee’s approval of the contract by which the lessor acquired the goods or the right to possession and use of the goods is a condition to effectiveness of the lease contract;

(C) The lessee, before signing the lease contract, receives an accurate and complete statement designating the promises and warranties, and any disclaimers of warranties, limitations or modifications of remedies, or liquidated damages, including those of a third party, such as the manufacturer of the goods, provided to the lessor by the person supplying the goods in connection with or as part of the contract by which the lessor acquired the goods or the right to possession and use of the goods; or

(D) If the lease is not a consumer lease, the lessor, before the lessee signs the lease contract, informs the lessee in writing (a) of the identity of the person supplying the goods to the lessor, unless the lessee has selected that person and directed the lessor to acquire the goods or the right to possession and use of the goods from that person, (b) that the lessee is entitled under this article to the promises and warranties, including those of any third party, provided to the lessor by the person supplying the goods in connection with or as part of the contract by which the lessor acquired the goods or the



right to possession and use of the goods, and (c) that the lessee may communicate with the person supplying the goods to the lessor and receive an accurate and complete statement of those promises and warranties, including any disclaimers and limitations of them or of remedies.

(h) “Goods” means all things that are movable at the time of identification to the lease contract, or are fixtures (Code Section 11-2A-309), but the term does not include money, documents, instruments, accounts, chattel paper, general intangibles, or minerals or the like, including oil and gas, before extraction. The term also includes the unborn young of animals.

(i) “Installment lease contract” means a lease contract that authorizes or requires the delivery of goods in separate lots to be separately accepted, even though the lease contract contains a clause “each delivery is a separate lease” or its equivalent.

(j) “Lease” means a transfer of the right to possession and use of goods for a term in return for consideration, but a sale, including a sale on approval or a sale or return, or retention or creation of a security interest is not a lease. Unless the context clearly indicates otherwise, the term includes a sublease.

(k) “Lease agreement” means the bargain, with respect to the lease, of the lessor and the lessee in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in this article. Unless the context clearly indicates otherwise, the term includes a sublease agreement.

(l) “Lease contract” means the total legal obligation that results from the lease agreement as affected by this article and any other applicable rules of law. Unless the context clearly indicates otherwise, the term includes a sublease contract.

(m) “Leasehold interest” means the interest of the lessor or the lessee under a lease contract.

(n) “Lessee” means a person who acquires the right to possession and use of goods under a lease. Unless the context clearly indicates otherwise, the term includes a sublessee.

(o) “Lessee in ordinary course of business” means a person who in good faith and without knowledge that the lease to him is in violation of the ownership rights or security interest or leasehold interest of a third party in the goods leases in ordinary course from a person in the business of selling or leasing goods of that kind but does not include a pawnbroker. “Leasing” may be for cash or by exchange of other property or on secured or unsecured credit and includes receiving goods or documents

of title under a pre-existing lease contract but does not include a transfer in bulk or as security for or in total or partial satisfaction of a money debt.

(p) “Lessor” means a person who transfers the right to possession and use of goods under a lease. Unless the context clearly indicates otherwise, the term includes a sublessor.

(q) “Lessor’s residual interest” means the lessor’s interest in the goods after expiration, termination, or cancellation of the lease contract.

(r) “Lien” means a charge against or interest in goods to secure payment of a debt or performance of an obligation, but the term does not include a security interest.

(s) “Lot” means a parcel or a single article that is the subject matter of a separate lease or delivery, whether or not it is sufficient to perform the lease contract.

(t) “Merchant lessee” means a lessee that is a merchant with respect to goods of the kind subject to the lease.

(u) “Present value” means the amount as of a date certain of one or more sums payable in the future, discounted to the date certain. The discount is determined by the interest rate specified by the parties if the rate was not manifestly unreasonable at the time the transaction was entered into; otherwise, the discount is determined by a commercially reasonable rate that takes into account the facts and circumstances of each case at the time the transaction was entered into.

(v) “Purchase” includes taking by sale, lease, mortgage, security interest, pledge, gift, or any other voluntary transaction creating an interest in goods.

(w) “Sublease” means a lease of goods the right to possession and use of which was acquired by the lessor as a lessee under an existing lease.

(x) “Supplier” means a person from whom a lessor buys or leases goods to be leased under a finance lease.

(y) “Supply contract” means a contract under which a lessor buys or leases goods to be leased.

(z) “Termination” occurs when either party pursuant to a power created by agreement or law puts an end to the lease contract otherwise than for default.

(2) Other definitions applying to this article and the sections in which they appear are:

“Accessions.” Code Section 11-2A-310(1).

“Construction mortgage.” Code Section 11-2A-309(1)(d).

“Encumbrance.” Code Section 11-2A-309(1)(e).

“Fixtures.” Code Section 11-2A-309(1)(a).

“Fixture filing.” Code Section 11-2A-309(1)(b).

“Purchase money lease.” Code Section 11-2A-309(1)(c).

(3) The following definitions in other articles of this title apply to this article:

“Account.” Code Section 11-9-102(a).

“Between merchants.” Code Section 11-2-104(3).

“Buyer.” Code Section 11-2-103(1)(a).

“Chattel paper.” Code Section 11-9-102(a).

“Consumer goods.” Code Section 11-9-102(a).

“Document.” Code Section 11-9-102(a).

“Entrusting.” Code Section 11-2-403(3).

“General intangible.” Code Section 11-9-102(a).

“Good faith.” Code Section 11-2-103(1)(b).

“Instrument.” Code Section 11-9-102(a).

“Merchant.” Code Section 11-2-104(1).

“Mortgage.” Code Section 11-9-102(a).

“Pursuant to commitment.” Code Section 11-9-102(a).

“Receipt.” Code Section 11-2-103(1)(c).

“Sale.” Code Section 11-2-106(1).

“Sale on approval.” Code Section 11-2-326.

“Sale or return.” Code Section 11-2-326.

“Seller.” Code Section 11-2-103(1)(d).

(4) In addition, Article 1 of this title contains general definitions and principles of construction and interpretation applicable throughout this article. (Code 1981, § 11-2A-103, enacted by Ga. L. 1993, p. 633, § 1; Ga. L. 2001, p. 362, § 9.)

**The 2001 amendment**, effective July 1, 2001, in subsection (3), substituted “Code Section 11-9-102(a)” for “Code Section 11-9-106” in the provisions regarding account, substituted “Code Section 11-9-102(a)” for “Code Section 11-9-105(1)(b)” in the provisions regarding

chattel paper, substituted “Code Section 11-9-102(a)” for “Code Section 11-9-109(1)” in the provisions regarding consumer goods, substituted “Code Section 11-9-102(a)” for “Code Section 11-9-105(1)(f)” in the provisions regarding document, in the provisions regarding gen-



eral intangible, substituted “intangible” for “intangibles” and substituted “Code Section 11-9-102(a)” for “Code Section 11-9-106”, substituted “Code Section 11-9-102(a)” for “Code Section 11-9-105(1)(i)” in the provisions regarding instrument, substituted “Code Section 11-9-102(a)” for “Code Section 11-9-105(1)(j)” in the provisions regarding mortgage, and substituted “Code Sec-

tion 11-9-102(a)” for “Code Section 11-9-105(1)(k)” in the provisions regarding pursuant to commitment.

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 1993, the period was moved to appear inside the quotation marks in each entry of the lists in subsections (2) and (3).

JUDICIAL DECISIONS

**Lease.** — A lease-purchase agreement meeting the requirements of O.C.G.A. § 10-1-681 constituted a true lease, not a security agreement, and was subject to § 365 of the Bankruptcy Code, 11 U.S.C.S. § 365. *Central Rents, Inc. v. Johnson*, 203 Bankr. 498 (Bankr. S.D. Ga. 1996).

Creditor’s unqualified right to require the debtor to repurchase equipment during or

at termination of a purported lease, coupled with a letter agreement that was intended to insure the return of the creditor’s investment and a return on the investment of a certain percentage indicated that the lease was a disguised security agreement. *Moore v. Emery (In re Am. Steel Prod., Inc.)*, 203 Bankr. 504 (Bankr. S.D. Ga. 1996).

RESEARCH REFERENCES

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 2A-103.

11-2A-104. Leases subject to other law.

(1) A lease, although subject to this article, is also subject to any applicable:

(a) Certificate of title statute of this State:

(b) Certificate of title statute of another jurisdiction (Code Section 11-2A-105); or

(c) Consumer protection statute of this State, or final consumer protection decision of a court of this State existing on July 1, 1993.

(2) In case of conflict between this article, other than Code Sections 11-2A-105, 11-2A-304(3), and 11-2A-305(3), and a statute or decision referred to in subsection (1), the statute or decision controls.

(3) Failure to comply with an applicable law has only the effect specified therein. (Code 1981, § 11-2A-104, enacted by Ga. L. 1993, p. 633, § 1.)

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 1993, “July 1, 1993” was substituted for “the effective date of this article” in paragraph (c)(1).

RESEARCH REFERENCES

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 2A-104.

**11-2A-105. Territorial application of article to goods covered by certificate of title.**

Subject to the provisions of Code Sections 11-2A-304(3) and 11-2A-305(3), with respect to goods covered by a certificate of title issued under a statute of this State or of another jurisdiction, compliance and the effect of compliance or noncompliance with a certificate of title statute are governed by the law (including the conflict of laws rules) of the jurisdiction issuing the certificate until the earlier of (a) surrender of the certificate, or (b) four months after the goods are removed from that jurisdiction and thereafter until a new certificate of title is issued by another jurisdiction. (Code 1981, § 11-2A-105, enacted by Ga. L. 1993, p. 633, § 1.)

**RESEARCH REFERENCES**

**U.L.A.** — Uniform Commercial Code  
(U.L.A.) § 2A-105.

**11-2A-106. Limitation on power of parties to consumer lease to choose applicable law and judicial forum.**

(1) If the law chosen by the parties to a consumer lease is that of a jurisdiction other than a jurisdiction in which the lessee resides at the time the lease agreement becomes enforceable or within 30 days thereafter or in which the goods are to be used, the choice is not enforceable.

(2) If the judicial forum chosen by the parties to a consumer lease is a forum that would not otherwise have jurisdiction over the lessee, the choice is not enforceable. (Code 1981, § 11-2A-106, enacted by Ga. L. 1993, p. 633, § 1.)

**RESEARCH REFERENCES**

**U.L.A.** — Uniform Commercial Code  
(U.L.A.) § 2A-106.

**11-2A-107. Waiver or renunciation of claim or right after default.**

Any claim or right arising out of an alleged default or breach of warranty may be discharged in whole or in part without consideration by a written waiver or renunciation signed and delivered by the aggrieved party. (Code 1981, § 11-2A-107, enacted by Ga. L. 1993, p. 633, § 1.)

**RESEARCH REFERENCES**

**U.L.A.** — Uniform Commercial Code  
(U.L.A.) § 2A-107.

**11-2A-108. Unconscionability.**

(1) If the court as a matter of law finds a lease contract or any clause of a lease contract to have been unconscionable at the time it was made the court may refuse to enforce the lease contract, or it may enforce the remainder of the lease contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(2) With respect to a consumer lease, if the court as a matter of law finds that a lease contract or any clause of a lease contract has been induced by unconscionable conduct or that unconscionable conduct has occurred in the collection of a claim arising from a lease contract, the court may grant appropriate relief.

(3) Before making a finding of unconscionability under subsection (1) or (2), the court, on its own motion or that of a party, shall afford the parties a reasonable opportunity to present evidence as to the setting, purpose, and effect of the lease contract or clause thereof, or of the conduct.

(4) In an action in which the lessee claims unconscionability with respect to a consumer lease:

(a) If the court finds unconscionability under subsection (1) or (2), the court shall award reasonable attorney's fees to the lessee.

(b) If the court does not find unconscionability and the lessee claiming unconscionability has brought or maintained an action he knew to be groundless, the court shall award reasonable attorney's fees to the party against whom the claim is made.

(c) In determining attorney's fees, the amount of the recovery on behalf of the claimant under subsections (1) and (2) is not controlling. (Code 1981, § 11-2A-108, enacted by Ga. L. 1993, p. 633, § 1.)

**RESEARCH REFERENCES**

**U.L.A.** — Uniform Commercial Code  
(U.L.A.) § 2A-108.

**11-2A-109. Option to accelerate at will.**

(1) A term providing that one party or his successor in interest may accelerate payment or performance or require collateral or additional collateral "at will" or "when he deems himself insecure" or in words of similar import must be construed to mean that he has power to do so only if he in good faith believes that the prospect of payment or performance is impaired.

(2) With respect to a consumer lease, the burden of establishing good faith under subsection (1) is on the party who exercised the power;



otherwise the burden of establishing lack of good faith is on the party against whom the power has been exercised. (Code 1981, § 11-2A-109, enacted by Ga. L. 1993, p. 633, § 1.)

#### RESEARCH REFERENCES

**U.L.A.** — Uniform Commercial Code  
(U.L.A.) § 2A-109.

### PART 2

#### FORMATION AND CONSTRUCTION OF LEASE CONTRACT

##### **11-2A-201. Statute of frauds.**

(1) A lease contract is not enforceable by way of action or defense unless:

(a) The total payments to be made under the lease contract, excluding payments for options to renew or buy, are less than \$1,000; or

(b) There is a writing, signed by the party against whom enforcement is sought or by that party's authorized agent, sufficient to indicate that a lease contract has been made between the parties and to describe the goods leased and the lease term.

(2) Any description of leased goods or of the lease term is sufficient and satisfies subsection (1)(b), whether or not it is specific, if it reasonably identifies what is described.

(3) A writing is not insufficient because it omits or incorrectly states a term agreed upon, but the lease contract is not enforceable under subsection (1)(b) beyond the lease term and the quantity of goods shown in the writing.

(4) A lease contract that does not satisfy the requirements of subsection (1), but which is valid in other respects, is enforceable:

(a) If the goods are to be specially manufactured or obtained for the lessee and are not suitable for lease or sale to others in the ordinary course of the lessor's business, and the lessor, before notice of repudiation is received and under circumstances that reasonably indicate that the goods are for the lessee, has made either a substantial beginning of their manufacture or commitments for their procurement;

(b) If the party against whom enforcement is sought admits in that party's pleading, testimony or otherwise in court that a lease contract was made, but the lease contract is not enforceable under this provision beyond the quantity of goods admitted; or

(c) With respect to goods that have been received and accepted by the lessee.

(5) The lease term under a lease contract referred to in subsection (4) is:

(a) If there is a writing signed by the party against whom enforcement is sought or by that party's authorized agent specifying the lease term, the term so specified;

(b) If the party against whom enforcement is sought admits in that party's pleading, testimony, or otherwise in court a lease term, the term so admitted; or

(c) A reasonable lease term. (Code 1981, § 11-2A-201, enacted by Ga. L. 1993, p. 633, § 1.)

#### RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 2A-201.

#### **11-2A-202. Final written expression: Parole or extrinsic evidence.**

Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented:

(a) By course of dealing or usage of trade or by course of performance; and

(b) By evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement. (Code 1981, § 11-2A-202, enacted by Ga. L. 1993, p. 633, § 1.)

#### RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 2A-202.

#### **11-2A-203. Seals inoperative.**

The affixing of a seal to a writing evidencing a lease contract or an offer to enter into a lease contract does not render the writing a sealed instrument and the law with respect to sealed instruments does not apply to the lease contract or offer. (Code 1981, § 11-2A-203, enacted by Ga. L. 1993, p. 633, § 1.)

**RESEARCH REFERENCES**

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 2A-203.

**11-2A-204. Formation in general.**

(1) A lease contract may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of a lease contract.

(2) An agreement sufficient to constitute a lease contract may be found although the moment of its making is undetermined.

(3) Although one or more terms are left open, a lease contract does not fail for indefiniteness if the parties have intended to make a lease contract and there is a reasonably certain basis for giving an appropriate remedy. (Code 1981, § 11-2A-204, enacted by Ga. L. 1993, p. 633, § 1.)

**RESEARCH REFERENCES**

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 2A-204.

**11-2A-205. Firm offers.**

An offer by a merchant to lease goods to or from another person in a signed writing that by its terms gives assurance it will be held open is not revocable, for lack of consideration, during the time stated or, if no time is stated, for a reasonable time, but in no event may the period of irrevocability exceed 3 months. Any such term of assurance on a form supplied by the offeree must be separately signed by the offeror. (Code 1981, § 11-2A-205, enacted by Ga. L. 1993, p. 633, § 1.)

**RESEARCH REFERENCES**

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 2A-205.

**11-2A-206. Offer and acceptance in formation of lease contract.**

(1) Unless otherwise unambiguously indicated by the language or circumstances, an offer to make a lease contract must be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances.

(2) If the beginning of a requested performance is a reasonable mode of acceptance, an offeror who is not notified of acceptance within a reasonable time may treat the offer as having lapsed before acceptance. (Code 1981, § 11-2A-206, enacted by Ga. L. 1993, p. 633, § 1.)



**RESEARCH REFERENCES**

**U.L.A.** — Uniform Commercial Code  
(U.L.A.) § 2A-206.

**11-2A-207. Course of performance or practical construction.**

(1) If a lease contract involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection is relevant to determine the meaning of the lease agreement.

(2) The express terms of a lease agreement and any course of performance, as well as any course of dealing and usage of trade, must be construed whenever reasonable as consistent with each other; but if that construction is unreasonable, express terms control course of performance, course of performance controls both course of dealing and usage of trade, and course of dealing controls usage of trade.

(3) Subject to the provisions of Code Section 11-2A-208 on modification and waiver, course of performance is relevant to show a waiver or modification of any term inconsistent with the course of performance. (Code 1981, § 11-2A-207, enacted by Ga. L. 1993, p. 633, § 1.)

**RESEARCH REFERENCES**

**U.L.A.** — Uniform Commercial Code  
(U.L.A.) § 2A-207.

**11-2A-208. Modification, rescission and waiver.**

(1) An agreement modifying a lease contract needs no consideration to be binding.

(2) A signed lease agreement that excludes modification or rescission except by a signed writing may not be otherwise modified or rescinded, but, except as between merchants, such a requirement on a form supplied by a merchant must be separately signed by the other party.

(3) The requirements of the statute of frauds section of this article (Code Section 11-2A-201) must be satisfied if the contract as modified is within its provisions.

(4) Although an attempt at modification or rescission does not satisfy the requirements of subsection (2), it may operate as a waiver.

(5) A party who has made a waiver affecting an executory portion of a lease contract may retract the waiver by reasonable notification received by the other party that strict performance will be required of any term waived, unless the retraction would be unjust in view of a material change of position in reliance on the waiver. (Code 1981, § 11-2A-208, enacted by Ga. L. 1993, p. 633, § 1.)

#### RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 2A-208.

#### **11-2A-209. Lessee under finance lease as beneficiary of supply contract.**

(1) The benefit of a supplier's promises to the lessor under the supply contract and of all warranties, whether express or implied, including those of any third party provided in connection with or as part of the supply contract, extends to the lessee to the extent of the lessee's leasehold interest under a finance lease related to the supply contract, but is subject to the terms of the warranty and of the supply contract and all defenses or claims arising therefrom.

(2) The extension of the benefit of a supplier's promises and of warranties to the lessee (Code Section 11-2A-209(1)) does not: (i) modify the rights and obligations of the parties to the supply contract, whether arising therefrom or otherwise, or (ii) impose any duty or liability under the supply contract on the lessee.

(3) Any modification or rescission of the supply contract by the supplier and the lessor is effective between the supplier and the lessee unless, before the modification or rescission, the supplier has received notice that the lessee has entered into a finance lease related to the supply contract. If the modification or rescission is effective between the supplier and the lessee, the lessor is deemed to have assumed, in addition to the obligations of the lessor to the lessee under the lease contract, promises of the supplier to the lessor and warranties that were so modified or rescinded as they existed and were available to the lessee before modification or rescission.

(4) In addition to the extension of the benefit of the supplier's promises and of warranties to the lessee under subsection (1), the lessee retains all rights that the lessee may have against the supplier which arise from an agreement between the lessee and the supplier or under other law. (Code 1981, § 11-2A-209, enacted by Ga. L. 1993, p. 633, § 1.)

#### RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 2A-209.

**11-2A-210. Express warranties.**

(1) Express warranties by the lessor are created as follows:

(a) Any affirmation of fact or promise made by the lessor to the lessee which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods will conform to the affirmation or promise.

(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods will conform to the description.

(c) Any sample or model that is made part of the basis of the bargain creates an express warranty that the whole of the goods will conform to the sample or model.

(2) It is not necessary to the creation of an express warranty that the lessor use formal words, such as “warrant” or “guarantee,” or that the lessor have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the lessor’s opinion or commendation of the goods does not create a warranty. (Code 1981, § 11-2A-210, enacted by Ga. L. 1993, p. 633, § 1.)

**RESEARCH REFERENCES**

**U.L.A.** — Uniform Commercial Code  
(U.L.A.) § 2A-210.

**11-2A-211. Warranties against interference and against infringement; lessee’s obligation against infringement.**

(1) There is in a lease contract a warranty that for the lease term no person holds a claim to or interest in the goods that arose from an act or omission of the lessor, other than a claim by way of infringement or the like, which will interfere with the lessee’s enjoyment of its leasehold interest.

(2) Except in a finance lease there is in a lease contract by a lessor who is a merchant regularly dealing in goods of the kind a warranty that the goods are delivered free of the rightful claim of any person by way of infringement or the like.

(3) A lessee who furnishes specifications to a lessor or a supplier shall hold the lessor and the supplier harmless against any claim by way of infringement or the like that arises out of compliance with the specifications. (Code 1981, § 11-2A-211, enacted by Ga. L. 1993, p. 633, § 1.)



## RESEARCH REFERENCES

**U.L.A.** — Uniform Commercial Code  
(U.L.A.) § 2A-211.

**11-2A-212. Implied warranty of merchantability.**

(1) Except in a finance lease, a warranty that the goods will be merchantable is implied in a lease contract if the lessor is a merchant with respect to goods of that kind.

(2) Goods to be merchantable must be at least such as:

(a) Pass without objection in the trade under the description in the lease agreement;

(b) In the case of fungible goods, are of fair average quality within the description;

(c) Are fit for the ordinary purposes for which goods of that type are used;

(d) Run, within the variation permitted by the lease agreement, of even kind, quality, and quantity within each unit and among all units involved;

(e) Are adequately contained, packaged, and labeled as the lease agreement may require; and

(f) Conform to any promises or affirmations of fact made on the container or label.

(3) Other implied warranties may arise from course of dealing or usage of trade. (Code 1981, § 11-2A-212, enacted by Ga. L. 1993, p. 633, § 1.)

## JUDICIAL DECISIONS

**Evidence of defect at time of lease.** — A claim for breach of an implied warranty of merchantability concerning an air mattress and pump was untenable since the plaintiff failed to provide any evidence that the mattress was not working when received by plaintiff. *Griffith v. Medical Rental Supply of Albany, Inc.*, 244 Ga. App. 120, 534 S.E.2d 859 (2000).

**Disclaimer inadequate.** — A reasonable person would not necessarily have noticed

and understood that by the mere mention of “as is” in the context in which it appeared in a lease agreement, without any mention of any warranties or any disclaimers of warranties, he or she was agreeing to forego any rights to lease a piece of equipment in fit and suitable working condition. *Bailey v. Tucker Equip. Sales, Inc.*, 236 Ga. App. 289, 510 S.E.2d 904 (1999).

## RESEARCH REFERENCES

**U.L.A.** — Uniform Commercial Code  
(U.L.A.) § 2A-212.

**11-2A-213. Implied warranty of fitness for particular purpose.**

Except in a finance lease, if the lessor at the time the lease contract is made has reason to know of any particular purpose for which the goods are required and that the lessee is relying on the lessor's skill or judgment to select or furnish suitable goods, there is in the lease contract an implied warranty that the goods will be fit for that purpose. (Code 1981, § 11-2A-213, enacted by Ga. L. 1993, p. 633, § 1.)

**JUDICIAL DECISIONS**

**Reliance on lessor's skill or judgment.** — A claim for breach of an implied warranty of fitness for a particular purpose concerning an air mattress and pump was untenable after it was clear that plaintiffs were relying on the skill of doctors, not the defendant lessor's skill or judgment, in selecting the appropriate mattress. *Griffith v. Medical Rental Supply of Albany, Inc.*, 244 Ga. App. 120, 534 S.E.2d 859 (2000).

person would not necessarily have noticed and understood that by the mere mention of "as is" in the context in which it appeared in a lease agreement, without any mention of any warranties or any disclaimers of warranties, he or she was agreeing to forego any rights to lease a piece of equipment in fit and suitable working condition. *Bailey v. Tucker Equip. Sales, Inc.*, 236 Ga. App. 289, 510 S.E.2d 904 (1999).

**Disclaimer inadequate.** — A reasonable

**RESEARCH REFERENCES**

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 2A-213.

**11-2A-214. Exclusion or modification of warranties.**

(1) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit a warranty must be construed wherever reasonable as consistent with each other; but, subject to the provisions of Code Section 11-2A-202 on parol or extrinsic evidence, negation or limitation is inoperative to the extent that the construction is unreasonable.

(2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention "merchantability," be by a writing, and be conspicuous. Subject to subsection (3), to exclude or modify any implied warranty of fitness the exclusion must be by a writing and be conspicuous. Language to exclude all implied warranties of fitness is sufficient if it is in writing, is conspicuous and states, for example, "There is no warranty that the goods will be fit for a particular purpose."

(3) Notwithstanding subsection (2), but subject to subsection (4),

(a) Unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is," or "with all faults," or by other language that in common understanding calls the lessee's attention to

the exclusion of warranties and makes plain that there is no implied warranty, if in writing and conspicuous;

(b) If the lessee before entering into the lease contract has examined the goods or the sample or model as fully as desired or has refused to examine the goods, there is no implied warranty with regard to defects that an examination ought in the circumstances to have revealed; and

(c) An implied warranty may also be excluded or modified by course of dealing, course of performance, or usage of trade.

(4) To exclude or modify a warranty against interference or against infringement (Code Section 11-2A-211) or any part of it, the language must be specific, be by a writing, and be conspicuous, unless the circumstances, including course of performance, course of dealing, or usage of trade, give the lessee reason to know that the goods are being leased subject to a claim or interest of any person. (Code 1981, § 11-2A-214, enacted by Ga. L. 1993, p. 633, § 1.)

### JUDICIAL DECISIONS

**Language not conspicuous.** — Where a paragraph in a lease purporting to disclaim implied warranties of merchantability and fitness was in the same size font as the rest of the printed terms and, although separately numbered, was not otherwise set apart from the other paragraphs, the language was not “conspicuous” within the meaning of O.C.G.A. § 11-1-201(10). *Bailey v. Tucker Equip. Sales, Inc.*, 236 Ga. App. 289, 510 S.E.2d 904 (1999).

A reasonable person would not necessarily

have noticed and understood that by the mere mention of “as is” in the context in which it appeared in a lease agreement, without any mention of any warranties or any disclaimers of warranties, he or she was agreeing to forego any rights to lease a piece of equipment in fit and suitable working condition. *Bailey v. Tucker Equip. Sales, Inc.*, 236 Ga. App. 289, 510 S.E.2d 904 (1999).

**Cited in** *Lane v. Ken Thomas of Ga., Inc.*, 233 Ga. App. 15, 503 S.E.2d 94 (1998).

### RESEARCH REFERENCES

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 2A-214.

### **11-2A-215. Cumulation and conflict of warranties express or implied.**

Warranties, whether express or implied; must be construed as consistent with each other and as cumulative, but if that construction is unreasonable, the intention of the parties determines which warranty is dominant. In ascertaining that intention the following rules apply:

(a) Exact or technical specifications displace an inconsistent sample or model or general language of description.

(b) A sample from an existing bulk displaces inconsistent general language of description.



(c) Express warranties displace inconsistent implied warranties other than an implied warranty of fitness for a particular purpose. (Code 1981, § 11-2A-215, enacted by Ga. L. 1993, p. 633, § 1.)

#### RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 2A-215.

### 11-2A-216. Third-party beneficiaries of express and implied warranties.

A warranty to or for the benefit of a lessee under this article, whether express or implied, extends to any natural person who is in the family or household of the lessee or who is a guest in the lessee's home if it is reasonable to expect that such person may use, consume, or be affected by the goods and who is injured in person by breach of the warranty. This Code section does not displace principles of law and equity that extend a warranty to or for the benefit of a lessee to other persons. The operation of this Code section may not be excluded, modified, or limited, but an exclusion, modification, or limitation of the warranty, including any with respect to rights and remedies, effective against the lessee is also effective against any beneficiary designated under this Code section. (Code 1981, § 11-2A-216, enacted by Ga. L. 1993, p. 633, § 1; Ga. L. 2002, p. 415, § 11.)

**The 2002 amendment**, effective April 18, 2002, part of an Act to revise, modernize, and correct the Code, substituted "Code section" for "section" in three places in this Code section.

#### RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 2A-216.

### 11-2A-217. Identification.

Identification of goods as goods to which a lease contract refers may be made at any time and in any manner explicitly agreed to by the parties. In the absence of explicit agreement, identification occurs:

(a) When the lease contract is made if the lease contract is for a lease of goods that are existing and identified;

(b) When the goods are shipped, marked, or otherwise designated by the lessor as goods to which the lease contract refers, if the lease contract is for a lease of goods that are not existing and identified; or

(c) When the young are conceived, if the lease contract is for a lease of unborn young of animals. (Code 1981, § 11-2A-217, enacted by Ga. L. 1993, p. 633, § 1.)

**RESEARCH REFERENCES**

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 2A-217.

**11-2A-218. Insurance and proceeds.**

(1) A lessee obtains an insurable interest when existing goods are identified to the lease contract even though the goods identified are nonconforming and the lessee has an option to reject them.

(2) If a lessee has an insurable interest only by reason of the lessor's identification of the goods, the lessor, until default or insolvency or notification to the lessee that identification is final, may substitute other goods for those identified.

(3) Notwithstanding a lessee's insurable interest under subsections (1) and (2), the lessor retains an insurable interest until an option to buy has been exercised by the lessee and risk of loss has passed to the lessee.

(4) Nothing in this section impairs any insurable interest recognized under any other statute or rule of law.

(5) The parties by agreement may determine that one or more parties have an obligation to obtain and pay for insurance covering the goods and by agreement may determine the beneficiary of the proceeds of the insurance. (Code 1981, § 11-2A-218, enacted by Ga. L. 1993, p. 633, § 1.)

**RESEARCH REFERENCES**

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 2A-218.

**11-2A-219. Risk of loss.**

(1) Except in the case of a finance lease, risk of loss is retained by the lessor and does not pass to the lessee. In the case of a finance lease, risk of loss passes to the lessee.

(2) Subject to the provisions of this article on the effect of default on risk of loss (Code Section 11-2A-220), if risk of loss is to pass to the lessee and the time of passage is not stated, the following rules apply:

(a) If the lease contract requires or authorizes the goods to be shipped by carrier

(i) And it does not require delivery at a particular destination, the risk of loss passes to the lessee when the goods are duly delivered to the carrier; but

(ii) If it does require delivery at a particular destination and the goods are there duly tendered while in the possession of the carrier, the

risk of loss passes to the lessee when the goods are there duly so tendered as to enable the lessee to take delivery.

(b) If the goods are held by a bailee to be delivered without being moved, the risk of loss passes to the lessee on acknowledgment by the bailee of the lessee's right to possession of the goods.

(c) In any case not within subsection (a) or (b), the risk of loss passes to the lessee on the lessee's receipt of the goods if the lessor, or, in the case of a finance lease, the supplier, is a merchant; otherwise the risk passes to the lessee on tender of delivery. (Code 1981, § 11-2A-219, enacted by Ga. L. 1993, p. 633, § 1.)

#### RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 2A-219.

#### **11-2A-220. Effect of default on risk of loss.**

(1) Where risk of loss is to pass to the lessee and the time of passage is not stated:

(a) If a tender or delivery of goods so fails to conform to the lease contract as to give a right of rejection, the risk of their loss remains with the lessor, or, in the case of a finance lease, the supplier, until cure or acceptance.

(b) If the lessee rightfully revokes acceptance, he, to the extent of any deficiency in his effective insurance coverage, may treat the risk of loss as having remained with the lessor from the beginning.

(2) Whether or not risk of loss is to pass to the lessee, if the lessee as to conforming goods already identified to a lease contract repudiates or is otherwise in default under the lease contract, the lessor, or, in the case of a finance lease, the supplier, to the extent of any deficiency in his effective insurance coverage may treat the risk of loss as resting on the lessee for a commercially reasonable time. (Code 1981, § 11-2A-220, enacted by Ga. L. 1993, p. 633, § 1.)

#### RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 2A-220.

#### **11-2A-221. Casualty to identified goods.**

If a lease contract requires goods identified when the lease contract is made, and the goods suffer casualty without fault of the lessee, the lessor or the supplier before delivery, or the goods suffer casualty before risk of loss



passes to the lessee pursuant to the lease agreement or Code Section 11-2A-219, then:

(a) If the loss is total, the lease contract is avoided; and

(b) If the loss is partial or the goods have so deteriorated as to no longer conform to the lease contract, the lessee may nevertheless demand inspection and at his option either treat the lease contract as avoided or, except in a finance lease that is not a consumer lease, accept the goods with due allowance from the rent payable for the balance of the lease term for the deterioration or the deficiency in quantity but without further right against the lessor. (Code 1981, § 11-2A-221, enacted by Ga. L. 1993, p. 633, § 1.)

#### RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 2A-221.

### PART 3

#### EFFECT OF LEASE CONTRACT

##### **11-2A-301. Enforceability of lease contract.**

Except as otherwise provided in this article, a lease contract is effective and enforceable according to its terms between the parties, against purchasers of the goods and against creditors of the parties. (Code 1981, § 11-2A-301, enacted by Ga. L. 1993, p. 633, § 1.)

#### RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 2A-301.

##### **11-2A-302. Title to and possession of goods.**

Except as otherwise provided in this article, each provision of this article applies whether the lessor or a third party has title to the goods, and whether the lessor, the lessee, or a third party has possession of the goods, notwithstanding any statute or rule of law that possession or the absence of possession is fraudulent. (Code 1981, § 11-2A-302, enacted by Ga. L. 1993, p. 633, § 1.)

#### RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 2A-302.

**11-2A-303. Alienability of party's interest under lease contract or of lessor's residual interest in goods; delegation of performance; transfer of rights.**

(1) As used in this Code section, "creation of a security interest" includes the sale of a lease contract that is subject to Article 9 of this title, Secured Transactions, by reason of paragraph (3) of subsection (a) of Code Section 11-9-109.

(2) Except as provided in subsection (3) of this Code section and in Code Section 11-9-407, a provision in a lease agreement which (i) prohibits the voluntary or involuntary transfer, including a transfer by sale, sublease, creation or enforcement of a security interest, or attachment, levy, or other judicial process, of an interest of a party under the lease contract or of the lessor's residual interest in the goods, or (ii) makes such a transfer an event of default, gives rise to the rights and remedies provided in subsection (4) of this Code section, but a transfer that is prohibited or is an event of default under the lease agreement is otherwise effective.

(3) A provision in a lease agreement which (i) prohibits a transfer of a right to damages for default with respect to the whole lease contract or of a right to payment arising out of the transferor's due performance of the transferor's entire obligation, or (ii) makes such a transfer an event of default, is not enforceable, and such a transfer is not a transfer that materially impairs the prospect of obtaining return performance by, materially changes the duty of, or materially increases the burden or risk imposed on, the other party to the lease contract within the purview of subsection (4) of this Code section.

(4) Subject to subsection (3) of this Code section and to Code Section 11-9-407:

(a) If a transfer is made which is made an event of default under a lease agreement, the party to the lease contract not making the transfer, unless that party waives the default or otherwise agrees, has the rights and remedies described in subsection (2) of Code Section 11-2A-501;

(b) If paragraph (a) of this subsection is not applicable and if a transfer is made that (i) is prohibited under a lease agreement or (ii) materially impairs the prospect of obtaining return performance by, materially changes the duty of, or materially increases the burden or risk imposed on, the other party to the lease contract, unless the party not making the transfer agrees at any time to the transfer in the lease contract or otherwise, then, except as limited by contract, (x) the transferor is liable to the party not making the transfer for damages caused by the transfer to the extent that the damages could not reasonably be prevented by the party not making the transfer and (y) a court having jurisdiction may grant other appropriate relief, including cancellation of

the lease contract or an injunction against the transfer. For purposes of determining the extent of liability for damages under this paragraph, the transferor has the burden of proving that any of the damages caused by the transfer could reasonably be or have been prevented by the party not making the transfer, and of proving the extent that they could reasonably be or have been so prevented.

(5) A transfer of “the lease” or of “all my rights under the lease”, or a transfer in similar general terms, is a transfer of rights, and, unless the language or the circumstances, as in a transfer for security, indicate the contrary, the transfer is a delegation of duties by the transferor to the transferee. Acceptance by the transferee constitutes a promise by the transferee to perform those duties. The promise is enforceable by either the transferor or the other party to the lease contract.

(6) Unless otherwise agreed by the lessor and the lessee, a delegation of performance does not relieve the transferor as against the other party of any duty to perform or of any liability for default.

(7) In a consumer lease, to prohibit the transfer of an interest of a party under the lease contract or to make a transfer an event of default, the language must be specific, by a writing, and conspicuous. (Code 1981, § 11-2A-303, enacted by Ga. L. 1993, p. 633, § 1; Ga. L. 2001, p. 362, § 10.)

**The 2001 amendment**, effective July 1, 2001, in subsection (1), inserted “Code” at the beginning and substituted “paragraph (3) of subsection (a) of Code Section 11-9-109” for “Code Section 11-9-102(1)(b)”; in subsection (2), substituted “subsection (3) of this Code section and in Code Section 11-9-407,” for “subsections (3) and (4),” and “subsection (4) of this Code section” for “subsection (5)”; deleted subsection (3), which read: “A provision in a lease agreement which (i) prohibits the creation or enforcement of a security interest in an interest of a party under the lease contract or in the lessor’s residual interest in the goods, or (ii) makes such a transfer an event of default, is not enforceable unless, and then only to the extent that, there is an actual transfer by the lessee of the lessee’s right of possession or use of the goods in violation of the provision or an actual delegation of a material performance of either party to the lease contract in violation of the provision. Neither the granting nor the enforcement of a security interest in (i) the lessor’s interest under the lease contract or (ii) the lessor’s residual interest in the goods is a transfer that materially impairs the prospect of obtaining return perfor-

mance by, materially changes the duty of, or materially increases the burden or risk imposed on, the lessee within the purview of subsection (5) unless, and then only to the extent that, there is an actual delegation of a material performance of the lessor. For purposes of this subsection: (a) a party’s ‘performance’ includes its rights as well as its duties; and (b) a party creating or enforcing (or seeking to create or enforce) a security interest that the lease contract prohibits or makes an event of default has the burden of proving that such a transfer does not involve an actual delegation of a material performance.”; redesignated former subsections (4) through (8) as present subsections (3) through (7), respectively; substituted “subsection (4) of this Code section” for “subsection (5)” at the end of subsection (3); in subsection (4), substituted “subsection (3) of this Code section and to Code Section 11-9-407” for “subsections (3) and (4)” in the introductory language, in paragraph (4)(a), substituted “If” for “if” at the beginning and substituted “subsection (2) of Code Section 11-2A-501” for “Code Section 11-2A-501(2)” at the end, and, in paragraph (4)(b), substituted “If paragraph (a) of this subsection” for “if paragraph (a)” at the



beginning, and substituted “determining paragraph” for “clause (b)(2)” in the last sentence.

#### RESEARCH REFERENCES

**U.L.A.** — Uniform Commercial Code  
(U.L.A.) § 2A-303.

#### **11-2A-304. Subsequent lease of goods by lessor.**

(1) Subject to Section 11-2A-303, a subsequent lessee from a lessor of goods under an existing lease contract obtains, to the extent of the leasehold interest transferred, the leasehold interest in the goods that the lessor had or had power to transfer, and except as provided in subsection (2) and Code Section 11-2A-527(4), takes subject to the existing lease contract. A lessor with voidable title has power to transfer a good leasehold interest to a good faith subsequent lessee for value, but only to the extent set forth in the preceding sentence. If goods have been delivered under a transaction of purchase, the lessor has that power even though:

- (a) The lessor’s transferor was deceived as to the identity of the lessor;
- (b) The delivery was in exchange for a check which is later dishonored;
- (c) It was agreed that the transaction was to be a “cash sale”; or
- (d) The delivery was procured through fraud punishable as larcenous under the criminal law.

(2) A subsequent lessee in the ordinary course of business from a lessor who is a merchant dealing in goods of that kind to whom the goods were entrusted by the existing lessee of that lessor before the interest of the subsequent lessee became enforceable against that lessor obtains, to the extent of the leasehold interest transferred, all of that lessor’s and the existing lessee’s rights to the goods, and takes free of the existing lease contract.

(3) A subsequent lessee from the lessor of goods that are subject to an existing lease contract and are covered by a certificate of title issued under a statute of this State or of another jurisdiction takes no greater rights than those provided both by this section and by the certificate of title statute. (Code 1981, § 11-2A-304, enacted by Ga. L. 1993, p. 633, § 1.)

#### RESEARCH REFERENCES

**U.L.A.** — Uniform Commercial Code  
(U.L.A.) § 2A-304.

**11-2A-305. Sale or sublease of goods by lessee.**

(1) Subject to the provisions of Code Section 11-2A-303, a buyer or sublessee from the lessee of goods under an existing lease contract obtains, to the extent of the interest transferred, the leasehold interest in the goods that the lessee had or had power to transfer, and except as provided in subsection (2) and Code Section 11-2A-511(4), takes subject to the existing lease contract. A lessee with a voidable leasehold interest has power to transfer a good leasehold interest to a good faith buyer for value or a good faith sublessee for value, but only to the extent set forth in the preceding sentence. When goods have been delivered under a transaction of lease the lessee has that power even though:

- (a) The lessor was deceived as to the identity of the lessee;
- (b) The delivery was in exchange for a check which is later dishonored; or
- (c) The delivery was procured through fraud punishable as larcenous under the criminal law.

(2) A buyer in the ordinary course of business or a sublessee in the ordinary course of business from a lessee who is a merchant dealing in goods of that kind to whom the goods were entrusted by the lessor obtains, to the extent of the interest transferred, all of the lessor's and lessee's rights to the goods, and takes free of the existing lease contract.

(3) A buyer or sublessee from the lessee of goods that are subject to an existing lease contract and are covered by a certificate of title issued under a statute of this State or of another jurisdiction takes no greater rights than those provided both by this section and by the certificate of title statute. (Code 1981, § 11-2A-305, enacted by Ga. L. 1993, p. 633, § 1.)

**RESEARCH REFERENCES**

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 2A-305.

**11-2A-306. Priority of certain liens arising by operation of law.**

If a person in the ordinary course of his business furnishes services or materials with respect to goods subject to a lease contract, a lien upon those goods in the possession of that person given by statute or rule of law for those materials or services takes priority over any interest of the lessor or lessee under the lease contract or this article unless (i) the lien is created by statute and the statute provides otherwise; (ii) the lien is created by rule of law and the rule of law provides otherwise; or (iii) with regard to the rights of a creditor of the lessor or lessee, a different priority would result by

application of Code Section 11-9-310. (Code 1981, § 11-2A-306, enacted by Ga. L. 1993, p. 633, § 1.)

#### RESEARCH REFERENCES

**U.L.A.** — Uniform Commercial Code  
(U.L.A.) § 2A-306.

#### **11-2A-307. Priority of liens arising by attachment or levy on, security interests in, and other claims to goods.**

(1) Except as otherwise provided in Code Section 11-2A-306, a creditor of a lessee takes subject to the lease contract.

(2) Except as otherwise provided in subsection (3) of this Code section and in Code Sections 11-2A-306 and 11-2A-308, a creditor of a lessor takes subject to the lease contract unless the creditor holds a lien that attached to the goods before the lease contract became enforceable.

(3) Except as otherwise provided in Code Sections 11-9-317, 11-9-321, and 11-9-323, a lessee takes a leasehold interest subject to a security interest held by a creditor of the lessor. (Code 1981, § 11-2A-307, enacted by Ga. L. 1993, p. 633, § 1; Ga. L. 2001, p. 362, § 11.)

**The 2001 amendment**, effective July 1, 2001, rewrote this section.

#### RESEARCH REFERENCES

**U.L.A.** — Uniform Commercial Code  
(U.L.A.) § 2A-307.

#### **11-2A-308. Special rights of creditors.**

(1) A creditor of a lessor in possession of goods subject to a lease contract may treat the lease contract as void if as against the creditor retention of possession by the lessor is fraudulent under any statute or rule of law, but retention of possession in good faith and current course of trade by the lessor for a commercially reasonable time after the lease contract becomes enforceable is not fraudulent.

(2) Nothing in this article impairs the rights of creditors of a lessor if the lease contract (a) becomes enforceable, not in current course of trade but in satisfaction of or as security for a pre-existing claim for money, security, or the like, and (b) is made under circumstances which under any statute or rule of law apart from this article would constitute the transaction a fraudulent transfer or voidable preference.

(3) A creditor of a seller may treat a sale or an identification of goods to a contract for sale as void if as against the creditor retention of possession



by the seller is fraudulent under any statute or rule of law, but retention of possession of the goods pursuant to a lease contract entered into by the seller as lessee and the buyer as lessor in connection with the sale or identification of the goods is not fraudulent if the buyer bought for value and in good faith. (Code 1981, § 11-2A-308, enacted by Ga. L. 1993, p. 633, § 1.)

#### RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 2A-308.

#### **11-2A-309. Lessor's and lessee's rights when goods become fixtures.**

(1) In this section:

(a) Goods are “fixtures” when they become so related to particular real estate that an interest in them arises under real estate law;

(b) A “fixture filing” is the filing, in the office where a record of a mortgage on the real estate would be filed or recorded, of a financing statement covering goods that are or are to become fixtures and conforming to the requirements of subsections (a) and (b) of Code Section 11-9-502;

(c) A lease is a “purchase money lease” unless the lessee has possession or use of the goods or the right to possession or use of the goods before the lease agreement is enforceable;

(d) A mortgage is a “construction mortgage” to the extent it secures an obligation incurred for the construction of an improvement on land including the acquisition cost of the land, if the recorded writing so indicates; and

(e) “Encumbrance” includes real estate mortgages and other liens on real estate and all other rights in real estate that are not ownership interests.

(2) Under this article a lease may be of goods that are fixtures or may continue in goods that become fixtures, but no lease exists under this article of ordinary building materials incorporated into an improvement on land.

(3) This article does not prevent creation of a lease of fixtures pursuant to real estate law.

(4) The perfected interest of a lessor of fixtures has priority over a conflicting interest of an encumbrancer or owner of the real estate if:

(a) The lease is a purchase money lease, the conflicting interest of the encumbrancer or owner arises before the goods become fixtures, the interest of the lessor is perfected by a fixture filing before the goods

become fixtures or within ten days thereafter, and the lessee has an interest of record in the real estate or is in possession of the real estate; or

(b) The interest of the lessor is perfected by a fixture filing before the interest of the encumbrancer or owner is of record, the lessor's interest has priority over any conflicting interest of a predecessor in title of the encumbrancer or owner, and the lessee has an interest of record in the real estate or is in possession of the real estate.

(5) The interest of a lessor of fixtures, whether or not perfected, has priority over the conflicting interest of an encumbrancer or owner of the real estate if:

(a) The fixtures are readily removable factory or office machines, readily removable equipment that is not primarily used or leased for use in the operation of the real estate, or readily removable replacements of domestic appliances that are goods subject to a consumer lease, and before the goods become fixtures the lease contract is enforceable; or

(b) The conflicting interest is a lien on the real estate obtained by legal or equitable proceedings after the lease contract is enforceable; or

(c) The encumbrancer or owner has consented in writing to the lease or has disclaimed an interest in the goods as fixtures; or

(d) The lessee has a right to remove the goods as against the encumbrancer or owner. If the lessee's right to remove terminates, the priority of the interest of the lessor continues for a reasonable time.

(6) Notwithstanding subsection (4)(a) but otherwise subject to subsections (4) and (5), the interest of a lessor of fixtures, including the lessor's residual interest, is subordinate to the conflicting interest of an encumbrancer of the real estate under a construction mortgage recorded before the goods become fixtures if the goods become fixtures before the completion of the construction. To the extent given to refinance a construction mortgage, the conflicting interest of an encumbrancer of the real estate under a mortgage has this priority to the same extent as the encumbrancer of the real estate under the construction mortgage.

(7) In cases not within the preceding subsections, priority between the interest of a lessor of fixtures, including the lessor's residual interest, and the conflicting interest of an encumbrancer or owner of the real estate who is not the lessee is determined by the priority rules governing conflicting interests in real estate.

(8) If the interest of a lessor of fixtures, including the lessor's residual interest, has priority over all conflicting interests of all owners and encumbrancers of the real estate, the lessor or the lessee may (i) on default, expiration, termination, or cancellation of the lease agreement but subject

to the agreement and this article, or (ii) if necessary to enforce other rights and remedies of the lessor or lessee under this article, remove the goods from the real estate, free and clear of all conflicting interests of all owners and encumbrancers of the real estate, but the lessor or lessee must reimburse any encumbrancer or owner of the real estate who is not the lessee and who has not otherwise agreed for the cost of repair of any physical injury, but not for any diminution in value of the real estate caused by the absence of the goods removed or by any necessity of replacing them. A person entitled to reimbursement may refuse permission to remove until the party seeking removal gives adequate security for the performance of this obligation.

(9) Even though the lease agreement does not create a security interest, the interest of a lessor of fixtures, including the lessor's residual interest, is perfected by filing a financing statement as a fixture filing for leased goods that are or are to become fixtures in accordance with the relevant provisions of the article on secured transactions (Article 9 of this title). (Code 1981, § 11-2A-309, enacted by Ga. L. 1993, p. 633, § 1; Ga. L. 2001, p. 362, § 12.)

The 2001 amendment, effective July 1, sections (a) and (b) of Code Section 2001, in subsection (b), inserted "record of 11-9-502" for "Code Section 11-9-402(5)" at a" near the beginning and substituted "sub- the end.

#### RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 2A-309.

#### 11-2A-310. Lessor's and lessee's rights when goods become accessions.

(1) Goods are "accessions" when they are installed in or affixed to other goods.

(2) The interest of a lessor or a lessee under a lease contract entered into before the goods became accessions is superior to all interests in the whole except as stated in subsection (4).

(3) The interest of a lessor or a lessee under a lease contract entered into at the time or after the goods became accessions is superior to all subsequently acquired interests in the whole except as stated in subsection (4) but is subordinate to interests in the whole existing at the time the lease contract was made unless the holders of such interests in the whole have in writing consented to the lease or disclaimed an interest in the goods as part of the whole.

(4) The interest of a lessor or a lessee under a lease contract described in subsection (2) or (3) is subordinate to the interest of

(a) A buyer in the ordinary course of business or a lessee in the ordinary course of business of any interest in the whole acquired after the goods became accessions; or



(b) A creditor with a security interest in the whole perfected before the lease contract was made to the extent that the creditor makes subsequent advances without knowledge of the lease contract.

(5) When under subsections (2) or (3) and (4) a lessor or a lessee of accessions holds an interest that is superior to all interests in the whole, the lessor or the lessee may (a) on default, expiration, termination, or cancellation of the lease contract by the other party but subject to the provisions of the lease contract and this article, or (b) if necessary to enforce his other rights and remedies under this article, remove the goods from the whole, free and clear of all interests in the whole, but he must reimburse any holder of an interest in the whole who is not the lessee and who has not otherwise agreed for the cost of repair of any physical injury but not for any diminution in value of the whole caused by the absence of the goods removed or by any necessity for replacing them. A person entitled to reimbursement may refuse permission to remove until the party seeking removal gives adequate security for the performance of this obligation. (Code 1981, § 11-2A-310, enacted by Ga. L. 1993, p. 633, § 1.)

RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 2A-310.

11-2A-311. Priority subject to subordination.

Nothing in this article prevents subordination by agreement by any person entitled to priority. (Code 1981, § 11-2A-311, enacted by Ga. L. 1993, p. 633, § 1.)

RESEARCH REFERENCES

U.L.A. — Uniform Commerical Code  
(U.L.A.) § 2A-311.

PART 4

PERFORMANCE OF LEASE CONTRACT: REPUDIATED,  
SUBSTITUTED AND EXCUSED

11-2A-401. Insecurity: Adequate assurance of performance.

(1) A lease contract imposes an obligation on each party that the other's expectation of receiving due performance will not be impaired.

(2) If reasonable grounds for insecurity arise with respect to the performance of either party, the insecure party may demand in writing adequate assurance of due performance. Until the insecure party receives that

assurance, if commercially reasonable the insecure party may suspend any performance for which he has not already received the agreed return.

(3) A repudiation of the lease contract occurs if assurance of due performance adequate under the circumstances of the particular case is not provided to the insecure party within a reasonable time, not to exceed 30 days after receipt of a demand by the other party.

(4) Between merchants, the reasonableness of grounds for insecurity and the adequacy of any assurance offered must be determined according to commercial standards.

(5) Acceptance of any nonconforming delivery or payment does not prejudice the aggrieved party's right to demand adequate assurance of future performance. (Code 1981, § 11-2A-401, enacted by Ga. L. 1993, p. 633, § 1.)

#### RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 2A-401.

#### **11-2A-402. Anticipatory repudiation.**

If either party repudiates a lease contract with respect to a performance not yet due under the lease contract, the loss of which performance will substantially impair the value of the lease contract to the other, the aggrieved party may:

(a) For a commercially reasonable time, await retraction of repudiation and performance by the repudiating party;

(b) Make demand pursuant to Code Section 11-2A-401 and await assurance of future performance adequate under the circumstances of the particular case; or

(c) Resort to any right or remedy upon default under the lease contract or this article, even though the aggrieved party has notified the repudiating party that the aggrieved party would await the repudiating party's performance and assurance and has urged retraction. In addition, whether or not the aggrieved party is pursuing one of the foregoing remedies, the aggrieved party may suspend performance or, if the aggrieved party is the lessor, proceed in accordance with the provisions of this article on the lessor's right to identify goods to the lease contract notwithstanding default or to salvage unfinished goods (Code Section 11-2A-524). (Code 1981, § 11-2A-402, enacted by Ga. L. 1993, p. 633, § 1.)

**RESEARCH REFERENCES**

**U.L.A.** — Uniform Commercial Code  
(U.L.A.) § 2A-402.

**11-2A-403. Retraction of anticipatory repudiation.**

(1) Until the repudiating party's next performance is due, the repudiating party can retract the repudiation unless, since the repudiation, the aggrieved party has canceled the lease contract or materially changed the aggrieved party's position or otherwise indicated that the aggrieved party considers the repudiation final.

(2) Retraction may be by any method that clearly indicates to the aggrieved party that the repudiating party intends to perform under the lease contract and includes any assurance demanded under Code Section 11-2A-401.

(3) Retraction reinstates a repudiating party's rights under a lease contract with due excuse and allowance to the aggrieved party for any delay occasioned by the repudiation. (Code 1981, § 11-2A-403, enacted by Ga. L. 1993, p. 633, § 1; Ga. L. 2002, p. 415, § 11.)

**The 2002 amendment**, effective April 18, 2002, part of an Act to revise, modernize, and correct the Code, substituted "canceled" for "cancelled" in subsection (1).

**RESEARCH REFERENCES**

**U.L.A.** — Uniform Commercial Code  
(U.L.A.) § 2A-403.

**11-2A-404. Substituted performance.**

(1) If without fault of the lessee, the lessor and the supplier, the agreed berthing, loading, or unloading facilities fail or the agreed type of carrier becomes unavailable or the agreed manner of delivery otherwise becomes commercially impracticable, but a commercially reasonable substitute is available, the substitute performance must be tendered and accepted.

(2) If the agreed means or manner of payment fails because of domestic or foreign governmental regulation:

(a) The lessor may withhold or stop delivery or cause the supplier to withhold or stop delivery unless the lessee provides a means or manner of payment that is commercially a substantial equivalent; and

(b) If delivery has already been taken, payment by the means or in the manner provided by the regulation discharges the lessee's obligation unless the regulation is discriminatory, oppressive, or predatory. (Code 1981, § 11-2A-404, enacted by Ga. L. 1993, p. 633, § 1.)



**RESEARCH REFERENCES**

**U.L.A.** — Uniform Commercial Code  
(U.L.A.) § 2A-404.

**11-2A-405. Excused performance.**

Subject to Code Section 11-2A-404 on substituted performance, the following rules apply:

(a) Delay in delivery or nondelivery in whole or in part by a lessor or a supplier who complies with paragraphs (b) and (c) is not a default under the lease contract if performance as agreed has been made impracticable by the occurrence of a contingency the nonoccurrence of which was a basic assumption on which the lease contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order, whether or not the regulation or order later proves to be invalid.

(b) If the causes mentioned in paragraph (a) affect only part of the lessor's or the supplier's capacity to perform, he shall allocate production and deliveries among his customers but at his option may include regular customers not then under contract for sale or lease as well as his own requirements for further manufacture. He may so allocate in any manner that is fair and reasonable.

(c) The lessor seasonably shall notify the lessee and in the case of a finance lease the supplier seasonably shall notify the lessor and the lessee, if known, that there will be delay or nondelivery and, if allocation is required under paragraph (b), of the estimated quota thus made available for the lessee. (Code 1981, § 11-2A-405, enacted by Ga. L. 1993, p. 633, § 1.)

**RESEARCH REFERENCES**

**U.L.A.** — Uniform Commercial Code  
(U.L.A.) § 2A-405.

**11-2A-406. Procedure on excused performance.**

(1) If the lessee receives notification of a material or indefinite delay or an allocation justified under Code Section 11-2A-405, the lessee may by written notification to the lessor as to any goods involved, and with respect to all of the goods if under an installment lease contract the value of the whole lease contract is substantially impaired (Code Section 11-2A-510):

(a) Terminate the lease contract (Code Section 11-2A-505(2)); or

(b) Except in a finance lease that is not a consumer lease, modify the lease contract by accepting the available quota in substitution, with due allowance from the rent payable for the balance of the lease term for the deficiency but without further right against the lessor.

(2) If, after receipt of a notification from the lessor under Code Section 11-2A-405, the lessee fails so to modify the lease agreement within a reasonable time not exceeding 30 days, the lease contract lapses with respect to any deliveries affected. (Code 1981, § 11-2A-406, enacted by Ga. L. 1993, p. 633, § 1.)

#### RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 2A-406.

#### **11-2A-407. Irrevocable promises: Finance leases.**

(1) In the case of a finance lease that is not a consumer lease the lessee's promises under the lease contract become irrevocable and independent upon the lessee's acceptance of the goods.

(2) A promise that has become irrevocable and independent under subsection (1):

(a) Is effective and enforceable between the parties, and by or against third parties including assignees of the parties; and

(b) Is not subject to cancellation, termination, modification, repudiation, excuse, or substitution without the consent of the party to whom the promise runs.

(3) This section does not affect the validity under any other law of a covenant in any lease contract making the lessee's promises irrevocable and independent upon the lessee's acceptance of the goods. (Code 1981, § 11-2A-407, enacted by Ga. L. 1993, p. 633, § 1.)

#### RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 2A-407.

## PART 5

## DEFAULT

## Subpart A

## In General

**11-2A-501. Default: Procedure.**

(1) Whether the lessor or the lessee is in default under a lease contract is determined by the lease agreement and this article.

(2) If the lessor or the lessee is in default under the lease contract, the party seeking enforcement has rights and remedies as provided in this article and, except as limited by this article, as provided in the lease agreement.

(3) If the lessor or the lessee is in default under the lease contract, the party seeking enforcement may reduce the party's claim to judgment, or otherwise enforce the lease contract by self-help or any available judicial procedure or nonjudicial procedure, including administrative proceeding, arbitration, or the like, in accordance with this article.

(4) Except as otherwise provided in Code Section 11-1-106(1) or this article or the lease agreement, the rights and remedies referred to in subsections (2) and (3) are cumulative.

(5) If the lease agreement covers both real property and goods, the party seeking enforcement may proceed under this Part as to the goods, or under other applicable law as to both the real property and the goods in accordance with that party's rights and remedies in respect of the real property, in which case this Part does not apply. (Code 1981, § 11-2A-501, enacted by Ga. L. 1993, p. 633, § 1.)

**RESEARCH REFERENCES**

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 2A-501.

**11-2A-502. Notice after default.**

Except as otherwise provided in this article, applicable statutes, or the lease agreement, the lessor or lessee in default under the lease contract is not entitled to notice of default or notice of enforcement from the other party to the lease agreement. (Code 1981, § 11-2A-502, enacted by Ga. L. 1993, p. 633, § 1.)



**RESEARCH REFERENCES**

**U.L.A.** — Uniform Commercial Code  
(U.L.A.) § 2A-502.

**11-2A-503. Modification or impairment of rights and remedies.**

(1) Except as otherwise provided in this article, the lease agreement may include rights and remedies for default in addition to or in substitution for those provided in this article and may limit or alter the measure of damages recoverable under this article.

(2) Resort to a remedy provided under this article or in the lease agreement is optional unless the remedy is expressly agreed to be exclusive. If circumstances cause an exclusive or limited remedy to fail of its essential purpose, or provision for an exclusive remedy is unconscionable, remedy may be had as provided in this article.

(3) Consequential damages may be liquidated under Code Section 11-2A-504, or may otherwise be limited, altered, or excluded unless the limitation, alteration, or exclusion is unconscionable. Limitation, alteration, or exclusion of consequential damages for injury to the person in the case of consumer goods is *prima facie* unconscionable but limitation, alteration, or exclusion of damages where the loss is commercial is not *prima facie* unconscionable.

(4) Rights and remedies on default by the lessor or the lessee with respect to any obligation or promise collateral or ancillary to the lease contract are not impaired by this article. (Code 1981, § 11-2A-503, enacted by Ga. L. 1993, p. 633, § 1.)

**RESEARCH REFERENCES**

**U.L.A.** — Uniform Commercial Code  
(U.L.A.) § 2A-503.

**11-2A-504. Liquidation of damages.**

(1) Damages payable by either party for default, or any other act or omission, including indemnity for loss or diminution of anticipated tax benefits or loss or damage to lessor's residual interest, may be liquidated in the lease agreement but only at an amount or by a formula that is reasonable in light of the then anticipated harm caused by the default or other act or omission.

(2) If the lease agreement provides for liquidation of damages, and such provision does not comply with subsection (1), or such provision is an exclusive or limited remedy that circumstances cause to fail of its essential purpose, remedy may be had as provided in this article.

(3) If the lessor justifiably withholds or stops delivery of goods because of the lessee's default or insolvency (Code Section 11-2A-525 or 11-2A-526), the lessee is entitled to restitution of any amount by which the sum of his payments exceeds:

(a) The amount to which the lessor is entitled by virtue of terms liquidating the lessor's damages in accordance with subsection (1); or

(b) In the absence of those terms, 20 percent of the then present value of the total rent the lessee was obligated to pay for the balance of the lease term, or, in the case of a consumer lease, the lesser of such amount or \$500.

(4) A lessee's right to restitution under subsection (3) is subject to offset to the extent the lessor establishes:

(a) a right to recover damages under the provisions of this article other than subsection (1); and

(b) the amount or value of any benefits received by the lessee directly or indirectly by reason of the lease contract. (Code 1981, § 11-2A-504, enacted by Ga. L. 1993, p. 633, § 1.)

#### JUDICIAL DECISIONS

**Where a lease agreement provided for liquidated damages** and set forth a formula to calculate such damages, O.C.G.A. §§ 11-2A-527 and 11-2A-528, regarding damages available upon default, did not apply; rather, the more general directives of O.C.G.A. § 11-2A-504 were controlling. *Carter v. Tokai Fin. Servs., Inc.*, 231 Ga. App. 755, 500 S.E.2d 638 (1998).

**Enforceable liquidated damages provision.** — A lease clause which required the reduction of the accelerated rent to present value tended to establish a reasonable estimate of probable loss and constituted an enforceable liquidated damages provision.

*Jamsky v. HPSC, Inc.*, 238 Ga. App. 447, 519 S.E.2d 246 (1999).

The liquidated damages provision of the personal property lease did not act as a penalty and was enforceable under Georgia law where it used a formula in compliance with both the UCC drafter's formula and the provisions enacted by the Georgia General Assembly. *Summerhill Neighborhood Dev. Corp. v. Telerent Leasing Corp.*, 242 Ga. App. 142, 528 S.E.2d 889 (2000).

**Cited in** *Sun v. Mercedes Benz Credit Corp.*, 254 Ga. App. 463, S.E.2d , 2002 Ga. App. LEXIS 270 (Mar. 1, 2002).

#### RESEARCH REFERENCES

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 2A-504.

#### **11-2A-505. Cancellation and termination and effect of cancellation, termination, rescission, or fraud on rights and remedies.**

(1) On cancellation of the lease contract, all obligations that are still executory on both sides are discharged, but any right based on prior default

or performance survives, and the canceling party also retains any remedy for default of the whole lease contract or any unperformed balance.

(2) On termination of the lease contract, all obligations that are still executory on both sides are discharged but any right based on prior default or performance survives.

(3) Unless the contrary intention clearly appears, expressions of “cancellation,” “rescission,” or the like of the lease contract may not be construed as a renunciation or discharge of any claim in damages for an antecedent default.

(4) Rights and remedies for material misrepresentation or fraud include all rights and remedies available under this article for default.

(5) Neither rescission nor a claim for rescission of the lease contract nor rejection or return of the goods may bar or be deemed inconsistent with a claim for damages or other right or remedy. (Code 1981, § 11-2A-505, enacted by Ga. L. 1993, p. 633, § 1; Ga. L. 2002, p. 415, § 11.)

**The 2002 amendment**, effective April 18, 2002, part of an Act to revise, modernize, and correct the Code, substituted “canceling” for “cancelling” in subsection (1).

#### RESEARCH REFERENCES

**U.L.A.** — Uniform Commercial Code  
(U.L.A.) § 2A-505.

#### **11-2A-506. Statute of limitations.**

(1) An action for default under a lease contract, including breach of warranty or indemnity, must be commenced within 4 years after the cause of action accrued. By the original lease contract the parties may reduce the period of limitation to not less than one year.

(2) A cause of action accrues when the default occurs, regardless of the aggrieved party’s lack of knowledge of the default. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.

(3) If an action commenced within the time limited by subsection (1) is so terminated as to leave available a remedy by another action for the same default or breach of warranty or indemnity, the other action may be commenced after the expiration of the time limited and within 6 months after the termination of the first action unless the termination resulted from voluntary discontinuance or from dismissal for failure or neglect to prosecute.



(4) This section does not alter the law on tolling of the statute of limitations nor does it apply to causes of action that have accrued before July 1, 1993. (Code 1981, § 11-2A-506, enacted by Ga. L. 1993, p. 633, § 1.)

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 1993, “July 1, 1993” was substituted for “this article becomes effective” in subsection (4).

#### RESEARCH REFERENCES

**U.L.A.** — Uniform Commercial Code  
(U.L.A.) § 2A-506.

#### **11-2A-507. Proof of market rent: Time and place.**

(1) Damages based on market rent (Code Section 11-2A-519 or 11-2A-528) are determined according to the rent for the use of the goods concerned for a lease term identical to the remaining lease term of the original lease agreement and prevailing at the times specified in Code Sections 11-2A-519 and 11-2A-528.

(2) If evidence of rent for the use of the goods concerned for a lease term identical to the remaining lease term of the original lease agreement and prevailing at the times or places described in this article is not readily available, the rent prevailing within any reasonable time before or after the time described or at any other place or for a different lease term which in commercial judgment or under usage of trade would serve as a reasonable substitute for the one described may be used, making any proper allowance for the difference, including the cost of transporting the goods to or from the other place.

(3) Evidence of a relevant rent prevailing at a time or place or for a lease term other than the one described in this article offered by one party is not admissible unless and until he has given the other party notice the court finds sufficient to prevent unfair surprise.

(4) If the prevailing rent or value of any goods regularly leased in any established market is in issue, reports in official publications or trade journals or in newspapers or periodicals of general circulation published as the reports of that market are admissible in evidence. The circumstances of the preparation of the report may be shown to affect its weight but not its admissibility. (Code 1981, § 11-2A-507, enacted by Ga. L. 1993, p. 633, § 1.)

#### RESEARCH REFERENCES

**U.L.A.** — Uniform Commercial Code  
(U.L.A.) § 2A-507.

## Subpart B

## Default by Lessor

**11-2A-508. Lessee's remedies.**

(1) If a lessor fails to deliver the goods in conformity to the lease contract (Code Section 11-2A-509) or repudiates the lease contract (Code Section 11-2A-402), or a lessee rightfully rejects the goods (Code Section 11-2A-509) or justifiably revokes acceptance of the goods (Code Section 11-2A-517), then with respect to any goods involved, and with respect to all of the goods if under an installment lease contract the value of the whole lease contract is substantially impaired (Code Section 11-2A-510), the lessor is in default under the lease contract and the lessee may:

(a) Cancel the lease contract (Code Section 11-2A-505(1));

(b) Recover so much of the rent and security as has been paid and is just under the circumstances;

(c) Cover and recover damages as to all goods affected whether or not they have been identified to the lease contract (Code Sections 11-2A-518 and 11-2A-520), or recover damages for nondelivery (Code Sections 11-2A-519 and 11-2A-520);

(d) Exercise any other rights or pursue any other remedies provided in the lease contract.

(2) If a lessor fails to deliver the goods in conformity to the lease contract or repudiates the lease contract, the lessee may also:

(a) If the goods have been identified, recover them (Code Section 11-2A-522); or

(b) In a proper case, pursue those rights contained in Code Section 11-2A-521.

(3) If a lessor is otherwise in default under a lease contract, the lessee may exercise the rights and pursue the remedies provided in the lease contract, which may include a right to cancel the lease, and in Code Section 11-2A-519(3).

(4) If a lessor has breached a warranty, whether express or implied, the lessee may recover damages (Code Section 11-2A-519(4)).

(5) On rightful rejection or justifiable revocation of acceptance, a lessee has a security interest in goods in the lessee's possession or control for any rent and security that has been paid and any expenses reasonably incurred in their inspection, receipt, transportation, and care and custody and may hold those goods and dispose of them in good faith and in a commercially reasonable manner, subject to Code Section 11-2A-527(5).

(6) Subject to the provisions of Code Section 11-2A-407, a lessee, on notifying the lessor of the lessee's intention to do so, may deduct all or any part of the damages resulting from any default under the lease contract from any part of the rent still due under the same lease contract. (Code 1981, § 11-2A-508, enacted by Ga. L. 1993, p. 633, § 1.)

#### RESEARCH REFERENCES

**U.L.A.** — Uniform Commercial Code  
(U.L.A.) § 2A-508.

#### **11-2A-509. Lessee's rights on improper delivery; rightful rejection.**

(1) Subject to the provisions of Code Section 11-2A-510 on default in installment lease contracts, if the goods or the tender or delivery fail in any respect to conform to the lease contract, the lessee may reject or accept the goods or accept any commercial unit or units and reject the rest of the goods.

(2) Rejection of goods is ineffective unless it is within a reasonable time after tender or delivery of the goods and the lessee seasonably notifies the lessor. (Code 1981, § 11-2A-509, enacted by Ga. L. 1993, p. 633, § 1.)

#### RESEARCH REFERENCES

**U.L.A.** — Uniform Commercial Code  
(U.L.A.) § 2A-509.

#### **11-2A-510. Installment lease contracts: Rejection and default.**

(1) Under an installment lease contract a lessee may reject any delivery that is nonconforming if the nonconformity substantially impairs the value of that delivery and cannot be cured or the nonconformity is a defect in the required documents; but if the nonconformity does not fall within subsection (2) and the lessor or the supplier gives adequate assurance of its cure, the lessee must accept that delivery.

(2) Whenever nonconformity or default with respect to one or more deliveries substantially impairs the value of the installment lease contract as a whole there is a default with respect to the whole. But, the aggrieved party reinstates the installment lease contract as a whole if the aggrieved party accepts a nonconforming delivery without seasonably notifying of cancellation or brings an action with respect only to past deliveries or demands performance as to future deliveries. (Code 1981, § 11-2A-510, enacted by Ga. L. 1993, p. 633, § 1.)



**RESEARCH REFERENCES**

**U.L.A.** — Uniform Commercial Code  
(U.L.A.) § 2A-510.

**11-2A-511. Merchant lessee's duties as to rightfully rejected goods.**

(1) Subject to any security interest of a lessee (Code Section 11-2A-508(5)), if a lessor or a supplier has no agent or place of business at the market of rejection, a merchant lessee, after rejection of goods in his possession or control, shall follow any reasonable instructions received from the lessor or the supplier with respect to the goods. In the absence of those instructions, a merchant lessee shall make reasonable efforts to sell, lease, or otherwise dispose of the goods for the lessor's account if they threaten to decline in value speedily. Instructions are not reasonable if on demand indemnity for expenses is not forthcoming.

(2) If a merchant lessee (subsection (1)) or any other lessee (Code Section 11-2A-512) disposes of goods, he is entitled to reimbursement either from the lessor or the supplier or out of the proceeds for reasonable expenses of caring for and disposing of the goods and, if the expenses include no disposition commission, to such commission as is usual in the trade, or if there is none, to a reasonable sum not exceeding 10 percent of the gross proceeds.

(3) In complying with this section or Code Section 11-2A-512, the lessee is held only to good faith. Good faith conduct hereunder is neither acceptance or conversion nor the basis of an action for damages.

(4) A purchaser who purchases in good faith from a lessee pursuant to this section or Code Section 11-2A-512 takes the goods free of any rights of the lessor and the supplier even though the lessee fails to comply with one or more of the requirements of this article. (Code 1981, § 11-2A-511, enacted by Ga. L. 1993, p. 633, § 1.)

**RESEARCH REFERENCES**

**U.L.A.** — Uniform Commercial Code  
(U.L.A.) § 2A-511.

**11-2A-512. Lessee's duties as to rightfully rejected goods.**

(1) Except as otherwise provided with respect to goods that threaten to decline in value speedily (Code Section 11-2A-511) and subject to any security interest of a lessee (Code Section 11-2A-508(5)):

(a) The lessee, after rejection of goods in the lessee's possession, shall hold them with reasonable care at the lessor's or the supplier's disposition for a reasonable time after the lessee's seasonable notification of rejection;

(b) If the lessor or the supplier gives no instructions within a reasonable time after notification of rejection, the lessee may store the rejected goods for the lessor's or the supplier's account or ship them to the lessor or the supplier or dispose of them for the lessor's or the supplier's account with reimbursement in the manner provided in Code Section 11-2A-511; but

(c) The lessee has no further obligations with regard to goods rightfully rejected.

(2) Action by the lessee pursuant to subsection (1) is not acceptance or conversion. (Code 1981, § 11-2A-512, enacted by Ga. L. 1993, p. 633, § 1.)

#### RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 2A-512.

#### **11-2A-513. Cure by lessor of improper tender or delivery; replacement.**

(1) If any tender or delivery by the lessor or the supplier is rejected because nonconforming and the time for performance has not yet expired, the lessor or the supplier may seasonably notify the lessee of the lessor's or the supplier's intention to cure and may then make a conforming delivery within the time provided in the lease contract.

(2) If the lessee rejects a nonconforming tender that the lessor or the supplier had reasonable grounds to believe would be acceptable with or without money allowance, the lessor or the supplier may have a further reasonable time to substitute a conforming tender if he seasonably notifies the lessee. (Code 1981, § 11-2A-513, enacted by Ga. L. 1993, p. 633, § 1.)

#### RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 2A-513.

#### **11-2A-514. Waiver of lessee's objections.**

(1) In rejecting goods, a lessee's failure to state a particular defect that is ascertainable by reasonable inspection precludes the lessee from relying on the defect to justify rejection or to establish default:

(a) If, stated seasonably, the lessor or the supplier could have cured it (Code Section 11-2A-513); or

(b) Between merchants if the lessor or the supplier after rejection has made a request in writing for a full and final written statement of all defects on which the lessee proposes to rely.

(2) A lessee's failure to reserve rights when paying rent or other consideration against documents precludes recovery of the payment for defects apparent on the face of the documents. (Code 1981, § 11-2A-514, enacted by Ga. L. 1993, p. 633, § 1.)

#### RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 2A-514.

#### **11-2A-515. Acceptance of goods.**

(1) Acceptance of goods occurs after the lessee has had a reasonable opportunity to inspect the goods and

(a) The lessee signifies or acts with respect to the goods in a manner that signifies to the lessor or the supplier that the goods are conforming or that the lessee will take or retain them in spite of their nonconformity; or

(b) The lessee fails to make an effective rejection of the goods (Code Section 11-2A-509(2)).

(2) Acceptance of a part of any commercial unit is acceptance of that entire unit. (Code 1981, § 11-2A-515, enacted by Ga. L. 1993, p. 633, § 1.)

#### RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 2A-515.

#### **11-2A-516. Effect of acceptance of goods; notice of default; burden of establishing default after acceptance; notice of claim or litigation to person answerable over.**

(1) A lessee must pay rent for any goods accepted in accordance with the lease contract, with due allowance for goods rightfully rejected or not delivered.

(2) A lessee's acceptance of goods precludes rejection of the goods accepted. In the case of a finance lease, if made with knowledge of a nonconformity, acceptance cannot be revoked because of it. In any other case, if made with knowledge of a nonconformity, acceptance cannot be revoked because of it unless the acceptance was on the reasonable assumption that the nonconformity would be seasonably cured. Acceptance does not of itself impair any other remedy provided by this article or the lease agreement for nonconformity.



(3) If a tender has been accepted:

(a) Within a reasonable time after the lessee discovers or should have discovered any default, the lessee shall notify the lessor and the supplier, if any, or be barred from any remedy against the party not notified;

(b) Except in the case of a consumer lease, within a reasonable time after the lessee receives notice of litigation for infringement or the like (Code Section 11-2A-211) the lessee shall notify the lessor or be barred from any remedy over for liability established by the litigation; and

(c) The burden is on the lessee to establish any default.

(4) If a lessee is sued for breach of a warranty or other obligation for which a lessor or a supplier is answerable over the following apply:

(a) The lessee may give the lessor or the supplier, or both, written notice of the litigation. If the notice states that the person notified may come in and defend and that if the person notified does not do so that person will be bound in any action against that person by the lessee by any determination of fact common to the two litigations, then unless the person notified after seasonable receipt of the notice does come in and defend that person is so bound.

(b) The lessor or the supplier may demand in writing that the lessee turn over control of the litigation including settlement if the claim is one for infringement or the like (Code Section 11-2A-211) or else be barred from any remedy over. If the demand states that the lessor or the supplier agrees to bear all expense and to satisfy any adverse judgment, then unless the lessee after seasonable receipt of the demand does turn over control the lessee is so barred.

(5) Subsections (3) and (4) apply to any obligation of a lessee to hold the lessor or the supplier harmless against infringement or the like (Code Section 11-2A-211). (Code 1981, § 11-2A-516, enacted by Ga. L. 1993, p. 633, § 1.)

#### RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 2A-516.

#### **11-2A-517. Revocation of acceptance of goods.**

(1) A lessee may revoke acceptance of a lot or commercial unit whose nonconformity substantially impairs its value to the lessee if the lessee has accepted it:

(a) Except in the case of a finance lease, on the reasonable assumption that its nonconformity would be cured and it has not been seasonably cured; or

(b) Without discovery of the nonconformity if the lessee's acceptance was reasonably induced either by the lessor's assurances or, except in the case of a finance lease, by the difficulty of discovery before acceptance.

(2) Except in the case of a finance lease that is not a consumer lease, a lessee may revoke acceptance of a lot or commercial unit if the lessor defaults under the lease contract and the default substantially impairs the value of that lot or commercial unit to the lessee.

(3) If the lease agreement so provides, the lessee may revoke acceptance of a lot or commercial unit because of other defaults by the lessor.

(4) Revocation of acceptance must occur within a reasonable time after the lessee discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by the nonconformity. Revocation is not effective until the lessee notifies the lessor.

(5) A lessee who so revokes has the same rights and duties with regard to the goods involved as if the lessee had rejected them. (Code 1981, § 11-2A-517, enacted by Ga. L. 1993, p. 633, § 1.)

#### RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 2A-517.

#### **11-2A-518. Cover; substitute goods.**

(1) After a default by a lessor under the lease contract of the type described in Code Section 11-2A-508(1) or, if agreed, after other default by the lessor, the lessee may cover by making any purchase or lease of or contract to purchase or lease goods in substitution for those due from the lessor.

(2) Except as otherwise provided with respect to damages liquidated in the lease agreement (Code Section 11-2A-504) or otherwise determined pursuant to agreement of the parties (Code Sections 11-1-102(3) and 11-2A-503), if a lessee's cover is by a lease agreement substantially similar to the original lease agreement and the new lease agreement is made in good faith and in a commercially reasonable manner, the lessee may recover from the lessor as damages (i) the present value, as of the date of the commencement of the term of the new lease agreement, of the rent under the new lease agreement applicable to that period of the new lease term which is comparable to the then remaining term of the original lease agreement minus the present value as of the same date of the total rent for the then remaining lease term of the original lease agreement, and (ii) any incidental or consequential damages, less expenses saved in consequence of the lessor's default.

(3) If a lessee's cover is by lease agreement that for any reason does not qualify for treatment under subsection (2), or is by purchase or otherwise, the lessee may recover from the lessor as if the lessee had elected not to cover and Code Section 11-2A-519 governs. (Code 1981, § 11-2A-518, enacted by Ga. L. 1993, p. 633, § 1.)

#### RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 2A-518.

#### **11-2A-519. Lessee's damages for nondelivery, repudiation, default, and breach of warranty in regard to accepted goods.**

(1) Except as otherwise provided with respect to damages liquidated in the lease agreement (Code Section 11-2A-504) or otherwise determined pursuant to agreement of the parties (Code Sections 11-1-102(3) and 11-2A-503), if a lessee elects not to cover or a lessee elects to cover and the cover is by lease agreement that for any reason does not qualify for treatment under Code Section 11-2A-518(2), or is by purchase or otherwise, the measure of damages for non-delivery or repudiation by the lessor or for rejection or revocation of acceptance by the lessee is the present value, as of the date of the default, of the then market rent minus the present value as of the same date of the original rent, computed for the remaining lease term of the original lease agreement, together with incidental and consequential damages, less expenses saved in consequence of the lessor's default.

(2) Market rent is to be determined as of the place for tender or, in cases of rejection after arrival or revocation of acceptance, as of the place of arrival.

(3) Except as otherwise agreed, if the lessee has accepted goods and given notification (Code Section 11-2A-516(3)), the measure of damages for nonconforming tender or delivery or other default by a lessor is the loss resulting in the ordinary course of events from the lessor's default as determined in any manner that is reasonable together with incidental and consequential damages, less expenses saved in consequence of the lessor's default.

(4) Except as otherwise agreed, the measure of damages for breach of warranty is the present value at the time and place of acceptance of the difference between the value of the use of the goods accepted and the value if they had been as warranted for the lease term, unless special circumstances show proximate damages of a different amount, together with incidental and consequential damages, less expenses saved in consequence of the lessor's default or breach of warranty. (Code 1981, § 11-2A-519, enacted by Ga. L. 1993, p. 633, § 1.)



**RESEARCH REFERENCES**

**U.L.A.** — Uniform Commercial Code  
(U.L.A.) § 2A-519.

**11-2A-520. Lessee's incidental and consequential damages.**

(1) Incidental damages resulting from a lessor's default include expenses reasonably incurred in inspection, receipt, transportation, and care and custody of goods rightfully rejected or goods the acceptance of which is justifiably revoked, any commercially reasonable charges, expenses or commissions in connection with effecting cover, and any other reasonable expense incident to the default.

(2) Consequential damages resulting from a lessor's default include:

(a) Any loss resulting from general or particular requirements and needs of which the lessor at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and

(b) Injury to person or property proximately resulting from any breach of warranty. (Code 1981, § 11-2A-520, enacted by Ga. L. 1993, p. 633, § 1.)

**RESEARCH REFERENCES**

**U.L.A.** — Uniform Commercial Code  
(U.L.A.) § 2A-520.

**11-2A-521. Lessee's right to specific performance or replevin.**

(1) Specific performance may be decreed if the goods are unique or in other proper circumstances.

(2) A decree for specific performance may include any terms and conditions as to payment of the rent, damages, or other relief that the court deems just.

(3) A lessee has a right of replevin, detinue, sequestration, claim and delivery, or the like for goods identified to the lease contract if after reasonable effort the lessee is unable to effect cover for those goods or the circumstances reasonably indicate that the effort will be unavailing. (Code 1981, § 11-2A-521, enacted by Ga. L. 1993, p. 633, § 1.)

**RESEARCH REFERENCES**

**U.L.A.** — Uniform Commercial Code  
(U.L.A.) § 2A-521.

**11-2A-522. Lessee's right to goods on lessor's insolvency.**

(1) Subject to subsection (2) and even though the goods have not been shipped, a lessee who has paid a part or all of the rent and security for goods identified to a lease contract (Code Section 11-2A-217) on making and keeping good a tender of any unpaid portion of the rent and security due under the lease contract may recover the goods identified from the lessor if the lessor becomes insolvent within 10 days after receipt of the first installment of rent and security.

(2) A lessee acquires the right to recover goods identified to a lease contract only if they conform to the lease contract. (Code 1981, § 11-2A-522, enacted by Ga. L. 1993, p. 633, § 1.)

**RESEARCH REFERENCES**

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 2A-522.

**Subpart C****Default by Lessee****11-2A-523. Lessor's remedies.**

(1) If a lessee wrongfully rejects or revokes acceptance of goods or fails to make a payment when due or repudiates with respect to a part or the whole, then, with respect to any goods involved, and with respect to all of the goods if under an installment lease contract the value of the whole lease contract is substantially impaired (Code Section 11-2A-510), the lessee is in default under the lease contract and the lessor may:

(a) Cancel the lease contract (Code Section 11-2A-505(1));

(b) Proceed respecting goods not identified to the lease contract (Code Section 11-2A-524);

(c) Withhold delivery of the goods and take possession of goods previously delivered (Code Section 11-2A-525);

(d) Stop delivery of the goods by any bailee (Code Section 11-2A-526);

(e) Dispose of the goods and recover damages (Code Section 11-2A-527), or retain the goods and recover damages (Code Section 11-2A-528), or in a proper case recover rent (Code Section 11-2A-529);

(f) Exercise any other rights or pursue any other remedies provided in the lease contract.

(2) If a lessor does not fully exercise a right or obtain a remedy to which the lessor is entitled under subsection (1), the lessor may recover the loss

resulting in the ordinary course of events from the lessee's default as determined in any reasonable manner, together with incidental damages, less expenses saved in consequence of the lessee's default.

(3) If a lessee is otherwise in default under a lease contract, the lessor may exercise the rights and pursue the remedies provided in the lease contract, which may include a right to cancel the lease. In addition, unless otherwise provided in the lease contract:

(a) If the default substantially impairs the value of the lease contract to the lessor, the lessor may exercise the rights and pursue the remedies provided in subsections (1) or (2); or

(b) If the default does not substantially impair the value of the lease contract to the lessor, the lessor may recover as provided in subsection (2). (Code 1981, § 11-2A-523, enacted by Ga. L. 1993, p. 633, § 1.)

#### RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 2A-523.

#### **11-2A-524. Lessor's right to identify goods to lease contract.**

(1) After default by the lessee under the lease contract of the type described in Code Section 11-2A-523(1) or Code Section 11-2A-523(3)(a) or, if agreed, after other default by the lessee, the lessor may:

(a) Identify to the lease contract conforming goods not already identified if at the time the lessor learned of the default they were in the lessor's or the supplier's possession or control; and

(b) Dispose of goods (Code Section 11-2A-527(1)) that demonstrably have been intended for the particular lease contract even though those goods are unfinished.

(2) If the goods are unfinished, in the exercise of reasonable commercial judgment for the purposes of avoiding loss and of effective realization, an aggrieved lessor or the supplier may either complete manufacture and wholly identify the goods to the lease contract or cease manufacture and lease, sell, or otherwise dispose of the goods for scrap or salvage value or proceed in any other reasonable manner. (Code 1981, § 11-2A-524, enacted by Ga. L. 1993, p. 633, § 1.)

#### RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 2A-524.



**11-2A-525. Lessor's right to possession of goods.**

(1) If a lessor discovers the lessee to be insolvent, the lessor may refuse to deliver the goods.

(2) After a default by the lessee under the lease contract of the type described in Code Section 11-2A-523(1) or 11-2A-523(3)(a) or, if agreed, after other default by the lessee, the lessor has the right to take possession of the goods. If the lease contract so provides, the lessor may require the lessee to assemble the goods and make them available to the lessor at a place to be designated by the lessor which is reasonably convenient to both parties. Without removal, the lessor may render unusable any goods employed in trade or business, and may dispose of goods on the lessee's premises (Code Section 11-2A-527).

(3) The lessor may proceed under subsection (2) without judicial process if it can be done without breach of the peace or the lessor may proceed by action. (Code 1981, § 11-2A-525, enacted by Ga. L. 1993, p. 633, § 1.)

**RESEARCH REFERENCES**

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 2A-525.

**11-2A-526. Lessor's stoppage of delivery in transit or otherwise.**

(1) A lessor may stop delivery of goods in the possession of a carrier or other bailee if the lessor discovers the lessee to be insolvent and may stop delivery of carload, truckload, planeload, or larger shipments of express or freight if the lessee repudiates or fails to make a payment due before delivery, whether for rent, security or otherwise under the lease contract, or for any other reason the lessor has a right to withhold or take possession of the goods.

(2) In pursuing its remedies under subsection (1), the lessor may stop delivery until

(a) Receipt of the goods by the lessee;

(b) Acknowledgment to the lessee by any bailee of the goods, except a carrier, that the bailee holds the goods for the lessee; or

(c) Such an acknowledgment to the lessee by a carrier via reshipment or as warehouseman.

(3) (a) To stop delivery, a lessor shall so notify as to enable the bailee by reasonable diligence to prevent delivery of the goods.

(b) After notification, the bailee shall hold and deliver the goods according to the directions of the lessor, but the lessor is liable to the bailee for any ensuing charges or damages.

(c) A carrier who has issued a nonnegotiable bill of lading is not obliged to obey a notification to stop received from a person other than the consignor. (Code 1981, § 11-2A-526, enacted by Ga. L. 1993, p. 633, § 1.)

#### RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 2A-526.

#### **11-2A-527. Lessor's rights to dispose of goods.**

(1) After a default by a lessee under the lease contract of the type described in Code Section 11-2A-523(1) or 11-2A-523(3)(a) or after the lessor refuses to deliver or takes possession of goods (Code Section 11-2A-525 or 11-2A-526), or, if agreed, after other default by a lessee, the lessor may dispose of the goods concerned or the undelivered balance thereof by lease, sale, or otherwise.

(2) Except as otherwise provided with respect to damages liquidated in the lease agreement (Code Section 11-2A-504) or otherwise determined pursuant to agreement of the parties (Code Sections 11-1-102(3) and 11-2A-503), if the disposition is by lease agreement substantially similar to the original lease agreement and the new lease agreement is made in good faith and in a commercially reasonable manner, the lessor may recover from the lessee as damages (i) accrued and unpaid rent as of the date of the commencement of the term of the new lease agreement, (ii) the present value, as of the same date, of the total rent for the then remaining lease term of the original lease agreement minus the present value, as of the same date, of the rent under the new lease agreement applicable to that period of the new lease term which is comparable to the then remaining term of the original lease agreement, and (iii) any incidental damages allowed under Code Section 11-2A-530, less expenses saved in consequence of the lessee's default.

(3) If the lessor's disposition is by lease agreement that for any reason does not qualify for treatment under subsection (2), or is by sale or otherwise, the lessor may recover from the lessee as if the lessor had elected not to dispose of the goods and Code Section 11-2A-528 governs.

(4) A subsequent buyer or lessee who buys or leases from the lessor in good faith for value as a result of a disposition under this section takes the goods free of the original lease contract and any rights of the original lessee even though the lessor fails to comply with one or more of the requirements of this article.

(5) The lessor is not accountable to the lessee for any profit made on any disposition. A lessee who has rightfully rejected or justifiably revoked

acceptance shall account to the lessor for any excess over the amount of the lessee's security interest (Code Section 11-2A-508(5)). (Code 1981, § 11-2A-527, enacted by Ga. L. 1993, p. 633, § 1.)

### JUDICIAL DECISIONS

Where a lease agreement provided for liquidated damages and set forth a formula to calculate such damages, O.C.G.A. §§ 11-2A-527 and 11-2A-528 did not apply; rather, the more general directives of O.C.G.A. § 11-2A-504, regarding liquidation of damages, were controlling. *Carter v. Tokai Fin. Servs., Inc.*, 231 Ga. App. 755, 500 S.E.2d 638 (1998).

**Damages liquidated in agreement.** — Where a lease financing agreement specifi-

cally set forth a formula to calculate damages, O.C.G.A. §§ 11-2A-527 and 11-2A-528 were not applicable in an action on a deficiency claim arising out of the sale of collateral. *Jamsky v. HPSC, Inc.*, 238 Ga. App. 447, 519 S.E.2d 246 (1999).

**Cited in** *Summerhill Neighborhood Dev. Corp. v. Telerent Leasing Corp.*, 242 Ga. App. 142, 528 S.E.2d 889 (2000).

### RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 2A-527.

#### **11-2A-528. Lessor's damages for nonacceptance, failure to pay, repudiation, or other default.**

(1) Except as otherwise provided with respect to damages liquidated in the lease agreement (Code Section 11-2A-504) or otherwise determined pursuant to agreement of the parties (Code Sections 11-1-102(3) and 11-2A-503), if a lessor elects to retain the goods or a lessor elects to dispose of the goods and the disposition is by lease agreement that for any reason does not qualify for treatment under Code Section 11-2A-527(2), or is by sale or otherwise, the lessor may recover from the lessee as damages for a default of the type described in Code Section 11-2A-523(1) or 11-2A-523(3)(a), or, if agreed, for other default of the lessee, (i) accrued and unpaid rent as of the date of default if the lessee has never taken possession of the goods, or, if the lessee has taken possession of the goods, as of the date the lessor repossesses the goods or an earlier date on which the lessee makes a tender of the goods to the lessor, (ii) the present value as of the date determined under clause (i) of the total rent for the then remaining lease term of the original lease agreement minus the present value as of the same date of the market rent at the place where the goods are located computed for the same lease term, and (iii) any incidental damages allowed under Code Section 11-2A-530, less expenses saved in consequence of the lessee's default.

(2) If the measure of damages provided in subsection (1) is inadequate to put a lessor in as good a position as performance would have, the measure of damages is the present value of the profit, including reasonable



overhead, the lessor would have made from full performance by the lessee, together with any incidental damages allowed under Code Section 11-2A-530, due allowance for costs reasonably incurred and due credit for payments or proceeds of disposition. (Code 1981, § 11-2A-528, enacted by Ga. L. 1993, p. 633, § 1.)

### JUDICIAL DECISIONS

**Where a lease agreement provided for liquidated damages** and set forth a formula to calculate such damages, O.C.G.A. §§ 11-2A-527 and 11-2A-528 did not apply; rather, the more general directives of O.C.G.A. § 11-2A-504, regarding liquidation of damages, were controlling. *Carter v. Tokai Fin. Servs., Inc.*, 231 Ga. App. 755, 500 S.E.2d 638 (1998).

**Damages liquidated in agreement.** — Where a lease financing agreement specifi-

cally set forth a formula to calculate damages, O.C.G.A. §§ 11-2A-527 and 11-2A-528 were not applicable in an action on a deficiency claim arising out of the sale of collateral. *Jamsky v. HPSC, Inc.*, 238 Ga. App. 447, 519 S.E.2d 246 (1999).

**Cited in** *Summerhill Neighborhood Dev. Corp. v. Telerent Leasing Corp.*, 242 Ga. App. 142, 528 S.E.2d 889 (2000).

### RESEARCH REFERENCES

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 2A-528.

### 11-2A-529. Lessor's action for the rent.

(1) After default by the lessee under the lease contract of the type described in Code Section 11-2A-523(1) or 11-2A-523(3)(a) or, if agreed, after other default by the lessee, if the lessor complies with subsection (2), the lessor may recover from the lessee as damages:

(a) For goods accepted by the lessee and not repossessed by or tendered to the lessor, and for conforming goods lost or damaged within a commercially reasonable time after risk of loss passes to the lessee (Code Section 11-2A-219), (i) accrued and unpaid rent as of the date of entry of judgment in favor of the lessor, (ii) the present value as of the same date of the rent for the then remaining lease term of the lease agreement, and (iii) any incidental damages allowed under Code Section 11-2A-530, less expenses saved in consequence of the lessee's default; and

(b) For goods identified to the lease contract if the lessor is unable after reasonable effort to dispose of them at a reasonable price or the circumstances reasonably indicate that effort will be unavailing, (i) accrued and unpaid rent as of the date of entry of judgment in favor of the lessor, (ii) the present value as of the same date of the rent for the then remaining lease term of the lease agreement, and (iii) any incidental damages allowed under Code Section 11-2A-530, less expenses saved in consequence of the lessee's default.

(2) Except as provided in subsection (3), the lessor shall hold for the lessee for the remaining lease term of the lease agreement any goods that have been identified to the lease contract and are in the lessor's control.

(3) The lessor may dispose of the goods at any time before collection of the judgment for damages obtained pursuant to subsection (1). If the disposition is before the end of the remaining lease term of the lease agreement, the lessor's recovery against the lessee for damages is governed by Code Section 11-2A-527 or Code Section 11-2A-528, and the lessor will cause an appropriate credit to be provided against a judgment for damages to the extent that the amount of the judgment exceeds the recovery available pursuant to Code Section 11-2A-527 or 11-2A-528.

(4) Payment of the judgment for damages obtained pursuant to subsection (1) entitles the lessee to the use and possession of the goods not then disposed of for the remaining lease term of and in accordance with the lease agreement.

(5) After default by the lessee under the lease contract of the type described in Code Section 11-2A-523(1) or Code Section 11-2A-523(3)(a) or, if agreed, after other default by the lessee, a lessor who is held not entitled to rent under this section must nevertheless be awarded damages for non-acceptance under Code Section 11-2A-527 or Code Section 11-2A-528. (Code 1981, § 11-2A-529, enacted by Ga. L. 1993, p. 633, § 1.)

#### RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 2A-529.

#### **11-2A-530. Lessor's incidental damages.**

Incidental damages to an aggrieved lessor include any commercially reasonable charges, expenses, or commissions incurred in stopping delivery, in the transportation, care and custody of goods after the lessee's default, in connection with return or disposition of the goods, or otherwise resulting from the default. (Code 1981, § 11-2A-530, enacted by Ga. L. 1993, p. 633, § 1.)

#### RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 2A-530.

#### **11-2A-531. Standing to sue third parties for injury to goods.**

(1) If a third party so deals with goods that have been identified to a lease contract as to cause actionable injury to a party to the lease contract (a) the

lessor has a right of action against the third party, and (b) the lessee also has a right of action against the third party if the lessee:

- (i) Has a security interest in the goods;
- (ii) Has an insurable interest in the goods; or

(iii) Bears the risk of loss under the lease contract or has since the injury assumed that risk as against the lessor and the goods have been converted or destroyed.

(2) If at the time of the injury the party plaintiff did not bear the risk of loss as against the other party to the lease contract and there is no arrangement between them for disposition of the recovery, his suit or settlement, subject to his own interest, is as a fiduciary for the other party to the lease contract.

(3) Either party with the consent of the other may sue for the benefit of whom it may concern. (Code 1981, § 11-2A-531, enacted by Ga. L. 1993, p. 633, § 1.)

#### RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 2A-531.

#### **11-2A-532. Lessor's rights to residual interest.**

In addition to any other recovery permitted by this article or other law, the lessor may recover from the lessee an amount that will fully compensate the lessor for any loss of or damage to the lessor's residual interest in the goods caused by the default of the lessee. (Code 1981, § 11-2A-532, enacted by Ga. L. 1993, p. 633, § 1.)

#### RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 2A-532.



## ARTICLE 3

### NEGOTIABLE INSTRUMENTS

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11-3-419. Instruments signed for accommodation.

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11-3-501. Presentment.

11-3-502. Dishonor.

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#### Discharge and Payment

Sec.

11-3-601. Discharge and effect of discharge.

11-3-602. Payment.

11-3-603. Tender of payment.

11-3-604. Discharge by cancellation or renunciation.

11-3-605. Discharge of indorsers and accommodation parties.

**Cross references.** — Venue for actions against maker, endorser, drawer, etc., of certain instruments, Ga. Const. 1976, Art. VI, Sec. XIV, Para. V (see Ga. Const. 1983, Art. VI, Sec. II, Para. V). Requirements pertaining to negotiable obligations, notes, or checks issued to purchase registered securities, § 10-5-19. Requirements pertaining to instruments issued in payment of wages or salary generally, § 34-7-3. Negotiable nature of evidences of state indebtedness, § 50-17-29.

**Law reviews.** — For article, "Negotiable Instruments Problems in the Financing of

Home Improvements," see 11 Mercer L. Rev. 316 (1960). For article, "Voidability of Minors' Contracts: A Feudal Doctrine in a Modern Economy," see 1 Ga. L. Rev. 205 (1967). For annual survey of law of business associations, see 43 Mercer L. Rev. 85 (1991). For article, "The Revision of U.C.C. Articles Three and Four: A Process Which Excluded Consumer Protection Requires Federal Action," see 43 Mercer L. Rev. 827 (1992). For annual survey article discussing developments in commercial law, see 51 Mercer L. Rev. 165 (1999).

## JUDICIAL DECISIONS

**Article 3 applies only to negotiable instruments.** Barton v. Scott Hudgens Realty & Mtg., Inc., 136 Ga. App. 565, 222 S.E.2d 126 (1975) (decided under former law).

**Action by real estate broker on promissory note.** — If one who has acted as real estate broker or salesman wishes to bring suit to enforce broker's rights under brokerage or salesman's contract, the broker must comply with requirement of O.C.G.A. § 43-40-24,

but where contract sued upon is promissory note and not brokerage or salesman's contract, suit is not one for collection of compensation for performance of acts mentioned in O.C.G.A. T. 43, but is suit to enforce obligations of note and is governed by provisions of Art. 3 of the Uniform Commercial Code. Azar-Beard & Assocs. v. Wallace, 146 Ga. App. 671, 247 S.E.2d 154 (1978) (decided under former law).

## RESEARCH REFERENCES

**ALR.** — Effect of Negotiable Instruments Law upon the theory as to a check being an assignment of the drawer's funds, 5 ALR 1667.

Withdrawal of, or right to withdraw, letter from mail as affecting consummation of contract, 9 ALR 386; 92 ALR 1062.

Alteration of commercial paper by reducing the amount, 9 ALR 1087.

Usury as predicable upon transaction in form a sale or exchange of commercial paper or other choses in action, 165 ALR 626.

Construction and effect of UCC Article 3,

dealing with commercial paper, 67 ALR3d 144; 78 ALR3d 1020; 88 ALR3d 1100; 97 ALR3d 798; 97 ALR3d 1114; 23 ALR4th 855; 36 ALR4th 212; 42 ALR5th 137; 45 ALR5th 389.

Unintentional cancellation of negotiable instrument under UCC Article 3, 59 ALR4th 617.

## PART 1

### GENERAL PROVISIONS AND DEFINITIONS

**Editor's notes.** — Ga. L. 1996, p. 1306, § 3, effective July 1, 1996, repealed the Code sections formerly codified at this article, relating to commercial paper, and enacted the current article. The former article consisted of Code Sections 11-3-101 through 11-3-122 (Part 1), 11-3-201 through 11-3-208 (Part 2), 11-3-301 through 11-3-307 (Part 3), 11-3-401 through 11-3-419 (Part 4), 11-3-501 through 11-3-511 (Part 5), 11-3-601 through 11-3-606 (Part 6), 11-3-701 (Part 7), and

11-3-801 through 11-3-805 (Part 8) and was based on Code 1933, §§ 109A-3—101-109A-3—122, 109A-3—201-109A-3—208, 109A-3—301-109A-3—307, 109A-3—401-109A-3—419, 109A-3—501-109A-3—511, 109A-3—601-109A-3—606, 109A-3—701, 109A-3—801-109A-3—805; respectively enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 1963, p. 188, §§ 4-8; Ga. L. 1983, p. 509, § 1; Ga. L. 1989, p. 807, § 1; Ga. L. 1992, p. 6, § 11; Ga. L. 1992, p. 2685, § 2.

#### 11-3-101. Short title.

This article may be cited as “Uniform Commercial Code — Negotiable Instruments.” (Code 1981, § 11-3-101, enacted by Ga. L. 1996, p. 1306, § 3.)

**Law reviews.** — For article, “The Good Faith Purchase Idea and the Uniform Commercial Code,” see 15 Ga. L. Rev. 605

(1981). For annual survey article on business associations, see 50 Mercer L. Rev. 171 (1998).

### RESEARCH REFERENCES

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 3-101.

**ALR.** — What constitutes unjustifiable impairment of collateral, discharging parties to

a negotiable instrument under UCC § 3-606(1)(B), 61 ALR5th 525.

#### 11-3-102. Subject matter.

(a) This article applies to negotiable instruments. It does not apply to money, to payment orders governed by Article 4A of this title, or to securities governed by Article 8 of this title.

(b) If there is conflict between this article and Article 4 or 9 of this title, Articles 4 and 9 of this title govern.

(c) Regulations of the Board of Governors of the Federal Reserve System and operating circulars of the federal reserve banks supersede any inconsistent provision of this article to the extent of the inconsistency. (Code 1981, § 11-3-102, enacted by Ga. L. 1996, p. 1306, § 3; Ga. L. 2002, p. 415, § 11.)



**The 2002 amendment**, effective April 18, 2002, part of an Act to revise, modernize, and correct the Code, revised capitalization in subsection (c).

**Law reviews.** — For review of 1996 commercial code legislation, see 13 Ga. St. U.L. Rev. 41.

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 11 Am. Jur. 2d, Bills and Notes, §§ 13, 15, 26. 68A Am. Jur. 2d, Secured Transactions, § 14.

**C.J.S.** — 10 C.J.S., Bills and Notes, § 2 et seq.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 3-102.

**ALR.** — Title to commercial paper deposited by the customer of a bank to his account, 16 ALR 1084; 42 ALR 492; 68 ALR 725; 99 ALR 486.

Trust in proceeds of collections made by charging debtor's account in collecting bank, 24 ALR 1152; 42 ALR 754; 47 ALR 761; 77 ALR 473.

Estoppel by delay, after knowledge, in disclosing forgery of commercial paper, 25 ALR 177; 50 ALR 1374.

Clearing-house transactions as payment or acceptance of checks, 30 ALR 1028.

Duty of bank to prior parties to the paper to apply deposit to credit of endorser on paper owned by bank, 37 ALR 578.

Renewal of bill or note as precluding defenses available against the original, 41 ALR 963.

Effect of Negotiable Instruments Act on statute invalidating instrument given for gambling consideration, 46 ALR 959.

### 11-3-103. Definitions.

(a) In this article:

(1) “Acceptor” means a drawee who has accepted a draft.

(2) “Drawee” means a person ordered in a draft to make payment.

(3) “Drawer” means a person who signs or is identified in a draft as a person ordering payment.

(4) “Good faith” means honesty in fact and the observance of reasonable commercial standards of fair dealing.

(5) “Maker” means a person who signs or is identified in a note as a person undertaking to pay.

(6) “Order” means a written instruction to pay money signed by the person giving the instruction. The instruction may be addressed to any person, including the person giving the instruction, or to one or more persons jointly or in the alternative but not in succession. An authorization to pay is not an order unless the person authorized to pay is also instructed to pay.

(7) “Ordinary care” in the case of a person engaged in business means observance of reasonable commercial standards, prevailing in the area in which the person is located, with respect to the business in which the person is engaged. In the case of a bank that takes an instrument for processing for collection or payment by automated means, reasonable commercial standards do not require the bank to examine the instru-

ment if the failure to examine does not violate the bank's prescribed procedures and the bank's procedures do not vary unreasonably from general banking usage not disapproved by this article or Article 4 of this title.

(8) "Party" means a party to an instrument.

(9) "Promise" means a written undertaking to pay money signed by the person undertaking to pay. An acknowledgment of an obligation by the obligor is not a promise unless the obligor also undertakes to pay the obligation.

(10) "Prove" with respect to a fact means to meet the burden of establishing the fact as "burden of establishing" is defined in subsection (8) of Code Section 11-1-201.

(11) "Remitter" means a person who purchases an instrument from its issuer if the instrument is payable to an identified person other than the purchaser.

(b) Other definitions applying to this article and the Code sections in which they appear are:

"Acceptance." Code Section 11-3-409.

"Accommodated party." Code Section 11-3-419.

"Accommodation party." Code Section 11-3-419.

"Alteration." Code Section 11-3-407.

"Anomalous indorsement." Code Section 11-3-205.

"Blank indorsement." Code Section 11-3-205.

"Cashier's check." Code Section 11-3-104.

"Certificate of deposit." Code Section 11-3-104.

"Certified check." Code Section 11-3-409.

"Check." Code Section 11-3-104.

"Consideration." Code Section 11-3-303.

"Draft." Code Section 11-3-104.

"Holder in due course." Code Section 11-3-302.

"Incomplete instrument." Code Section 11-3-115.

"Indorsement." Code Section 11-3-204.

"Indorser." Code Section 11-3-204.

"Instrument." Code Section 11-3-104.

“Issue.” Code Section 11-3-105.  
“Issuer.” Code Section 11-3-105.  
“Negotiable instrument.” Code Section 11-3-104.  
“Negotiation.” Code Section 11-3-201.  
“Note.” Code Section 11-3-104.  
“Payable at a definite time.” Code Section 11-3-108.  
“Payable on demand.” Code Section 11-3-108.  
“Payable to bearer.” Code Section 11-3-109.  
“Payable to order.” Code Section 11-3-109.  
“Payment.” Code Section 11-3-602.  
“Person entitled to enforce.” Code Section 11-3-301.  
“Presentment.” Code Section 11-3-501.  
“Reacquisition.” Code Section 11-3-207.  
“Special indorsement.” Code Section 11-3-205.  
“Teller’s check.” Code Section 11-3-104.  
“Transfer of instrument.” Code Section 11-3-203.  
“Traveler’s check.” Code Section 11-3-104.  
“Value.” Code Section 11-3-303.

(c) The following definitions in other articles apply to this article:

“Bank.” Code Section 11-4-105.  
“Banking day.” Code Section 11-4-104.  
“Clearing house.” Code Section 11-4-104.  
“Collecting bank.” Code Section 11-4-105.  
“Depository bank.” Code Section 11-4-105.  
“Documentary draft.” Code Section 11-4-104.  
“Intermediary bank.” Code Section 11-4-105.  
“Item.” Code Section 11-4-104.  
“Payor bank.” Code Section 11-4-105.  
“Suspends payments.” Code Section 11-4-104.

(d) In addition, Article 1 of this title contains general definitions and principles of construction and interpretation applicable throughout this article. (Code 1981, § 11-3-103, enacted by Ga. L. 1996, p. 1306, § 3.)



## JUDICIAL DECISIONS

The collecting bank is merely an agent of the drawer of a draft. *Wallace v. Harrison*, 166 Ga. App. 461, 304 S.E.2d 487 (1983) (decided under former Code Section 11-3-120).

The 1996 amendments of the UCC definitions of “good faith” and “holder in due course” (O.C.G.A. §§ 11-3-102 and 11-3-103) did not apply retroactively to trans-

actions before their effective date; rather, the definitions in O.C.G.A. §§ 11-2-201 and 11-3-302 (former version) applied. *Choo Choo Tire Serv., Inc v. Union Planters Nat’l Bank*, 231 Ga. App. 346, 498 S.E.2d 799 (1998).

Cited in *Stebbins v. Georgia Power Co.*, 252 Ga. App. 261, 555 S.E.2d 906 (2001).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 11 Am. Jur. 2d, Bills and Notes, §§ 13, 71, 90, 185. 12 Am. Jur 2d, Bills and Notes, §§ 451, 460.

**C.J.S.** — 82 C.J.S., Statutes, § 309.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 3-103.

**ALR.** — Writing on the margin or on the back of a bill or a note at the time of its execution as a part thereof, 13 ALR 251; 155 ALR 218.

**11-3-104. Negotiable instrument.**

(a) Except as provided in subsections (c) and (d) of this Code section, “negotiable instrument” means an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order, if it:

(1) Is payable to bearer or to order at the time it is issued or first comes into possession of a holder;

(2) Is payable on demand or at a definite time; and

(3) Does not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money, but the promise or order may contain:

(i) An undertaking or power to give, maintain, or protect collateral to secure payment;

(ii) An authorization or power to the holder to confess judgment or realize on or dispose of collateral; or

(iii) A waiver of the benefit of any law intended for the advantage or protection of an obligor.

(b) “Instrument” means a negotiable instrument.

(c) An order that meets all of the requirements of subsection (a) of this Code section, except paragraph (1) of subsection (a) of this Code section, and otherwise falls within the definition of “check” in subsection (f) of this Code section is a negotiable instrument and a check.

(d) A promise or order other than a check is not an instrument if, at the time it is issued or first comes into possession of a holder, it contains a conspicuous statement, however expressed, to the effect that the promise or order is not negotiable or is not an instrument governed by this article.

(e) An instrument is a “note” if it is a promise and is a “draft” if it is an order. If an instrument falls within the definition of both “note” and “draft,” a person entitled to enforce the instrument may treat it as either.

(f) “Check” means (i) a draft, other than a documentary draft, payable on demand and drawn on a bank; or (ii) a cashier’s check or teller’s check. An instrument may be a check even though it is described on its face by another term, such as “money order.”

(g) “Cashier’s check” means a draft with respect to which the drawer and drawee are the same bank or branches of the same bank.

(h) “Teller’s check” means a draft drawn by a bank (i) on another bank; or (ii) payable at or through a bank.

(i) “Traveler’s check” means an instrument that (i) is payable on demand; (ii) is drawn on or payable at or through a bank; (iii) is designated by the term “traveler’s check” or by a substantially similar term; and (iv) requires, as a condition to payment, a countersignature by a person whose specimen signature appears on the instrument.

(j) “Certificate of deposit” means an instrument containing an acknowledgment by a bank that a sum of money has been received by the bank and a promise by the bank to repay the sum of money. A certificate of deposit is a note of the bank. (Code 1981, § 11-3-104, enacted by Ga. L. 1996, p. 1306, § 3.)

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 1996, semicolons were substituted for commas near the end of subparagraphs (a)(3)(i) and (a)(3)(ii).

**Law reviews.** — For note, “The Law of Evidence in the Uniform Commercial Code,” see 1 Ga. L. Rev. 44 (1966). For note analyzing consumer protection in retail installment contracts with reference to waiver of defenses by purchaser and the denial of holder in due course status to assignee of

contract, in light of *Geiger Fin. Co. v. Graham*, 123 Ga. App. 771, 182 S.E.2d 521 (1971), see 23 Mercer L. Rev. 673 (1972). For note, “Negotiable Promissory Notes Containing Time and Demand Provisions: The Need for Consistent Interpretation,” see 19 Ga. L. Rev. 717 (1984).

For comment on *Geiger Fin. Co. v. Graham*, 123 Ga. App. 771, 182 S.E.2d 521 (1971), see 8 Ga. St. B.J. 400 (1972).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION  
UNCONDITIONAL PROMISE  
“ORDER” OR “BEARER”  
CHECKS  
NOTES

### General Consideration

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Code Section 11-3-104 are included in the annotations for this section.

**Legislative intent.** — Intent of this section is that a negotiable instrument carry nothing but simple promise to pay, with certain limited exceptions, and provision in a writing granting to holder powers to waive particular defaults or remedies without waiving others and to require its written consent for any transfer of buyer's obligations, while keeping its own freely transferrable, is not among these exceptions. *Geiger Fin. Co. v. Graham*, 123 Ga. App. 771, 182 S.E.2d 521 (1971) (decided under former Code Section 11-3-104).

**A money order** is a negotiable instrument. *Kline v. Atlanta Gas Light Co.*, 246 Ga. App. 172, 538 S.E.2d 93 (2000).

**Negotiability demands that instrument bear a definite sum** in order that subsequent holders can take and transfer the instrument without plumbing intricacies of individual relationships or payback schemes, so that the instrument is functional equivalent of currency. *Cobb Bank & Trust Co. v. American Mfrs. Mut. Ins. Co.*, 459 F. Supp. 328 (N.D. Ga. 1978), *aff'd*, 624 F.2d 722 (5th Cir. 1980) (decided under former Code Section 11-3-104).

**Recitation of consideration in promissory note is not essential to recovery.** *Riddick v. Evans*, 155 Ga. App. 868, 274 S.E.2d 40 (1980) (decided under former Code Section 11-3-104).

**Parol evidence** may not be used to impose conditions which are not apparent from the face of a note. *Bentley v. National Bank*, 175 Ga. App. 732, 334 S.E.2d 331 (1985) (decided under former Code Section 11-3-104).

**Enforceability of nonnegotiable note as between maker and payee.** — In action by payee against maker of note, it is immaterial that conditions were placed on promise to pay sum certain in event of subsequent discovery of errors in accounting, thereby rendering sum uncertain and invalidating it as negotiable paper within requirements of the former provisions of this section, and it shall be enforced in accordance with its terms as between parties to it. *Daniels v. Allen*, 118 Ga. App. 722, 165 S.E.2d 449

(1968) (decided under former Code Section 11-3-106).

**Enforceability of provision for payment of attorney's fees.** — Where note provides for payment of attorney's fees and proper notice of intention to sue is given as required by O.C.G.A. § 13-1-11, they are recoverable. *Harrison v. Harrison*, 208 Ga. 70, 65 S.E.2d 173 (1951) (decided under former Code 1933, § 14-202) (decided under former Code Section 11-3-106).

**Cited in** *Ameritrust Co. v. White*, 73 F.3d 1553 (11th Cir. 1996).

### Unconditional Promise

**Application to guaranties.** — Article 3 does not govern guaranties which are not ancillary to notes or other actionable negotiable instruments; guaranties alone are not negotiable instruments since they are conditional promises to pay a sum certain. *Fidelity Nat'l Bank v. Reid*, 180 Ga. App. 428, 348 S.E.2d 913 (1986); *Panasonic Indus. Co. v. Hall*, 197 Ga. App. 860, 399 S.E.2d 733 (1990) (decided under former Code Section 11-3-104).

**Instrument with no unconditional promise to pay sum at determinable future date.** — Where the instrument at issue was not a negotiable note and was expressly never to be enforced against the petitioner individually and personally, the instrument was not a promissory note or any other obligation of insured since it did not contain unconditional promise to pay anything at any determinable future date. *American Cas. Co. v. Griffith*, 107 Ga. App. 224, 129 S.E.2d 549 (1963) (decided under former Code Section 11-3-104).

**Writing containing terms not listed in this section or O.C.G.A. § 11-3-112.** — If writing contains any promise, order, obligation or power not listed in this section, or O.C.G.A. § 11-3-112, it is not a negotiable instrument and the concept of holder in due course does not apply. *Geiger Fin. Co. v. Graham*, 123 Ga. App. 771, 182 S.E.2d 521 (1971) (decided under former Code Section 11-3-104).

**Bond carrying implied condition that underlying note first be funded** is not negotiable under subsection (1)(b) of this section. *Cobb Bank & Trust Co. v. American Mfrs. Mut. Ins. Co.*, 459 F. Supp. 328 (N.D. Ga. 1978), *aff'd*, 624 F.2d 722 (5th Cir. 1980)



(decided under former Code Section 11-3-104).

### **“Order” or “Bearer”**

**Absence of language making writing payable to order or bearer.** — Absent language making writing payable to order or bearer, writing is not negotiable instrument. *Hall v. Westmoreland*, 119 Ga. App. 809, 182 S.E.2d 539 (1971) (decided under former Code Section 11-3-104).

Document lacking words of negotiability “order” or “bearer” may not be negotiable instrument in determinations of transfer rights and holder status. *Cobb Bank & Trust Co. v. American Mfrs. Mut. Ins. Co.*, 459 F. Supp. 328 (N.D. Ga. 1978), *aff’d*, 624 F.2d 722 (5th Cir. 1980) (decided under former Code Section 11-3-104).

### **Checks**

**Check defined.** — A check, executed and delivered, is a contract in writing by which drawer contracts with payee that bank will pay to payee amount designated on presentation. *Bailey v. Polote*, 152 Ga. App. 255, 262 S.E.2d 551 (1979) (decided under former Code Section 11-3-104).

A check executed and delivered is a contract in writing by which the drawer contracts with the payee that the bank will pay to the latter on the drawer’s order the amount designated on presentation. *Mason v. Blayton*, 119 Ga. App. 203, 166 S.E.2d 601 (1969) (decided under former Code Section 11-3-104).

**Check backed by lawful money.** — Inherent in the definition, a check is a promise to pay which can be taken by the bearer or indorsee and “cashed” or converted on demand into federal reserve notes equalling the value stated on the check. *Strickland v. A Mtg. Co.*, 179 Bankr. 979 (Bankr. N.D. Ga. 1995).

**Place of performance.** — A check is a written contract to be performed at place where banking house or place of business of person on whom it is drawn is located. *Mason v. Blayton*, 119 Ga. App. 203, 166 S.E.2d 601 (1969) (decided under former Code Section 11-3-104).

**Checks and demand notes.** — There is little difference between a check and a demand note. Both are acknowledgments of

indebtedness and unconditional promises to pay. *Mason v. Blayton*, 119 Ga. App. 203, 166 S.E.2d 601 (1969) (decided under former Code Section 11-3-104).

**Acceptance of check must be in writing.** — Acceptance of check by means of telephone conversation cannot be effective because law requires that acceptance be in writing. *Georgia Bank & Trust Co. v. Hadarits*, 111 Ga. App. 195, 141 S.E.2d 172, *rev’d* on other grounds, 221 Ga. 125, 143 S.E.2d 627 (1965) (decided under former Code Section 11-3-104).

**A check imports a consideration.** *Mason v. Blayton*, 119 Ga. App. 203, 166 S.E.2d 601 (1969) (decided under former Code Section 11-3-104).

**A check is not a financial statement;** it is an evidence of debt. *A.G. Edwards & Sons v. Paulk*, 25 Bankr. 913 (Bankr. M.D. Ga. 1982); *Doug Howle’s Paces Ferry Dodge, Inc. v. Ethridge*, 80 Bankr. 581 (Bankr. M.D. Ga. 1987); *Georgetown Village Apts. v. Fontana*, 92 Bankr. 559 (Bankr. M.D. Ga. 1988) (decided under former Code Section 11-3-104).

**It makes no difference if payee fills in amount due.** — A defendant could be found guilty of the issuance of bad checks despite defendant’s contention that the checks were not “checks” because they did not contain a “sum certain” until the payee filled in the amount due at the defendant’s request. *Hutchens v. State*, 174 Ga. App. 507, 330 S.E.2d 436 (1985) (decided under former Code Section 11-3-104).

**Absence of drawer’s signature on payroll check.** — Fact that instrument purporting to be payroll check was not signed by drawer does not prevent it from being a check under this section, since it had most attributes of a check and was used in transaction as a check would ordinarily be used. *United States v. Webb*, 443 F.2d 308 (5th Cir. 1971) (decided under former Code Section 11-3-104).

**Conditional sale contract.** — Although theoretically possible, a retail installment contract, or conditional sale contract (or a writing of this nature by whatever name) is not usually a note as defined in this section, but where there is any doubt, presumption is against negotiability. *Geiger Fin. Co. v. Graham*, 123 Ga. App. 771, 182 S.E.2d 521 (1971) (decided under former Code Section 11-3-104).

## Notes

**Enforceability of nonnegotiable note as between maker and payee.** — In action by payee against maker of note, it is immaterial that conditions were placed on promise to pay sum certain in event of subsequent discovery of errors in accounting, thereby

rendering the sum uncertain and invalidating it as negotiable paper within requirements of this section, and it shall be enforced in accordance with its terms as between parties to it. *Daniels v. Allen*, 118 Ga. App. 722, 165 S.E.2d 449 (1968) (decided under former Code Section 11-3-104).

## OPINIONS OF THE ATTORNEY GENERAL

**Money order.** — Since essence of commercial paper is negotiability, money order drawn as negotiable instrument is commercial paper. 1962 Op. Att'y Gen. p. 340.

**Investing school funds in certificates of deposit issued by institutions other than those covered by O.C.G.A. § 20-2-411.** — The phrase "certificates of deposit" as used in O.C.G.A. § 20-2-411 applies to certificates

of deposit issued by commercial banks and by federal or state chartered savings and loan associations and investment of school funds in "certificates of deposit" issued by institutions other than those named would present a question of whether such investment was prudent and in exercise of sufficient care and diligence. 1969 Op. Att'y Gen. No. 69-306.

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 11 Am. Jur. 2d, Banks and Financial Institutions, §§ 653 et seq., 888. 11 Am. Jur. 2d, Bills and Notes, §§ 21 et seq., 44 et seq., 52 et seq., 88, 98, 128 et seq., 217. 17A Am. Jur. 2d, Contracts, §§ 300-302. 50 Am. Jur. 2d, Letters of Credit and Credit Cards, §§ 3, 5, 10, 19. 68A Am. Jur. 2d, Secured Transactions, §§ 14, 55. 69 Am. Jur. 2d, Securities Regulation — State, § 76.

**C.J.S.** — 10 C.J.S., Bills and Notes, §§ 127, 135 et seq.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 3-104.

**ALR.** — Bills and notes: negotiability as affected by provision in relation to interest or discount, 2 ALR 139; 51 ALR 294; 58 ALR 1281.

Effect of verbal order with respect to payment of check or transfer of bank deposit, 2 ALR 175.

Title to commercial paper deposited by the customer of a bank to his account, 11 ALR 1043; 16 ALR 1084; 42 ALR 492; 68 ALR 725; 99 ALR 486.

Writing on the margin or on the back of a bill or a note at the time of its execution as a part thereof, 13 ALR 251; 155 ALR 218.

Reference to extrinsic agreements as affecting negotiability of bill or note, 14 ALR 1126; 33 ALR 1173; 37 ALR 655; 61 ALR 815; 104 ALR 1378.

Negotiability of instrument as affected by

incompleteness of the attempt to fix due date, 19 ALR 508.

Absence of revenue stamp as affecting bona fides of purchaser of bill or note, 21 ALR 1125.

Private corporate bonds as negotiable within the meaning of Negotiable Instruments Act, 31 ALR 1390.

Acceleration provision as affecting negotiability, 34 ALR 872; 72 ALR 268.

Negotiability of instrument payable in "current funds," "currency," etc., 36 ALR 1358.

Negotiability of municipal bonds as affected by reference to fund from which they are to be paid, 42 ALR 1027.

Right of holder to sue bank in respect of deposit made, for payment of existing obligation other than check, 50 ALR 1012.

Passing of title to goods by acceptance of draft for purchase price, with warehouse receipt attached, or by transfer of draft with receipt, 55 ALR 1116.

Assignability of nonnegotiable certificate of deposit, 59 ALR 1478.

Necessity that checks be signed by all persons in whose name the deposit stands, 61 ALR 967.

Validity and effect of provision in contract that it shall be regarded as a negotiable instrument, 79 ALR 33.

Liability of endorser of non-negotiable commercial paper, 79 ALR 719.

Negotiability as affected by reservation of obligor's right to anticipate time of payments, 81 ALR 396.

Bank deposit for purpose of meeting certain checks or classes of checks, 86 ALR 375.

Right to insist upon production and surrender of non-negotiable instrument, or upon indemnity bond, as condition of payment, 98 ALR 1489.

Negotiability of bill or note as affected by provision authorizing confession of judgment, 117 ALR 673.

Provision of negotiable instruments law declaring conclusive presumption in favor of holder in due course of valid delivery of negotiable paper as applicable where instrument never had inception by delivery, 123 ALR 1360.

Validity, nature, and enforceability of an instrument which states that a specified sum is owed, but includes no express promise to pay it, 127 ALR 650.

Negotiability of paper as affected by provisions therein relating to future contingent fund or security for its payment, 134 ALR 946.

Construction and application of provision of Uniform Negotiable Instruments Act that waiver embodied in instrument itself is binding upon all parties, 140 ALR 1253.

Conflict between provisions of note and of conditional sale instrument in connection with which note is given, 143 ALR 591.

Recovery back of money paid for bank draft, 153 ALR 393.

Validity of provision in promissory note or other evidence of indebtedness for payment, as attorneys' fees, expenses, and costs of collection, of specified percentage of note, 17 ALR2d 288.

Necessity of introducing evidence to show reasonableness of attorney's fees where promissory note provides for such fees, 18 ALR3d 733.

What constitutes unconditional promise to pay under Uniform Commercial Code § 3-104(1)(b), 88 ALR3d 1100.

Effect on negotiability of instrument, under terms of UCC § 3-104(1), of statements expressly limiting negotiability or transferability, 58 ALR4th 632.

What constitutes undertaking or instruction to do any act in addition to payment of money as limitation on definition of negotiable instrument under UCC § 3-104, 75 ALR5th 559.

What constitutes "fixed amount of money" for purposes of § 3-104 of Uniform Commercial Code providing that negotiable instrument must contain unconditional promise to pay fixed amount of money, 76 ALR5th 289.

When is instrument "payable to bearer or to order" as required to constitute negotiable instrument under Article 3 of the Uniform Commercial Code §§ 3-104(a)(1) and 3-109, 77 ALR5th 523.

### 11-3-105. Issue of instrument.

(a) "Issue" means the first delivery of an instrument by the maker or drawer, whether to a holder or nonholder, for the purpose of giving rights on the instrument to any person.

(b) An unissued instrument, or an unissued incomplete instrument that is completed, is binding on the maker or drawer, but nonissuance is a defense. An instrument that is conditionally issued or is issued for a special purpose is binding on the maker or drawer, but failure of the condition or special purpose to be fulfilled is a defense.

(c) "Issuer" applies to issued and unissued instruments and means a maker or drawer of an instrument. (Code 1981, § 11-3-105, enacted by Ga. L. 1996, p. 1306, § 3.)



## JUDICIAL DECISIONS

**Enforceability of note.** — Issuance - or delivery - of a note is a prerequisite to its enforceability; thus, where note was never delivered, it cannot be enforced. *Jones v. Phillips*, 237 Ga. App. 24, 513 S.E.2d 241 (1999).

## RESEARCH REFERENCES

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 3-105.

**11-3-106. Unconditional promise or order.**

(a) Except as provided in this Code section, for the purposes of subsection (a) of Code Section 11-3-104, a promise or order is unconditional unless it states (i) an express condition to payment; (ii) that the promise or order is subject to or governed by another writing; or (iii) that rights or obligations with respect to the promise or order are stated in another writing. A reference to another writing does not of itself make the promise or order conditional.

(b) A promise or order is not made conditional (i) by a reference to another writing for a statement of rights with respect to collateral, prepayment, or acceleration; or (ii) because payment is limited to resort to a particular fund or source.

(c) If a promise or order requires, as a condition to payment, a countersignature by a person whose specimen signature appears on the promise or order, the condition does not make the promise or order conditional for the purposes of subsection (a) of Code Section 11-3-104. If the person whose specimen signature appears on an instrument fails to countersign the instrument, the failure to countersign is a defense to the obligation of the issuer, but the failure does not prevent a transferee of the instrument from becoming a holder of the instrument.

(d) If a promise or order at the time it is issued or first comes into possession of a holder contains a statement, required by applicable statutory or administrative law, to the effect that the rights of a holder or transferee are subject to claims or defenses that the issuer could assert against the original payee, the promise or order is not thereby made conditional for the purposes of subsection (a) of Code Section 11-3-104; but, if the promise or order is an instrument, there cannot be a holder in due course of the instrument. (Code 1981, § 11-3-106, enacted by Ga. L. 1996, p. 1306, § 3.)

## JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Code Section 11-3-105 are included in the annotations for this section.

**Enforceability of nonnegotiable note as between maker and payee.** — In action by payee against maker of note, it is immaterial that conditions were placed on promise to pay sum certain in event of subsequent discovery of errors in accounting, thereby rendering sum uncertain and invalidating instrument as negotiable paper within requirements of this section, and it shall be enforced in accordance with its terms as

between parties to it. *Daniels v. Allen*, 118 Ga. App. 722, 165 S.E.2d 449 (1968) (decided under former Code Section 11-3-105).

**Admissibility of parole evidence.** — Parol evidence is generally inadmissible to alter unconditional nature of promissory note, absent fraud, accident, or mistake. *Brice v. Northwest Ga. Bank*, 186 Ga. App. 871, 368 S.E.2d 816 (1988) (decided under former Code Section 11-3-118).

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 11 Am. Jur. 2d, Bills and Notes, §§ 52, 92, 95, 131. 64 Am. Jur. 2d, Public Securities and Obligations, §§ 17 et seq., 32.

**C.J.S.** — 10 C.J.S., Bills and Notes, § 138 et seq.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 3-106.

**ALR.** — Bills and notes: negotiability as affected by provision in relation to interest or discount, 51 ALR 294; 58 ALR 1281.

Effect of words “without offset,” “without defalcation,” or the like, in negotiable paper, 79 ALR 126.

Negotiability under Uniform Negotiable

Instruments Act as affected by provision for attorney’s fee, 91 ALR 693.

Negotiability of paper as affected by provisions therein relating to future contingent fund or security for its payment, 134 ALR 946.

Validity of provision in promissory note or other evidence of indebtedness for payment, as attorneys’ fees, expenses, and costs of collection, of specified percentage of note, 17 ALR2d 288.

What constitutes unconditional promise to pay under Uniform Commercial Code § 3-104(1)(b), 88 ALR3d 1100.

### 11-3-107. Instrument payable in foreign money.

Unless the instrument otherwise provides, an instrument that states the amount payable in foreign money may be paid in the foreign money or in an equivalent amount in dollars calculated by using the current bank offered spot rate at the place of payment for the purchase of dollars on the day on which the instrument is paid. (Code 1981, § 11-3-107, enacted by Ga. L. 1996, p. 1306, § 3.)

#### RESEARCH REFERENCES

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 3-107.

### 11-3-108. Payable on demand or at definite time.

(a) A promise or order is “payable on demand” if it (i) states that it is payable on demand or at sight, or otherwise indicates that it is payable at the will of the holder; or (ii) does not state any time of payment.

(b) A promise or order is “payable at a definite time” if it is payable upon the elapse of a definite period of time after sight or acceptance or at a fixed date or dates or at a time or times readily ascertainable at the time

the promise or order is issued, subject to rights of (i) prepayment; (ii) acceleration; (iii) extension at the option of the holder; or (iv) extension to a further definite time at the option of the maker or acceptor or automatically upon or after a specified act or event.

(c) If an instrument payable, at a fixed date, is also payable upon demand made before the fixed date, the instrument is payable on demand until the fixed date and, if demand for payment is not made before that date, becomes payable at a definite time on the fixed date. (Code 1981, § 11-3-108, enacted by Ga. L. 1996, p. 1306, § 3.)

**Law reviews.** — For note, “Negotiable Promissory Notes Containing Time and Demand Provisions: The Need for Consistent

Interpretation,” see 19 Ga. L. Rev. 717 (1984).

### JUDICIAL DECISIONS

**Editor’s notes.** — In light of the similarity of the provisions, decisions under former Code 1882, § 2791, former Code 1933, § 14-207, and former Code Section 11-3-108 are included in the annotations for this section.

**Inapplicability to original presentment of documentary drafts.** — It is O.C.G.A. § 11-4-302(b), not this section, which governs as to the “time allowed” the bank for responding to the original presentment of the documentary drafts to it for payment. Accordingly, an otherwise untimely failure on the part of the bank to accept, pay or return the documentary drafts pursuant to their original specification merely as “sight drafts” may be actionable as a failure to comply with O.C.G.A. § 11-4-302(b), but could not constitute an intentional “refusal” to comply with a demand for payment or return so as to be actionable as a conversion under O.C.G.A. § 11-3-419. *Bank S. v. Roswell Jeep Eagle, Inc.*, 204 Ga. App. 432, 419 S.E.2d 522 (1992) (decided under former Code Section 11-3-108).

**No independent demand for payment required.** — Suit may be brought on demand paper without making any independent demand. *Fulton Nat’l Bank v. Willis Denney Ford, Inc.*, 154 Ga. App. 846, 269 S.E.2d 916 (1980); *Stone v. First Nat’l Bank*, 159 Ga. App. 812, 285 S.E.2d 207 (1981) (decided under former Code Section 11-3-108).

Note payable on demand is due immediately after delivery, without further notice or demand. *Fulton Nat’l Bank v. Willis Denney*

*Ford, Inc.*, 154 Ga. App. 846, 269 S.E.2d 916 (1980); *Stone v. First Nat’l Bank*, 159 Ga. App. 812, 285 S.E.2d 207 (1981) (decided under former Code Section 11-3-108).

**Enforcement of payment anytime within statute of limitations.** — There is no reason why obligor on “immediately” due and payable instrument should be entitled to contest holder’s decision to enforce payment anytime within statute of limitation as being in bad faith. *Fulton Nat’l Bank v. Willis Denney Ford, Inc.*, 154 Ga. App. 846, 269 S.E.2d 916 (1980) (decided under former Code Section 11-3-108).

Only “duty” under Uniform Commercial Code on holder of demand instrument is to seek enforcement of instrument which is on its face “immediately” due and payable within applicable statute of limitation. *Stone v. First Nat’l Bank*, 159 Ga. App. 812, 285 S.E.2d 207 (1981) (decided under former Code Section 11-3-108).

**When cause of action on demand instrument accrues.** — Cause of action against maker or acceptor accrues in case of demand instrument upon its date or, if no date is stated, on date of issue. *Stone v. First Nat’l Bank*, 159 Ga. App. 812, 285 S.E.2d 207 (1981) (decided under former Code Section 11-3-108).

**When county warrants are payable.** — A county warrant, which is a liquidated demand, even though it does not express any date for payment, is as matter of law payable on demand made five days after date on which it is issued, and will ordinarily bear



interest from and after demand so made. *Marion County v. First Nat'l Bank*, 193 Ga. 263, 18 S.E.2d 475 (1942) (decided under former Code 1933, § 14-207).

**When no time specified for payment of bill**, it is due upon presentment and accep-

ance. *Bedell v. Scarlett*, 75 Ga. 56 (1885) (decided under former Code 1882, § 2791).

**Cited** in *Johnson v. Hodge*, 223 Ga. App. 227, 477 S.E.2d 385 (1996).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 11 Am. Jur. 2d, Bills and Notes, §§ 57, 58, 104 et seq., 124.

**C.J.S.** — 10 C.J.S., Bills and Notes, §§ 14, 134.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 3-108.

**ALR.** — Negotiability of instrument as affected by incompleteness of the attempt to fix due date, 19 ALR 508.

Validity, construction, and application of

clause entitling mortgagee to acceleration of balance due in case of conveyance or transfer of mortgaged property, 69 ALR3d 713; 22 ALR4th 1266; 61 ALR4th 1070.

What transfers justify acceleration under “due-on-sale” clause of real estate mortgage, 22 ALR4th 1266.

Validity and enforceability of due-on-sale real-estate mortgage provisions, 61 ALR4th 1070.

### 11-3-109. Payable to bearer or to order.

(a) A promise or order is payable to bearer if it:

(1) States that it is payable to bearer or to the order of bearer or otherwise indicates that the person in possession of the promise or order is entitled to payment;

(2) Does not state a payee; or

(3) States that it is payable to or to the order of cash or otherwise indicates that it is not payable to an identified person.

(b) A promise or order that is not payable to bearer is payable to order if it is payable to (i) the order of an identified person; or (ii) an identified person or order. A promise or order that is payable to order is payable to the identified person.

(c) An instrument payable to bearer may become payable to an identified person if it is specially indorsed pursuant to subsection (a) of Code Section 11-3-205. An instrument payable to an identified person may become payable to bearer if it is indorsed in blank pursuant to subsection (b) of Code Section 11-3-205. (Code 1981, § 11-3-109, enacted by Ga. L. 1996, p. 1306, § 3.)

### JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Civil Code 1910, § 4273, former Civil Code 1910, § 4273, former Code 1933, § 14-208, and former Code Section 11-3-110, are included in the annotations for this section.

**Payee must be indicated with reasonable certainty.** — Where instrument or note is not payable to bearer but is payable to order, there being no blank left for name of payee, payee must be named or indicated therein with reasonable certainty. *Peretzman v.*

Borochoff, 58 Ga. App. 838, 200 S.E. 331 (1938) (decided under former Code Section 11-3-110).

**Authority to fill blank left for name of payee.** — Where blank is left in bill or note for name of payee, there is an implied authority to holder to fill up instrument and make it in fact what it was designed to be. If made payable in blank, person to whom it is negotiated by maker may fill it up by inserting that person's own name; if made payable to order of person who shall thereafter endorse it, it is negotiable without any alteration, and may be transferred by endorsement. *Peretzman v. Borochoff*, 58 Ga. App. 838, 200 S.E. 331 (1938) (decided under former Code Section 11-3-110).

**Absence of language making writing payable to order or bearer.** — Absent language

making writing payable to order or bearer, writing is not negotiable instrument. *Hall v. Westmoreland, Hall & Bryan*, 123 Ga. App. 809, 182 S.E.2d 539 (1971) (decided under former Code Section 11-3-110).

**Terms "bearer" and "holder" are of same import,** and where either is not employed in an instrument it may be negotiated by delivery. *Pryor v. American Trust & Banking Co.*, 15 Ga. App. 822, 84 S.E. 312 (1915) (decided under former Civil Code 1910 § 4273).

**Absence of language making writing payable to order or bearer.** — Absent language making writing payable to order or bearer, writing is not negotiable instrument. *Hall v. Westmoreland, Hall & Bryan*, 123 Ga. App. 809, 182 S.E.2d 539 (1971).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 11 Am. Jur. 2d, Bills and Notes, §§ 75 et seq., 122, 203, 212.

**C.J.S.** — 10 C.J.S., Bills and Notes, §§ 13, 128.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 3-109.

**ALR.** — Necessity of express agreement between endorsers to be jointly and not successively liable, in order to give a right of contribution as between themselves, 11 ALR 1332; 90 ALR 305.

Waiver of demand and notice as affecting endorsers other than the one above whose name it immediately appears, 21 ALR 1396; 110 ALR 1228.

Presumption from possession of ownership of unendorsed note payable to order on issue between rival claimants, 30 ALR 1492.

Validity and effect of note payable to maker without words of negotiability, 42 ALR 1067; 50 ALR 426.

Instrument payable to "estate" as within rule that an instrument payable to order of

fictitious or nonexistent person is payable to bearer, 60 ALR 610.

Payment to, or endorsement by, indicated beneficiary of check purporting to be payable or endorsed to one person "for another," 61 ALR 272.

When negotiable instruments deemed payable to fictitious or nonexistent persons within statute or rule that makes such paper payable to bearer, 118 ALR 15.

Validity and effect of note payable by its terms to maker or order and not endorsed by maker, 126 ALR 1309.

Liability of bank for diversion to benefit of presenter or third party of proceeds of check drawn to bank's order by drawer not indebted to bank, 69 ALR4th 778.

When is instrument "payable to bearer or to order" as required to constitute negotiable instrument under Article 3 of the Uniform Commercial Code §§ 3-104(a)(1) and 3-109, 77 ALR5th 523.

## 11-3-110. Identification of person to whom instrument is payable.

(a) The person to whom an instrument is initially payable is determined by the intent of the person, whether or not authorized, signing as, or in the name or behalf of, the issuer of the instrument. The instrument is payable to the person intended by the signer even if that person is identified in the

instrument by a name or other identification that is not that of the intended person. If more than one person signs in the name or behalf of the issuer of an instrument and all the signers do not intend the same person as payee, the instrument is payable to any person intended by one or more of the signers.

(b) If the signature of the issuer of an instrument is made by automated means, such as a check-writing machine, the payee of the instrument is determined by the intent of the person who supplied the name or identification of the payee, whether or not authorized to do so.

(c) A person to whom an instrument is payable may be identified in any way, including by name, identifying number, office, or account number. For the purpose of determining the holder of an instrument, the following rules apply:

(1) If an instrument is payable to an account and the account is identified only by number, the instrument is payable to the person to whom the account is payable. If an instrument is payable to an account identified by number and by the name of a person, the instrument is payable to the named person, whether or not that person is the owner of the account identified by number.

(2) If an instrument is payable to:

(i) A trust, an estate, or a person described as trustee or representative of a trust or estate, the instrument is payable to the trustee, the representative, or a successor of either, whether or not the beneficiary or estate is also named;

(ii) A person described as agent or similar representative of a named or identified person, the instrument is payable to the represented person, the representative, or a successor of the representative;

(iii) A fund or organization that is not a legal entity, the instrument is payable to a representative of the members of the fund or organization; or

(iv) An office or to a person described as holding an office, the instrument is payable to the named person, the incumbent of the office, or a successor to the incumbent.

(d) If an instrument is payable to two or more persons alternatively, it is payable to any of them and may be negotiated, discharged, or enforced by any or all of them in possession of the instrument. If an instrument is payable to two or more persons not alternatively, it is payable to all of them and may be negotiated, discharged, or enforced only by all of them. If an instrument payable to two or more persons is ambiguous as to whether it is payable to the persons alternatively, the instrument is payable to the persons alternatively. (Code 1981, § 11-3-110, enacted by Ga. L. 1996, p. 1306, § 3.)



**Law reviews.** — For comment on *Fulton Nat'l Bank v. Didschuneit*, 92 Ga. App. 527, 88 S.E.2d 853 (1955), holding defendant bank liable for cashing check payable to joint payees on the authorized signature of only one of the payees, see 18 Ga. B.J. 346

(1956). For comment on *Trust Co. v. Refrigeration Supplies, Inc.*, 241 Ga. 406, 246 S.E.2d 282 (1978), discussing liability of collecting and payor banks for payment of check over missing endorsement of copayee, see 13 Ga. L. Rev. 677 (1979).

## JUDICIAL DECISIONS

### ANALYSIS

#### GENERAL CONSIDERATION

##### ALTERNATE PAYEES

##### JOINT PAYEES

#### General Consideration

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Code 1933, §§ 14-403 and 14-412 and former Code Section 11-3-116 are included in the annotations for this section.

**Purpose of former statute regarding scope of endorsement.** — Purpose of former Code 1933, § 14-403, which required endorsement of the entire instrument or the unpaid residue, was to prevent payee or payees from varying or enlarging contract initially made by maker of instrument. When a maker executed a negotiable instrument payable to one payee or more, jointly, the maker subjected to one lawsuit, and if the payee in instrument transferred it to two or more endorsees severally, such endorsement subjected maker to two or more suits to which the maker had not been liable at time executed instrument. *Hodson v. Scoggins*, 102 Ga. App. 44, 115 S.E.2d 715 (1960) (decided under former Code 1933, § 14-403).

**Possession as evidence of title.** — Possession of a negotiable instrument is presumptive evidence of title, but it is not conclusive. One in possession of personal property is presumed to be the owner until the contrary appears, and the burden of rebutting the presumption is upon the party claiming adversely to the one in possession. *Hattaway v. Keefe*, 191 Ga. App. 315, 381 S.E.2d 569 (1989) (decided under former Code Section 11-3-116).

**Ownership between copayees.** — This Code section does not control ownership between copayees. *Hattaway v. Keefe*, 191 Ga. App. 315, 381 S.E.2d 569 (1989) (decided under former Code Section 11-3-116).

**Enforcement by principal or agent in own name.** — Principal or agent may enforce payment as holder of instrument in own name. *Bennett v. Cannon*, 114 Ga. App. 479, 151 S.E.2d 828 (1966) (decided under former Code Section 11-3-117).

#### Alternate Payees

**One endorsement where payees' names separated by slash.** — Bank's payment of checks with only one endorsement is not only proper but was required where the two designated payees' names are separated by a virgule. *Ryland Group, Inc. v. Gwinnett County Bank*, 151 Ga. App. 148, 259 S.E.2d 152 (1979) (decided under former Code Section 11-3-116).

#### Joint Payees

**Endorsement by all payees.** — Instrument payable to joint payees must be endorsed by all of them. *Insurance Co. of N. Am. v. Atlas Supply Co.*, 121 Ga. App. 1, 172 S.E.2d 632 (1970) (decided under former Code Section 11-3-116).

Payment of a check payable to order of two or more payees without endorsement of a joint payee is exercise of dominion and control over check inconsistent with nonsigning payee's rights amounting to conversion. Situation is analogous to payment of check on forged endorsement, which former Code section § 11-3-419(1)(c) acknowledges to be conversion. *Trust Co. v. Refrigeration Supplies, Inc.*, 241 Ga. 406, 246 S.E.2d 282 (1978) (decided under former Code Section 11-3-116).

**Cashing bank's liability for failure to obtain copayee's endorsement.** — Cashing bank is liable in damages to copayee for its

failure to obtain copayee's endorsement on checks involved. *Insurance Co. of N. Am. v. Atlas Supply Co.*, 121 Ga. App. 1, 172 S.E.2d 632 (1970) (decided under former Code Section 11-3-116).

Damaged payee has cause of action against cashing bank for damages sustained where latter fails to obtain endorsements of all copayees on check. *Insurance Co. of N. Am. v. Atlas Supply Co.*, 121 Ga. App. 1, 172 S.E.2d 632 (1970) (decided under former Code Section 11-3-116).

**Bank not holder of instrument lacking joint payee's endorsement.** — A bank never became a holder in due course where a check made payable jointly to the bank's customer and a third party was never en-

dorsed by the third party before deposit in the bank. *Citizens & S. Nat'l Bank v. Sun Belt Elec. Constructors, Inc.*, 64 Bankr. 377 (Bankr. N.D. Ga. 1986) (decided under former Code Section 11-3-116).

**Where payee's interest in note is specified.** — Where instrument is payable to order of three payees and specifically states that interest of third payee is to be \$1,000.00, endorsee of such third payee may maintain action for interest in the instrument without endorsement of other two payees and without joining them as parties. *Hodson v. Scoggins*, 102 Ga. App. 44, 115 S.E.2d 715 (1960) (decided under former Code 1933, § 14-412).

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 11 Am. Jur. 2d, Bills and Notes, §§ 79, 205, 391 et seq. 11 Am. Jur. 2d, Banks and Financial Institutions, § 918. 12 Am. Jur. 2d, Bills and Notes, §§ 586, 646.

**C.J.S.** — 10 C.J.S., Bills and Notes, §§ 13, 128.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 3-110.

**ALR.** — Instruments for payment of money naming in alternative two or more payees, 171 ALR 522.

Bank's liability to nonsigning payee for payment of check drawn to joint payees without obtaining endorsement by both, 47 ALR3d 537.

### 11-3-111. Place of payment.

Except as otherwise provided for items in Article 4 of this title, an instrument is payable at the place of payment stated in the instrument. If no place of payment is stated, an instrument is payable at the address of the drawee or maker stated in the instrument. If no address is stated, the place of payment is the place of business of the drawee or maker. If a drawee or maker has more than one place of business, the place of payment is any place of business of the drawee or maker chosen by the person entitled to enforce the instrument. If the drawee or maker has no place of business, the place of payment is the residence of the drawee or maker. (Code 1981, § 11-3-111, enacted by Ga. L. 1996, p. 1306, § 3.)

#### RESEARCH REFERENCES

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 3-111.

### 11-3-112. Interest.

(a) Unless otherwise provided in the instrument (i) an instrument is not

payable with interest; and (ii) interest on an interest-bearing instrument is payable from the date of the instrument.

(b) Interest may be stated in an instrument as a fixed or variable amount of money or it may be expressed as a fixed or variable rate or rates. The amount or rate of interest may be stated or described in the instrument in any manner and may require reference to information not contained in the instrument. If an instrument provides for interest, but the amount of interest payable cannot be ascertained from the description, interest is payable at the judgment rate in effect at the place of payment of the instrument and at the time interest first accrues. (Code 1981, § 11-3-112, enacted by Ga. L. 1996, p. 1306, § 3.)

JUDICIAL DECISIONS

**Accrual of interest.** — Even though notes did not specifically provide that interest would begin to accrue on the date of the note, such was the construction of the notes under former § 11-3-118(d), as that section applied to these notes. *Talmadge v. Respass*, 224 Ga. App. 768, 482 S.E.2d 709 (1997).

RESEARCH REFERENCES

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 3-112.

11-3-113. Date of instrument.

(a) An instrument may be antedated or postdated. The date stated determines the time of payment if the instrument is payable at a fixed period after date. Except as provided in subsection (c) of Code Section 11-4-401, an instrument payable on demand is not payable before the date of the instrument.

(b) If an instrument is undated, its date is the date of its issue or, in the case of an unissued instrument, the date it first comes into possession of a holder. (Code 1981, § 11-3-113, enacted by Ga. L. 1996, p. 1306, § 3.)

**Law reviews.** — For note, “The Law of Evidence in the Uniform Commercial Code,” see 1 Ga. L. Rev. 44 (1966). For article discussing parol evidence in the law of commercial paper, see 13 Ga. L. Rev. 53 (1978).

JUDICIAL DECISIONS

**Editor’s notes.** — In light of the similarity of the provisions, decisions under former Code Section 11-3-114, are included in the annotations for this section.

**Presumption that date on an instrument is correct is not conclusive,** and may be overcome by parol evidence that it was in fact made on another date. *Pazol v. Citizens Nat’l Bank*, 110 Ga. App. 319, 138 S.E.2d 442 (1964) (decided under former Code Section 11-3-114).

**Check bearing date more than one year before transfer.** — Regarding requirement of former subsection (3) of this section, fact that copy of a check attached as exhibit to petition bears a date more than one year



prior to time instrument was alleged to have been transferred to plaintiff bank does not subject petition to general demurrer (now motion to dismiss) on ground that petition

shows bank had notice the check was overdue. *Pazol v. Citizens Nat'l Bank*, 110 Ga. App. 319, 138 S.E.2d 442 (1964) (decided under former Code Section 11-3-114).

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 11 Am. Jur. 2d, Banks and Financial Institutions, § 898. 11 Am. Jur. 2d, Bills and Notes, §§ 67, 124, 190 et seq.

**C.J.S.** — 10 C.J.S., Bills and Notes, §§ 86 et seq., 127.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 3-113.

**ALR.** — Right of transferee of postdated check, 21 ALR 234.

Time as of which postdated check deemed payment or acknowledgment of original ob-

ligation for purposes of statute of limitations in action on original obligation, 150 ALR 858.

Controlling date in case of check or note for purpose of unlawful preference provisions of bankruptcy or insolvency statute, 7 ALR2d 1015.

Application of “bad check” statute with respect to postdated checks, 52 ALR3d 464.

Extent of bank’s liability for paying postdated check, 31 ALR4th 329.

### 11-3-114. Contradictory terms of instrument.

If an instrument contains contradictory terms, typewritten terms prevail over printed terms, handwritten terms prevail over both, and words prevail over numbers. (Code 1981, § 11-3-114, enacted by Ga. L. 1996, p. 1306, § 3.)

#### RESEARCH REFERENCES

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 3-114.

### 11-3-115. Incomplete instrument.

(a) “Incomplete instrument” means a signed writing, whether or not issued by the signer, the contents of which show at the time of signing that it is incomplete but that the signer intended it to be completed by the addition of words or numbers.

(b) Subject to subsection (c) of this Code section, if an incomplete instrument is an instrument under Code Section 11-3-104, it may be enforced according to its terms if it is not completed, or according to its terms as augmented by completion. If an incomplete instrument is not an instrument under Code Section 11-3-104, but, after completion, the requirements of Code Section 11-3-104 are met, the instrument may be enforced according to its terms as augmented by completion.

(c) If words or numbers are added to an incomplete instrument without authority of the signer, there is an alteration of the incomplete instrument under Code Section 11-3-407.

(d) The burden of establishing that words or numbers were added to an incomplete instrument without authority of the signer is on the person

asserting the lack of authority. (Code 1981, § 11-3-115, enacted by Ga. L. 1996, p. 1306, § 3.)

**Law reviews.** — For article discussing parol evidence in the law of commercial paper, see 13 Ga. L. Rev. 53 (1978).

## JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Code 1933, § 14-214 and former Code Section 11-3-115 are included in the annotations for this section.

**Enforceability when complete.** — A note delivered and signed but incomplete is enforceable when complete. *Harbage v. Dollar Farm Prods. Co.*, 166 Ga. App. 561, 305 S.E.2d 25 (1983) (decided under former Code Section 11-3-115).

**Relevance of parties' confidential relationship.** — Under theory that contract's completion was unauthorized and fraudulent, warranting cancellation, parties' confidential relationship is irrelevant. *First Am. Bank v. Bishop*, 244 Ga. 317, 260 S.E.2d 49 (1979) (decided under former Code Section 11-3-115).

**Naming payee with reasonable certainty.** — Where instrument or note is not payable to bearer but is payable to order, there being no blank left for name of payee, payee must be named or indicated therein with reasonable certainty. *Peretzman v. Borochoff*, 58 Ga. App. 838, 200 S.E. 331 (1938) (decided under former Code 1933, § 14-214).

**Where blank is left in bill or note for name of payee,** there is an implied authority to holder to fill up instrument and make it in fact what it was designed to be. If made payable in blank, person to whom it is negotiated by maker may fill it up by inserting that person's own name; if made payable to order of person who shall thereafter endorse it, it is negotiable without any alteration, and may be transferred by endorsement. *Peretzman v. Borochoff*, 58 Ga. App. 838, 200 S.E. 331 (1938) (decided under former Code 1933, § 14-214).

Where promissory note not payable to

bearer does not contain name of payee, but has a blank left therefor, if suit be brought on it by person who alleges and proves that it was delivered to bearer by principal maker, and that bearer then was and still is legal owner and bona fide holder thereof, bearer may recover in such suit without filling in blank. *Peretzman v. Borochoff*, 58 Ga. App. 838, 200 S.E. 331 (1938) (decided under former Code 1933, § 14-214).

**Authority regarding blanks.** — Purchaser of blank paper is on inquiry as to authority given regarding blanks. *A.J. Cannon & Co. v. Collier*, 91 Ga. App. 40, 84 S.E.2d 482 (1954) (decided under former Code 1933, § 14-214).

Where payee took check to plaintiff's place of business with amount in blank and filled in blank with plaintiff's knowledge, plaintiff was put in same position plaintiff would have been in had payee transferred the check in blank; in either event, plaintiff would be put on inquiry as to payee's authority relative to amount of the check, and when plaintiff took the check, plaintiff did so at peril. *A.J. Cannon & Co. v. Collier*, 91 Ga. App. 40, 84 S.E.2d 482 (1954) (decided under former Code 1933, § 14-214).

**Insurance company agent accepting note, agreeing to fill in blanks.** — Where it is alleged that incomplete note was delivered and accepted by agent of insurance company who agreed to fill in blanks for next year's premium and otherwise complete the instrument, the note must be treated as though it were so completed, any delay in completing same being chargeable solely to company agent and not to insured. *Reeves v. Progressive Life Ins. Co.*, 85 Ga. App. 576, 69 S.E.2d 882 (1952) (decided under former Code 1933, § 14-214).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 11 Am. Jur. 2d, Bills and Notes, §§ 57, 58, 99, 112 et seq.; 12 Am. Jur. 2d, Bills and Notes, §§ 563, 664, 676, 677.

**C.J.S.** — 10 C.J.S., Bills and Notes, §§ 32, 127.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 3-115.

**ALR.** — Effect of Negotiable Instruments Act on statute invalidating instrument given for gambling consideration, 8 ALR 314; 11 ALR 211; 37 ALR 698; 46 ALR 959.

Reference to extrinsic agreements as affecting negotiability of bill or note, 14 ALR 1126; 33 ALR 1173; 37 ALR 655; 61 ALR 815; 104 ALR 1378.

Negotiability of instrument as affected by incompleteness of the attempt to fix due date, 19 ALR 508.

Acceleration provision as affecting negotiability, 34 ALR 872; 72 ALR 268.

Validity and effect of note payable to maker without words of negotiability, 42 ALR 1067; 50 ALR 426.

Negotiability of note as affected by provision therein, or in mortgage securing the same for payment of taxes, assessments, or insurance, 45 ALR 1074.

Bills and notes: negotiability as affected by provision in relation to interest or discount, 58 ALR 1281.

Reference to extrinsic agreement as affecting negotiability of bill or note, 61 ALR 815; 104 ALR 1378.

Effect of payee of bill or note, executed in blank as to amount, filling it in for an amount in excess of that authorized, 75 ALR 1389.

Negotiability under Uniform Negotiable Instruments Act as affected by provision for attorney's fee, 91 ALR 693.

Negotiability as affected by provisions of instrument in relation to collateral other than mortgage, 102 ALR 1095.

Reference to extrinsic agreement as affecting negotiability of bill, note, or trade acceptance, 104 ALR 1378.

Negotiability of bill or note as affected by provision authorizing confession of judgment, 117 ALR 673.

Validity and effect of note payable by its terms to maker or order and not endorsed by maker, 126 ALR 1309.

Negotiability of paper as affected by provisions therein relating to future contingent fund or security for its payment, 134 ALR 946.

Rights of one who acquires lost or stolen traveler's checks, 42 ALR3d 846.

### 11-3-116. Joint and several liability; contribution.

(a) Except as otherwise provided in the instrument, two or more persons who have the same liability on an instrument as makers, drawers, acceptors, indorsers who indorse as joint payees, or anomalous indorsers are jointly and severally liable in the capacity in which they sign.

(b) Except as provided in subsection (e) of Code Section 11-3-419 or by agreement of the affected parties, a party having joint and several liability who pays the instrument is entitled to receive from any party having the same joint and several liability contribution in accordance with applicable law.

(c) Discharge of one party having joint and several liability by a person entitled to enforce the instrument does not affect the right under subsection (b) of this Code section of a party having the same joint and several liability to receive contribution from the party discharged. (Code 1981, § 11-3-116, enacted by Ga. L. 1996, p. 1306, § 3.)



**Law reviews.** — Wills, Trusts & Administration of Estates, see 53 Mercer L. Rev. 499 (2001).

## JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Code Section 11-3-118 are included in the annotations for this section.

**Liability of two or more makers to note.** — Under this section, whenever two or more persons sign as maker they are jointly and severally liable unless instrument in its own language specifies obligation differently, e.g., “we jointly promise” or “we promise severally.” *Ghitter v. Edge*, 118 Ga. App. 750, 165 S.E.2d 598 (1968) (decided under former Code Section 11-3-118).

**“We promise to pay.”** — A promissory note signed by two or more persons as makers, and containing the words, “I, we, or either of us promise to pay,” imports joint and several liability of makers. This comports with this section. *Powell v. Mobley*, 166 Ga. 163, 142 S.E. 678 (1928) (decided under former Ga. L. 1924, p. 126, § 17(7)).

Where negotiable instrument contains words “we promise to pay” and is signed by three parties, absent specific provision to contrary, comakers are jointly and severally liable under provisions of this section. *Simpson v. Wages*, 119 Ga. App. 324, 167 S.E.2d 213 (1969) (decided under former Code Section 11-3-118).

Where promissory note is signed by three persons as comakers and contains language “we promise to pay,” liability is joint and several, and an action against two comakers is sustainable even though one comaker is dismissed as a party defendant. *Hubert v.*

*Lawson*, 146 Ga. App. 698, 247 S.E.2d 223 (1978) (decided under former Code Section 11-3-118).

**“Lessees agree to pay.”** — Lessees under a contract which provided that “lessees agree to pay” were jointly bound under the contract. *Brackin Tie, Lumber & Chip Co. v. McLarty Farms, Inc.*, 95 F.R.D. 328 (S.D. Ga. 1982), *aff'd*, 704 F.2d 585 (11th Cir. 1983) (decided under former Code Section 11-3-118).

**Failure to join one of two makers.** — Contention that failure of plaintiff to join one of two makers of note as party defendant, without showing that party defendant was dead or could not be found, was fatal to plaintiff's suit on note, was without merit, since under paragraph (7) of former Code 1933, § 14-217, makers are considered jointly and severally liable unless otherwise specified. *Bullard v. Holman*, 184 Ga. 788, 193 S.E. 586 (1937) (decided under former Code 1933, § 14-217).

**Individual debt of one of parties executing security deed.** — See *Americus Fin. Co. v. Wilson*, 189 Ga. 635, 7 S.E.2d 259 (1940); *Bank of La Fayette v. Giles*, 208 Ga. 674, 69 S.E.2d 78 (1952); *Cordele Banking Co. v. Powers*, 217 Ga. 616, 124 S.E.2d 275 (1962); *Hill v. Perkins*, 218 Ga. 354, 127 S.E.2d 909 (1962).

**Cited in** *Peavy v. Bank South, N.A.*, 222 Ga. App. 501, 474 S.E.2d 690 (1996); *Cagle v. Davis*, 236 Ga. App. 657, 513 S.E.2d 16 (1999).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 11 Am. Jur. 2d, Bills and Notes, §§ 43, 99, 128. 12 Am. Jur. 2d, Bills and Notes, §§ 427 et seq., 439, 447 et seq., 471. 17A Am. Jur. 2d, Contracts, § 395. 20 Am. Jur. 2d, Counterclaim, Recoupment, and Offset, § 83. 45 Am. Jur. 2d, Interest and Usury, §§ 18, 51.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 3-116.

**ALR.** — Effect of death of one of joint payees of bill or note, 57 ALR 600.

Payment to, or endorsement by, indicated beneficiary of check purporting to be payable or endorsed to one person “for another,” 61 ALR 272.

Liability of bank for overpayment of Federal Government check, 96 ALR Fed. 908.

**11-3-117. Other agreements affecting instrument.**

Subject to applicable law regarding exclusion of proof of contemporaneous or previous agreements, the obligation of a party to an instrument to pay the instrument may be modified, supplemented, or nullified by a separate agreement of the obligor and a person entitled to enforce the instrument, if the instrument is issued or the obligation is incurred in reliance on the agreement or as part of the same transaction giving rise to the agreement. To the extent an obligation is modified, supplemented, or nullified by an agreement under this Code section, the agreement is a defense to the obligation. (Code 1981, § 11-3-117, enacted by Ga. L. 1996, p. 1306, § 3; Ga. L. 1997, p. 143, § 11.)

**Law reviews.** — For article discussing parol evidence in the law of commercial paper, see 13 Ga. L. Rev. 53 (1978).

For comment on *Geiger Fin. Co. v. Graham*, 123 Ga. App. 771, 182 S.E.2d 521 (1971), see 8 Ga. St. B.J. 400 (1972).

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 11 Am. Jur. 2d, Bills and Notes, §§ 52, 127, 131 et seq., 300. 12 Am. Jur. 2d, Bills and Notes, § 671. 69 Am. Jur. 2d, Secured Transactions, § 448.

**C.J.S.** — 10 C.J.S., Bills and Notes, §§ 90, 103, et seq.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 3-117.

**ALR.** — Negotiability as affected by provisions for extension of time, 77 ALR 1085.

Waiver of demand and notice as affecting indorsers other than the one above whose name it immediately appears, 110 ALR 1228.

**11-3-118. Statute of limitations.**

(a) Except as provided in subsection (e) of this Code section, an action to enforce the obligation of a party to pay a note payable at a definite time must be commenced within six years after the due date or dates stated in the note or, if a due date is accelerated, within six years after the accelerated due date.

(b) Except as provided in subsection (d) or (e) of this Code section, if demand for payment is made to the maker of a note payable on demand, an action to enforce the obligation of a party to pay the note must be commenced within six years after the demand. If no demand for payment is made to the maker, an action to enforce the note is barred if neither principal nor interest on the note has been paid for a continuous period of ten years.

(c) Except as provided in subsection (d) of this Code section, an action to enforce the obligation of a party to an unaccepted draft to pay the draft must be commenced within three years after dishonor of the draft or ten years after the date of the draft, whichever period expires first.

(d) An action to enforce the obligation of the acceptor of a certified check or the issuer of a teller's check, cashier's check, or traveler's check

must be commenced within three years after demand for payment is made to the acceptor or issuer, as the case may be.

(e) An action to enforce the obligation of a party to a certificate of deposit to pay the instrument must be commenced within six years after demand for payment is made to the maker, but if the instrument states a due date and the maker is not required to pay before that date, the six-year period begins when a demand for payment is in effect and the due date has passed.

(f) An action to enforce the obligation of a party to pay an accepted draft, other than a certified check, must be commenced within (i) six years after the due date or dates stated in the draft or acceptance if the obligation of the acceptor is payable at a definite time; or (ii) six years after the date of the acceptance if the obligation of the acceptor is payable on demand.

(g) Unless governed by other law regarding claims for indemnity or contribution, an action (i) for conversion of an instrument, for money had and received, or like action based on conversion; (ii) for breach of warranty; or (iii) to enforce an obligation, duty, or right arising under this article and not governed by this Code section, must be commenced within three years after the cause of action accrues.

(h) This Code section does not apply to sealed instruments, which are governed by the provisions of Code Section 9-3-23. (Code 1981, § 11-3-118, enacted by Ga. L. 1996, p. 1306, § 3.)

**Law reviews.** — For article on the 1963 amendment to the Georgia Uniform Commercial Code, see 14 Mercer L. Rev. 378 (1963).

For note, “Negotiable Promissory Notes Containing Time and Demand Provisions: The Need for Consistent Interpretation,” see 19 Ga. L. Rev. 717 (1984).

### JUDICIAL DECISIONS

**Editor’s notes.** — In light of the similarity of the provisions, decisions under former Code Section 11-3-122 are included in the annotations for this section.

**Retroactive application barred.** — O.C.G.A. § 11-3-118 did not apply retroactively to extend the limitation period in an action on a demand note brought before the current provision went into effect. *Johnson v. Hodge*, 223 Ga. App. 227, 477 S.E.2d 385 (1996).

Where an action on demand notes was barred under former § 11-3-122(1)(b), O.C.G.A. § 11-3-118 did not apply retroactively to revive the previously time-barred claim. *McNeal Constr. Co. v. Wilson*, 271 Ga. 540, 522 S.E.2d 222 (1999), reversing

*McNeal Constr. Co. v. Wilson*, 235 Ga. App. 759, 509 S.E.2d 742 (1998).

**Direct suit on instrument.** — One may bring action upon debt evidenced by commercial paper by suing directly on instrument which imports its own consideration without setting forth facts creating obligation evidenced by the paper. *Minner v. Childs*, 116 Ga. App. 272, 157 S.E.2d 50 (1967) (decided under former Code Section 11-3-122).

**Date of commencement of time for bringing actions.** — Six-year period for bringing actions on unsealed demand instrument commences upon date of instrument or, if no date is stated, on date instrument was issued. *Woodall v. Hixon*, 154 Ga. App. 844,



270 S.E.2d 65, rev'd on other grounds, 246 Ga. 758, 272 S.E.2d 727 (1980) (decided under former Code Section 11-3-122).

#### RESEARCH REFERENCES

**Effect of expiration of former limitation period.** — 11 Am. Jur. 2d, Banks and Financial Institutions, § 927. 11 Am. Jur. 2d, Bills and Notes, § 190. 12 Am. Jur. 2d, Bills and Notes, § 632 et seq. 45 Am. Jur. 2d, Interest and Usury, § 51.

**C.J.S.** — 10 C.J.S., Bills and Notes, §§ 86 et seq., 257. 47 C.J.S., Interest and Usury, §§ 42-53.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 3-118.

**ALR.** — Who must bear loss of funds from failure of bank, at which bill or note is payable, during delay in presenting it, 2 ALR 1381.

Time at which interest is payable under will or contract providing for payment of interest, 10 ALR 997.

Right of holder to sue bank in respect of deposit made, for payment of existing obligation other than check, 50 ALR 1012.

Time when statute of limitation commences to run in favor of endorser of paper upon which prior endorsement was forged, 117 ALR 1164.

Statute of limitations: action by one secondarily liable on negotiable instrument against others secondarily liable, or against principal, as an action on such instrument, or an action on an implied promise, or a similar action, 143 ALR 1062.

Application of "bad check" statute with respect to postdated checks, 52 ALR3d 464.

### 11-3-119. Notice of right to defend action.

In an action for breach of an obligation for which a third person is answerable over pursuant to this article or Article 4 of this title, the defendant may give the third person written notice of the litigation, and the person notified may then give similar notice to any other person who is answerable over. If the notice states that (i) the person notified may come in and defend; and (ii) failure to do so will bind the person notified in an action later brought by the person giving the notice as to any determination of fact common to the two litigations, the person notified is so bound unless after seasonable receipt of the notice the person notified does come in and defend. (Code 1981, § 11-3-119, enacted by Ga. L. 1996, p. 1306, § 3.)

#### RESEARCH REFERENCES

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 3-119.

## PART 2

### NEGOTIATION, TRANSFER, AND INDORSEMENT

### 11-3-201. Negotiation.

(a) "Negotiation" means a transfer of possession, whether voluntary or involuntary, of an instrument by a person other than the issuer to a person who thereby becomes its holder.

(b) Except for negotiation by a remitter, if an instrument is payable to an identified person, negotiation requires transfer of possession of the instrument and its indorsement by the holder. If an instrument is payable to bearer, it may be negotiated by transfer of possession alone. (Code 1981, § 11-3-201, enacted by Ga. L. 1996, p. 1306, § 3.)

**Law reviews.** — For article discussing judicial activism in cases involving claims and defenses under the Uniform Commercial Code, see 17 Ga. L. Rev. 569 (1983).

For comment on *Pendley v. Credit Equip. Corp.*, 92 Ga. App. 658, 89 S.E.2d 567 (1955), see 18 Ga. B.J. 495 (1956).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION  
DELIVERY  
ENDORSEMENT GENERALLY  
FORGED ENDORSEMENTS

General Consideration

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Code 1895, § 3705, former Ga. L. 1924, p. 126, §§ 31 and 52, former Code 1933, §§ 14-401, 14-402, 14-403, 14-412, and 14-420, and former Code Section 11-3-202 are included in the annotations for this section.

**"Holder" transferee.** — Only a negotiation, not an assignment, can make a transferee a "holder" of a negotiable instrument. *Bank of Danielsville v. Seagraves*, 167 Ga. App. 135, 305 S.E.2d 790 (1983) (decided under former Code Section 11-3-202).

**Payee alone is capable of negotiating instrument payable to a named payee or order,** and until payee has done so it is not in circulation. *Davis v. National City Bank*, 46 Ga. App. 194, 167 S.E. 191 (1932) (decided under former Code 1933, § 14-401).

**Note in possession of payee is presumed to be owned by payee.** *Willoughby v. Newman*, 46 Ga. App. 377, 167 S.E. 783 (1933) (decided under former Code 1933, § 14-401).

**Intermediary in possession of note payable to order of another.** — Intermediary in possession of note payable to order of some other person, although the intermediary might have an equity therein, is incapable of negotiating it, even to payee designated by instrument. *Davis v. National City Bank*, 46 Ga. App. 194, 167 S.E. 191 (1932) (decided

under former Code 1933, § 14-401).

**Bank as holder of instrument.** — Even if payee does not personally endorse instrument, a bank is holder of that instrument as long as it was issued to the bank. *Pazol v. Citizens Nat'l Bank*, 110 Ga. App. 319, 138 S.E.2d 442 (1964) (decided under former Code Section 11-3-202).

Delivery

**Essential in case of order paper.** — Delivery is an essential element of negotiation in the case of order paper. *Bank of Danielsville v. Seagraves*, 167 Ga. App. 135, 305 S.E.2d 790 (1983) (decided under former Code Section 11-3-202).

**Only bearer paper is negotiated by mere delivery.** — The only note which can be negotiated by mere delivery is one expressly made payable, or which has become payable, to bearer. *Davis v. National City Bank*, 46 Ga. App. 194, 167 S.E. 191 (1932) (decided under former Code 1933, § 14-401).

**Sufficiency of constructive delivery.** — Where there is no actual delivery of order paper, constructive delivery may be sufficient to effect negotiation where there is delivery of a written assignment without delivery of the negotiable instrument and it is the clear intent of the parties to effect such delivery and to transfer title to the negotiable instrument. *Bank of Danielsville v. Seagraves*, 167 Ga. App. 135, 305 S.E.2d 790 (1983) (decided under former Code Section 11-3-202).

### Endorsement Generally

**Purpose of former endorsement requirements.** — Purpose of former Code 1933, § 14-403, requiring endorsement of the entire instrument or the residue, was to prevent payee or payees from varying or enlarging contract initially made by maker of instrument. When a maker executed a negotiable instrument payable to one payee or more, jointly, the maker was subjected to one lawsuit, and if the payee in instrument transferred it to two or more endorsees severally, such endorsement subjected maker to two or more suits to which the maker had not been liable at time executed instrument. *Hodson v. Scoggins*, 102 Ga. App. 44, 115 S.E.2d 715 (1960) (decided under former Code 1933, §§ 14-403 and 14-412).

**Idea of endorsement has no relevance while note remains in hands of payee.** — Idea of endorsement or negotiation is not only excluded while note remains in hands of payee, but such is equally true prior to time it reaches payee's hands by delivery. *Davis v. National City Bank*, 46 Ga. App. 194, 167 S.E. 191 (1932) (decided under former Code 1933, § 14-401).

Where there are but two original parties to promissory note, maker and payee, so long as note remains in hands of payee, the idea of endorsement is excluded. *Willoughby v. Newman*, 46 Ga. App. 377, 167 S.E. 783 (1933) (decided under former Code 1933, § 14-401).

**Endorsement required to be holder in due course of order paper.** — To be holder in due course of note payable to named payee or order requires payee's endorsement. *Fourth Nat'l Bank v. Lattimore*, 168 Ga. 547, 148 S.E. 396 (1929) (decided under former Ga. L. 1924, p. 126, § 52).

Instrument payable to order can only be negotiated by endorsement. *Roswell Bank v. Citizens & S. De Kalb Bank*, 104 Ga. App. 291, 121 S.E.2d 706 (1961) (decided under former Code 1933, § 14-401).

**Transfer of order paper on consideration of love and affection.** — Legal title to note, payable to order, does not pass to transferee for consideration of love and affection only, except by endorsement on instrument or on paper attached to it. *Moore v. Moore*, 35 Ga. App. 39, 131 S.E. 922 (1926) (decided under former Ga. L. 1924, p. 126, § 31).

**Endorsement in corporate name, without more.** — In suit by transferee of negotiable instrument, written endorsement thereon, bearing as signature only corporate name of payee, not accompanied by name of agent by whom affixed nor by corporate seal, is, nevertheless, sufficient proof of transfer, unless endorsement be specifically denied on oath. *Sheffield v. Johnson County Sav. Bank*, 2 Ga. App. 221, 58 S.E. 386 (1907) (decided under former Code 1895, § 3705).

**An endorsement alone never constitutes negotiation,** and an attempt to negotiate note payable to order by endorsement of holder is incomplete, so that if stopped there, without delivery, there is no negotiation and title remains in holder. *Evans v. Luce*, 190 Ga. 403, 9 S.E.2d 646 (1940) (decided under former Code 1933, § 14-401).

**A writing and signature is necessary to formal endorsement** of a negotiable instrument. *Willoughby v. Newman*, 46 Ga. App. 377, 167 S.E. 783 (1933) (decided under former Code 1933, § 14-402).

**Recovery where payee's interest in note is specified.** — Where instrument is payable to order of three payees and it specifically states that interest of third payee is to be \$1,000.00, endorsee of such third payee may maintain action for interest in the instrument without endorsement of other two payees and without joining them as parties. *Hodson v. Scoggins*, 102 Ga. App. 44, 115 S.E.2d 715 (1960) (decided under former Code 1933, §§ 14-403 and 14-412).

**Transfer without endorsement.** — Where record shows that promissory note sued on was transferred for value by payee to plaintiff, but fails to show any endorsement, there was a transfer but no "negotiation" of instrument, and such transfer without endorsement does not preclude defendant from pleading, as against plaintiff transferee, any defenses which defendant could have set up against payee. *Christie v. Bassford*, 49 Ga. App. 94, 169 S.E. 687 (1933) (decided under former Ga. L. 1924, p. 126, § 49, subsequently codified as former Code 1933, § 14-420).

**When attachment of endorsement allowed.** — A separate paper may be attached to bill or note for purpose of writing endorsements when there is no room on instrument itself. *Tallahassee Bank & Trust Co.*



**Endorsement Generally (Cont'd)**

v. Raines, 125 Ga. App. 263, 187 S.E.2d 320 (1972) (decided under former Code Section 11-3-202).

**Extent to which paper must be affixed to instrument.** — To operate as an endorsement, a separate paper must be so firmly affixed to the instrument as to become an extension or part of it. Tallahassee Bank & Trust Co. v. Raines, 125 Ga. App. 263, 187 S.E.2d 320 (1972) (decided under former Code Section 11-3-202).

**A separate paper pinned or clipped to an instrument** is an insufficient endorsement. Tallahassee Bank & Trust Co. v. Raines, 125 Ga. App. 263, 187 S.E.2d 320 (1972) (decided under former Code Section 11-3-202).

**Forged Endorsements**

**Not true payee's signature.** — Check drawn to order of payee may not be negotiated without payee's endorsement. Unauthorized endorsement by forger does not operate as true payee's signature. Perini Corp. v. First Nat'l Bank, 553 F.2d 398 (5th Cir. 1977).

**Transferee does not become holder.** — Negotiation is necessary to confer holder status upon check's transferee. Accordingly, transferee under forged endorsement does not become a holder. Perini Corp. v. First Nat'l Bank, 553 F.2d 398 (5th Cir. 1977) (decided under former Code Section 11-3-202).

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 11 Am. Jur. 2d, Banks and Financial Institutions, § 918. 11 Am. Jur. 2d, Bills and Notes, § 210 et seq. 12 Am. Jur. 2d, Bills and Notes, §§ 586, 630.

**C.J.S.** — 10 C.J.S., Bills and Notes, §§ 147, 149.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 3-201.

**ALR.** — Transfer of notes as carrying the original claim for which note was given, 11 ALR 449.

Production of paper purporting to be endorsed in blank by payee or by a special endorsee, as prima facie evidence of plaintiff's title to the paper, 11 ALR 952; 85 ALR 304.

Reference to extrinsic agreements as affecting negotiability of bill or note, 14 ALR 1126; 33 ALR 1173; 37 ALR 655; 61 ALR 815; 104 ALR 1378.

Estoppel of maker of nonnegotiable paper to set up against transferee defense good against payee, 17 ALR 862.

Negotiability of instrument as affected by incompleteness of the attempt to fix due date, 19 ALR 508.

Endorsement of bill or note in form of guaranty of payment, 21 ALR 1375; 33 ALR 97; 46 ALR 1516.

Necessity of endorsement by all payees before maturity to make a transferee a bona fide holder, 25 ALR 163.

Effect of endorsement and delivery of note to comakers, 51 ALR 936.

Construction and application of provision of Negotiable Instruments Law in respect to endorsements which purport to transfer only part of amount payable, 63 ALR 499.

Validity and effect of provision in contract that it shall be regarded as a negotiable instrument, 79 ALR 33.

Necessity of notice of nonpayment of note or bill upon which corporation is primary obligor, in order to hold officer, director, or stockholder as endorser, 123 ALR 1367.

Endorsement of negotiable instrument by writing not on instrument itself, 19 ALR3d 1297.

Provision in draft or note directing payment "on acceptance" as affecting negotiability, 19 ALR4th 1268.

**11-3-202. Negotiation subject to rescission.**

(a) Negotiation is effective even if obtained (i) from an infant, a corporation exceeding its powers, or a person without capacity; (ii) by fraud, duress, or mistake; or (iii) in breach of duty or as part of an illegal transaction.

(b) To the extent permitted by other law, negotiation may be rescinded or may be subject to other remedies, but those remedies may not be asserted against a subsequent holder in due course or a person paying the instrument in good faith and without knowledge of facts that are a basis for rescission or other remedy. (Code 1981, § 11-3-202, enacted by Ga. L. 1996, p. 1306, § 3.)

### JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Code Section 11-3-207 are included in the annotations for this section.

**Defendant may waive claim of duress.** — Where the plaintiff accepted compensation and performed services under a written con-

tract, and never sought to rescind the contract or return the benefits obtained thereunder, the plaintiff waived any claim of duress. *Walton v. James & Dean, Inc.*, 177 Ga. App. 77, 338 S.E.2d 516 (1985) (decided under former Code Section 11-3-207).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 11 Am. Jur. 2d, Bills and Notes, §§ 215, 216, 236. 12 Am. Jur. 2d, Bill and Notes, § 610.

**C.J.S.** — 10 C.J.S., Bills and Notes, §§ 159, 161.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 3-202.

**ALR.** — Invalidity of note as affecting liability of endorser to endorsee or subsequent holder, 16 ALR 1377.

Effect of Negotiable Instruments Act on statute invalidating instrument given for

gambling consideration, 37 ALR 698; 46 ALR 959.

Statement made to prospective transferee at time of execution of obligation, negating defense or offset against obligation, as affecting right to set up defense of fraud, 60 ALR 1180.

Construction and effect of provision of Negotiable Instrument Law as to endorsement or assignment of instrument by infant or corporation, 73 ALR 172.

### 11-3-203. Transfer of instrument; rights acquired by transfer.

(a) An instrument is transferred when it is delivered by a person other than its issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument.

(b) Transfer of an instrument, whether or not the transfer is a negotiation, vests in the transferee any right of the transferor to enforce the instrument, including any right as a holder in due course, but the transferee cannot acquire the rights of a holder in due course by a transfer, directly or indirectly, from a holder in due course if the transferee engaged in fraud or illegality affecting the instrument.

(c) Unless otherwise agreed, if an instrument is transferred for value and the transferee does not become a holder because of lack of indorsement by the transferor, the transferee has a specifically enforceable right to the unqualified indorsement of the transferor, but negotiation of the instrument does not occur until the indorsement is made.

(d) If a transferor purports to transfer less than the entire instrument, negotiation of the instrument does not occur. The transferee obtains no rights under this article and has only the rights of a partial assignee. (Code 1981, § 11-3-203, enacted by Ga. L. 1996, p. 1306, § 3.)

**Law reviews.** — For article discussing judicial activism in cases involving claims and defenses under the Uniform Commercial Code, see 17 Ga. L. Rev. 569 (1983).

For note, “The Law of Evidence in the Uniform Commercial Code,” see 1 Ga. L. Rev. 44 (1966).

### JUDICIAL DECISIONS

**Editor’s notes.** — In light of the similarity of the issues dealt with under the provisions, decisions under former Code 1910, § 4535, former Code 1933, §§ 14-223, 14-420, and 14-505, and former Code Section 11-3-201 are included in the annotations for this section.

**Methods of transfer.** — There are two methods for transfer of negotiable instruments — negotiation and assignment. *Bank of Danielsville v. Seagraves*, 167 Ga. App. 135, 305 S.E.2d 790 (1983) (decided under former Code Section 11-3-201).

**“Holder” transferee.** — Only a negotiation, not an assignment, can make a transferee a “holder” of a negotiable instrument. *Bank of Danielsville v. Seagraves*, 167 Ga. App. 135, 305 S.E.2d 790 (1983) (decided under former Code Section 11-3-201).

**Delivery.** — Delivery is an essential element of negotiation in the case of order paper. *Bank of Danielsville v. Seagraves*, 167 Ga. App. 135, 305 S.E.2d 790 (1983) (decided under former Code Section 11-3-201).

**Sufficiency of constructive delivery.** — Where there is no actual delivery of order paper, constructive delivery may be sufficient to effect negotiation where there is delivery of a written assignment without delivery of the negotiable instrument and it is the clear intent of the parties to effect such delivery and to transfer title to the negotiable instrument. *Bank of Danielsville v. Seagraves*, 167 Ga. App. 135, 305 S.E.2d 790 (1983) (decided under former Code Section 11-3-201).

**Presumptive evidence of title.** — Possession of a negotiable instrument is presumptive evidence of title. *Dawson v. General Disct. Corp.*, 82 Ga. App. 29, 60 S.E.2d 653 (1950) (decided under prior law).

**Rights of transferee.** — Transferee acquires same rights as its transferor had.

*Northside Bldg. & Inv. Co. v. Finance Co. of Am.*, 119 Ga. App. 131, 166 S.E.2d 608 (1969) (decided under former Code Section 11-3-201).

**Bank as holder in due course.** — There is no compelling reason that a bank cannot be holder or holder in due course of instrument drawn on it if it meets all qualifications of the status, e.g., by taking instrument from transferor who is a holder in due course. *FDIC v. West*, 244 Ga. 396, 260 S.E.2d 89 (1979) (decided under former Code Section 11-3-201).

**Repurchase by prior holder.** — A sale under a power does not technically come within former Code section § 11-3-302(3)(a), but under this section prior holder with notice of defense or claim against instrument cannot improve position by repurchase. *Northside Bldg. & Inv. Co. v. Finance Co. of Am.*, 119 Ga. App. 131, 166 S.E.2d 608 (1969) (decided under former Code Section 11-3-201).

**Purchase at judicial sale.** — Status of one against whom defense might have been urged in prior capacity will not improve by interposing a holder in due course, but in the same vein one with rights of a holder in due course, and who has not otherwise lost such rights, does not diminish status by purchasing at a judicial sale although that person may not by virtue of such purchase alone become a due course holder. *Finance Co. of Am. v. Wilson*, 115 Ga. App. 280, 154 S.E.2d 459 (1967) (decided under former Code Section 11-3-201).

**Petition based upon promissory note payable to order of third party** is subject to general demurrer where it does not affirmatively appear that note has been transferred to plaintiff by written endorsement or for value without endorsement. *Atlas Fin. Co. v.*



McDonald, 110 Ga. App. 32, 137 S.E.2d 762 (1964) (decided under former Code Section 11-3-201).

To sustain action on promissory note payable to order of third party it must be affirmatively shown that note has been transferred to plaintiff by written endorsement or for value without endorsement. *Hemphill v. Simmons*, 120 Ga. App. 823, 172 S.E.2d 178 (1969) (decided under former Code Section 11-3-201).

**Transfer and assignment of a purchase money note and security agreement to a third party** did not destroy the purchase money character of the security interest, where the assignment did not refinance, renew, or modify the debtor's purchase money debt. *Brooks v. First Franklin Fin. Corp.*, 74 Bankr. 418 (Bankr. N.D. Ga. 1987) (decided under former Code Section 11-3-201).

**Right to sue on instrument despite failure to obtain proper endorsement.** — Where plaintiff establishes without dispute that plaintiff obtained possession of note by purchasing it for value from named payee, plaintiff acquires title to instrument and is entitled to sue to collect it, even if plaintiff failed to obtain a proper endorsement. *Hazel v. Tharpe & Brooks, Inc.*, 159 Ga. App. 415, 283 S.E.2d 653 (1981) (decided under former Code Section 11-3-201).

**Transfer without endorsement.** — Where holder of instrument payable to holder's order transfers it for value without endorsing it, transfer vests in transferee such title as transferor had therein, and transferee acquires, in addition, the right to have endorsement of transferor, although such transfer not effective to render transferee a holder in due course. *Folsom v. Continental Adjustment Corp.*, 48 Ga. App. 435, 172 S.E. 833 (1934) (decided under former Ga. L. 1924, p. 126, § 49, subsequently codified as former Code 1933, § 14-420).

Delivery for value unaccompanied by written endorsement constitutes transfer, but not negotiation, of note within negotiable instruments law. *Robbins v. Welfare Fin. Corp.*, 95 Ga. App. 90, 96 S.E.2d 892 (1957) (decided under former Code 1933, § 14-420).

Where it appears from allegations of petition that promisor executed negotiable note and that holder, who holds note without

written endorsement, financed note and contract and is transferee of the note and its holder in due course, petition is not subject to general demurrer upon ground that holder may not bring suit on note in its own name. *Stone v. Colonial Credit Co.*, 93 Ga. App. 348, 91 S.E.2d 835 (1956) (decided under former Code 1933, § 14-420).

A transfer without endorsement, vesting transferee with legal title, although not effective to render transferee a holder in due course, permits transferee to bring suit in own name. *Robbins v. Welfare Fin. Corp.*, 95 Ga. App. 90, 96 S.E.2d 892 (1957) (decided under former Code 1933, § 14-420).

Transfer for value, without endorsement, vests in the transferee such title as transferor had, and transferee may bring suit thereon in own name. *Northeast Factor & Disc. Co. v. Mortgage Invs., Inc.*, 107 Ga. App. 705, 131 S.E.2d 221 (1963) (decided under prior law).

Holder of note who is not payee may recover on it even though no transfer or endorsement appears thereon and holder's right, title and interest may be proved by parol. *Associates Disc. Corp. v. Brantley*, 102 Ga. App. 751, 117 S.E.2d 916 (1960) (decided under prior law).

A transferee receives all of the title of transferor to a negotiable instrument and is entitled to sue thereon in transferee's own name, but, without endorsement, the instrument has not been negotiated and takes subject to all equities between maker or drawer and transferor. *Jett v. Atlanta Fed. Sav. & Loan Ass'n*, 104 Ga. App. 688, 123 S.E.2d 27 (1961) (decided under prior law).

**Defense against transferee with notice of equities.** — In suit by holder against maker of negotiable note, where it appeared that plaintiff acquired note after maturity from one who had acquired it before maturity and without notice of any defect, it was error to charge jury that defense pleaded by maker would be good as against plaintiff, whether or not person who transferred it to plaintiff was a bona fide holder for value and without notice. *Houston v. Lundy*, 45 Ga. App. 122, 163 S.E. 328 (1932) (decided under former Code 1910, § 4535).

Purchaser of a negotiable note, although with notice, either express or constructive, of equities and defenses as between maker and original payee, is protected in title and

may recover on it if purchased, even without recourse, from one who took it, bona fide and without notice, from original payee. *Houston v. Lundy*, 45 Ga. App. 122, 163 S.E. 328 (1932) (decided under former Code 1910, § 4535).

**Defense that transfer not genuine.** — Payment of promissory note to supposed transferee, holding it by virtue of forged endorsement, will not protect maker or one who has assumed the debt, against payment to true owner; and consequently, in suit by such an alleged transferee to enforce liability against such parties, the assumer may utilize defense that alleged transfer by payee was not genuine. *Austell Bank v. National Bondholders*

*Corp.*, 188 Ga. 757, 4 S.E.2d 913 (1939) (decided under former Code 1933, § 14-223).

**Inquiry into holder's title.** — In suit instituted by person claiming to be owner and holder of promissory note, for the purpose of recovering thereon against maker and another person alleged to have assumed the debt, it is permissible for the latter to inquire into plaintiff's title to note, if necessary either for protection or to let in any valid defense which that person seeks to make. *Austell Bank v. National Bondholders Corp.*, 188 Ga. 757, 4 S.E.2d 913 (1939) (decided under former Code 1933, § 14-505).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 11 Am. Jur. 2d, Bills and Notes, §§ 207, 214, 236, 253 et seq., 389. 12 Am. Jur. 2d, Bills and Notes, §§ 525, 628, 660. 68A Am. Jur. 2d, Secured Transactions, § 14.

**C.J.S.** — 10 C.J.S., Bills and Notes, §§ 159 et seq., 189.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 3-203.

**ALR.** — Endorsement of bank check as carrying the title or rights incident to the original claim for which the check was given, 1 ALR 454.

Transfer of notes as carrying the original claim for which note was given, 11 ALR 449.

Estoppel of maker of nonnegotiable paper to set up against transferee defense good against payee, 17 ALR 862.

Right of transferee of postdated check, 21 ALR 234.

Endorsement of bill or note in form of guaranty of payment, 21 ALR 1375; 33 ALR 97; 46 ALR 1516.

Admissibility of parol evidence to vary or

explain the contract implied from the regular endorsement of a bill or note, 22 ALR 527; 35 ALR 1120; 54 ALR 999; 92 ALR 721.

Necessity of endorsement by all payees before maturity to make a transferee a bona fide holder, 25 ALR 163.

Estoppel by delay, after knowledge, in disclosing forgery of commercial paper, 25 ALR 177; 50 ALR 1374.

Presumption from possession of ownership of unendorsed note payable to order on issue between rival claimants, 30 ALR 1492.

Effect of assignment endorsed on back of commercial paper, 44 ALR 1353.

Payment to, or endorsement by, indicated beneficiary of check purporting to be payable or endorsed to one person "for another," 61 ALR 272.

When transfer of accounts or other choses in action is deemed a sale rather than a pledge as security for a loan, and vice versa, 95 ALR 1197.

Authority of agent to endorse and transfer commercial paper, 37 ALR2d 453.

### 11-3-204. Indorsement.

(a) "Indorsement" means a signature, other than that of a signer as maker, drawer, or acceptor, that alone or accompanied by other words is made on an instrument for the purpose of (i) negotiating the instrument; (ii) restricting payment of the instrument; or (iii) incurring indorser's liability on the instrument; but regardless of the intent of the signer, a signature and its accompanying words is an indorsement unless the accompanying words, terms of the instrument, place of the signature, or

other circumstances unambiguously indicate that the signature was made for a purpose other than indorsement. For the purpose of determining whether a signature is made on an instrument, a paper affixed to the instrument is a part of the instrument.

(b) “Indorser” means a person who makes an indorsement.

(c) For the purpose of determining whether the transferee of an instrument is a holder, an indorsement that transfers a security interest in the instrument is effective as an unqualified indorsement of the instrument.

(d) If an instrument is payable to a holder under a name that is not the name of the holder, indorsement may be made by the holder in the name stated in the instrument or in the holder’s name or both, but signature in both names may be required by a person paying or taking the instrument for value or collection. (Code 1981, § 11-3-204, enacted by Ga. L. 1996, p. 1306, § 3.)

### JUDICIAL DECISIONS

**Editor’s notes.** — In light of the similarity of the provisions, decisions under former Code Section 11-3-203 are included in the annotations for this section.

**Preferred endorsement.** — Though this section permits endorsement in the true name alone, endorsement showing both names is preferred. *Perini Corp. v. First Nat’l Bank*, 553 F.2d 398 (5th Cir. 1977) (decided under former Code Section 11-3-203).

**Person operating business under trade name.** — Under Georgia law, a person operating a business under trade name may endorse personally checks drawn to the operator under the operator’s trade name. *Perini Corp. v. First Nat’l Bank*, 553 F.2d 398 (5th Cir. 1977) (decided under former Code Section 11-3-203).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 11 Am. Jur. 2d, Bills and Notes, § 221.

**C.J.S.** — 10 C.J.S., Bills and Notes, §§ 147, 149.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 3-204.

**ALR.** — Construction and application of provision of Negotiable Instruments Law regarding endorsement of instrument by payee or endorsee whose name is wrongly designated or misspelled, 153 ALR 598.

### 11-3-205. Special indorsement; blank indorsement; anomalous indorsement.

(a) If an indorsement is made by the holder of an instrument, whether payable to an identified person or payable to bearer, and the indorsement identifies a person to whom it makes the instrument payable, it is a “special indorsement.” When specially indorsed, an instrument becomes payable to the identified person and may be negotiated only by the indorsement of that person. The principles stated in Code Section 11-3-110 apply to special indorsements.



(b) If an indorsement is made by the holder of an instrument and it is not a special indorsement, it is a “blank indorsement.” When indorsed in blank, an instrument becomes payable to bearer and may be negotiated by transfer of possession alone until specially indorsed.

(c) The holder may convert a blank indorsement that consists only of a signature into a special indorsement by writing, above the signature of the indorser, words identifying the person to whom the instrument is made payable.

(d) “Anomalous indorsement” means an indorsement made by a person who is not the holder of the instrument. An anomalous indorsement does not affect the manner in which the instrument may be negotiated. (Code 1981, § 11-3-205, enacted by Ga. L. 1996, p. 1306, § 3.)

**Cross references.** — Use of parol evidence to explain blank endorsements of negotiable paper, § 24-6-10.

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 11 Am. Jur. 2d, Bills and Notes, § 227, et seq.

**C.J.S.** — 10 C.J.S., Bills and Notes, §§ 152, 153.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 3-205.

**ALR.** — Undertaking of one who endorses a note without recourse, 2 ALR 216; 91 ALR 399.

Production of paper purporting to be endorsed in blank by payee or by a special endorsee, as prima facie evidence of plain-

tiff's title to the paper, 11 ALR 952; 85 ALR 304.

Endorsement of bill or note in form of guaranty of payment, 33 ALR 97; 46 ALR 1516.

Effect of assignment endorsed on back of commercial paper, 44 ALR 1353.

Payment to, or endorsement by, indicated beneficiary of check purporting to be payable or endorsed to one person “for another,” 61 ALR 272.

#### 11-3-206. Restrictive indorsement.

(a) An indorsement limiting payment to a particular person or otherwise prohibiting further transfer or negotiation of the instrument is not effective to prevent further transfer or negotiation of the instrument.

(b) An indorsement stating a condition to the right of the indorsee to receive payment does not affect the right of the indorsee to enforce the instrument. A person paying the instrument or taking it for value or collection may disregard the condition, and the rights and liabilities of that person are not affected by whether the condition has been fulfilled.

(c) If an instrument bears an indorsement which is described in subsection (b) of Code Section 11-4-201, an indorsement in blank, or an indorsement to a particular bank using the words “for deposit,” “for collection,” or other words indicating a purpose of having the instrument collected by a bank for the indorser or for a particular account, the following rules apply:

(1) A person, other than a bank, who purchases the instrument when so indorsed converts the instrument unless the amount paid for the instrument is received by the indorser or applied consistently with the indorsement;

(2) A depositary bank that purchases the instrument or takes it for collection when so indorsed converts the instrument unless the amount paid by the bank with respect to the instrument is received by the indorser or applied consistently with the indorsement;

(3) A payor bank that is also the depositary bank or that takes the instrument for immediate payment over the counter from a person other than a collecting bank converts the instrument unless the proceeds of the instrument are received by the indorser or applied consistently with the indorsement; and

(4) Except as otherwise provided in paragraph (3) of this subsection, a payor bank or intermediary bank may disregard the indorsement and is not liable if the proceeds of the instrument are not received by the indorser or applied consistently with the indorsement.

(d) Except for an indorsement covered by subsection (c) of this Code section, if an instrument bears an indorsement using words to the effect that payment is to be made to the indorsee as agent, trustee, or other fiduciary for the benefit of the indorser or another person, the following rules apply:

(1) Unless there is notice of breach of fiduciary duty as provided in Code Section 11-3-307, a person who purchases the instrument from the indorsee or takes the instrument from the indorsee for collection or payment may pay the proceeds of payment or the value given for the instrument to the indorsee without regard to whether the indorsee violates a fiduciary duty to the indorser; and

(2) A subsequent transferee of the instrument or person who pays the instrument is neither given notice nor otherwise affected by the restriction in the indorsement unless the transferee or payor knows that the fiduciary dealt with the instrument or its proceeds in breach of fiduciary duty.

(e) The presence on an instrument of an indorsement to which this Code section applies does not prevent a purchaser of the instrument from becoming a holder in due course of the instrument unless the purchaser is a converter under subsection (c) of this Code section or has notice or knowledge of breach of fiduciary duty as stated in subsection (d) of this Code section.

(f) In an action to enforce the obligation of a party to pay the instrument, the obligor has a defense if payment would violate an indorsement to which this Code section applies and the payment is not

permitted by this Code section. (Code 1981, § 11-3-206, enacted by Ga. L. 1996, p. 1306, § 3.)

### JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Code Section 11-3-206 are included in the annotations for this section.

**Bank as holder for value.** — By causing check to be endorsed "for deposit," payee signifies its purpose of deposit and a bank, by applying value given consistently with this endorsement by crediting payee-depositor's account with amount of the check, became a holder for value. *Pazol v. Citizens Nat'l Bank*,

110 Ga. App. 319, 138 S.E.2d 442 (1964) (decided under former Code Section 11-3-206).

**Endorsement on check that said "For Deposit Only"** was clearly ineffective to transfer title to a third party, and bank that converted said check was liable to the owner for the amount of the check. *Citizens Bank v. Thornton & Co.*, 172 Ga. App. 490, 323 S.E.2d 688 (1984) (decided under former Code Section 11-3-206).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 11 Am. Jur. 2d, Bills and Notes, §§ 22, 230 et seq., 249, 296.

**C.J.S.** — 10 C.J.S., Bills and Notes, § 154 et seq.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 3-206.

**ALR.** — Undertaking of one who endorses a note without recourse, 2 ALR 216; 91 ALR 399.

Endorsement of bill or note in form of guaranty of payment, 33 ALR 97; 46 ALR 1516.

Liability of endorser "for deposit" on the

endorsement to original, or subsequent, endorsee, 60 ALR 866.

Endorsement "for deposit only" as affecting right of holder of paper against drawer or maker who would have a good defense as against payee, 75 ALR 1415.

Sale or negotiation for value of commercial paper after it has been endorsed by the holder with a restrictive endorsement, as waiver of the restriction so as to entitle the purchaser to recover thereon as a holder in due course, 149 ALR 318.

### 11-3-207. Reacquisition.

Reacquisition of an instrument occurs if it is transferred to a former holder, by negotiation or otherwise. A former holder who reacquires the instrument may cancel indorsements made after the reacquirer first became a holder of the instrument. If the cancellation causes the instrument to be payable to the reacquirer or to bearer, the reacquirer may negotiate the instrument. An indorser whose indorsement is canceled is discharged, and the discharge is effective against any subsequent holder. (Code 1981, § 11-3-207, enacted by Ga. L. 1996, p. 1306, § 3.)

### JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Code Section 11-3-208 are included in the annotations for this section.

**Intent of section.** — O.C.G.A. § 11-3-601 and this section are intended to eliminate

circuitry in order of responsibility of endorsers. *Columbian Peanut Co. v. Frosteg*, 472 F.2d 476 (5th Cir.), cert. denied, 414 U.S. 824, 94 S. Ct. 126, 38 L. Ed. 2d 57 (1973) (decided under former Code Section 11-3-208).



RESEARCH REFERENCES

C.J.S. — 10 C.J.S., Bills and Notes, §§ 158, 244, 248.

U.L.A. — Uniform Commercial Code (U.L.A.) § 3-207.

PART 3

ENFORCEMENT OF INSTRUMENTS

JUDICIAL DECISIONS

Security agreements not within article’s ambit. — Under Georgia law, security agreements are not negotiable instruments. Thus, security agreements do not fall within the

ambit of this article, including the holder in due course provisions. *Massey-Ferguson Credit Corp. v. Wiley*, 655 F. Supp. 655 (M.D. Ga. 1987).

11-3-301. Person entitled to enforce instrument.

“Person entitled to enforce” an instrument means (i) the holder of the instrument; (ii) a nonholder in possession of the instrument who has the rights of a holder; or (iii) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to Code Section 11-3-309 or subsection (d) of Code Section 11-3-418. A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument. (Code 1981, § 11-3-301, enacted by Ga. L. 1996, p. 1306, § 3.)

JUDICIAL DECISIONS

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Editor’s notes. — In light of the similarity of the issues dealt with under the provisions, decisions under former Code 1933, §§ 14-214, 14-223, 14-505, 14-506 and former Code Section 11-3-301 are included in the annotations for this section.

Bank as holder or holder in due course. — There is no compelling reason that a bank cannot be a holder or holder in due course of an instrument drawn on it if it meets all qualifications of the status, e.g., by taking instrument from transferor who is a holder in due course. *FDIC v. West*, 244 Ga. 396, 260 S.E.2d 89 (1979) (decided under former Code Section 11-3-301).

Rights of original payee. — Original payee of note, as party to transaction for sale of

securities, of which the note is but a part, is limited in claim on the note to rights of one not a holder in due course. *Morris v. Durbin*, 123 Ga. App. 383, 180 S.E.2d 925 (1971) (decided under former Code Section 11-3-301).

Liability of drawer. — While drawer of check has right to stop payment of it at any time before it has been certified or paid by drawee, drawer remains liable, unless the drawer has a defense which is good against the holder. *Tidwell v. Bank of Tifton*, 115 Ga. App. 555, 155 S.E.2d 451 (1967) (decided under former Code Section 11-3-301).

Enforcement by bank when O.C.G.A. § 11-3-603 does not apply. — Where plaintiff bank is holder of a check and there are no provisions of O.C.G.A. § 11-3-603 which apply, the bank can enforce payment in its

**General Consideration** (Cont'd)

own name against drawer. *Pazol v. Citizens Nat'l Bank*, 110 Ga. App. 319, 138 S.E.2d 442 (1964) (decided under former Code Section 11-3-301).

**Assignment for collection as defense.** — Contention that note has been assigned to collection agencies presents no defense where plaintiff is holder of the note and none of the provisions of O.C.G.A. § 11-3-603 (concerning discharge of liability to the extent of payment or satisfaction) prevent recovery. *Wall v. Citizens & S. Bank*, 153 Ga. App. 29, 264 S.E.2d 523 (1980), aff'd, 247 Ga. 216, 274 S.E.2d 486 (1981) (decided under former Code Section 11-3-301).

**Nongenuine transfer as defense.** — Payment of promissory note to supposed transferee, holding it by virtue of forged endorsement, will not protect maker or one who has assumed the debt against payment to true owner; and consequently, in suit by such an alleged transferee to enforce liability against such parties, the assumer may avail self of defense that alleged transfer by payee was not genuine. *Austell Bank v. National Bondholders Corp.*, 188 Ga. 757, 4 S.E.2d 913 (1939) (decided under former Code 1933, § 14-223).

**Inquiry into holder's title in suit by holder against maker.** — In suit instituted by person claiming to be owner and holder of promissory note, for the purpose of recovering thereon against maker and another person alleged to have assumed the debt, it is permissible for the latter to inquire into plaintiff's title to note, if necessary either for plaintiff's protection or to let in any valid defense which plaintiff seeks to make. *Austell Bank v. National Bondholders Corp.*, 188 Ga. 757, 4 S.E.2d 913 (1939) (decided under former Code 1933, § 14-505).

**"Claim."** — Word "claim" descends from the law merchant and indicates certain rights in instrument on which suit is based rather than mere reasons why alleged debtor is not liable for the fund. It is, however, to some extent broader than concept of legal

title to instrument. *Fulton Nat'l Bank v. Delco Corp.*, 128 Ga. App. 16, 195 S.E.2d 455 (1973) (decided under former Code Section 11-3-304).

**Notice**

**Notice of infirmity or defect.** — Actual knowledge of infirmity or defect, or knowledge of facts such as to render taking of instrument an act of bad faith is necessary to constitute notice of infirmity under former Code 1933, § 14-506. *Equitable Disct. Corp. v. Guest*, 103 Ga. App. 258, 118 S.E.2d 864 (1961) (decided under former Code 1933, § 14-506).

**Words on instrument alluding to underlying transaction.** — Mere fact that trade acceptance, otherwise complete and regular upon its face, had printed thereon the words "Trade Acceptance" and "The transaction which gives rise to this instrument is the purchase of goods by the acceptor from the drawer," was not sufficient to constitute such notice of infirmity in the instrument as to alter status of plaintiff as a bona fide holder in due course. *Equitable Disct. Corp. v. Guest*, 103 Ga. App. 258, 118 S.E.2d 864 (1961) (decided under former Code 1933, § 14-506).

**Authority regarding blanks.** — Former Code 1933, § 14-214 puts a purchaser of blank paper on inquiry as to authority given regarding blanks. *A.J. Cannon & Co. v. Collier*, 91 Ga. App. 40, 84 S.E.2d 482 (1954) (decided under former Code 1933, § 14-214).

Where payee took check to plaintiff's place of business with amount in blank and filled in blank with plaintiff's knowledge, plaintiff was put in same position plaintiff would have been in had payee transferred the check to plaintiff in blank. In either event, plaintiff would be put on inquiry as to payee's authority relative to amount of check, and when plaintiff took the check, plaintiff did so at peril. *A.J. Cannon & Co. v. Collier*, 91 Ga. App. 40, 84 S.E.2d 482 (1954) (decided under former Code 1933, § 14-214).

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 4 Am. Jur. 2d, Alteration of Instruments, § 26. 11 Am. Jur. 2d, Bills and

Notes, §§ 203 et seq., 238 et seq., 251, 264, 277 et seq., 290, 300 et seq. 12 Am. Jur. 2d,

Bills and Notes, §§ 542, 641. 15A Am. Jur. 2d, Commercial Code, § 98.

**C.J.S.** — 10 C.J.S., Bills and Notes, §§ 172 et seq., 231 et seq.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 3-301.

**ALR.** — Right of purchaser of stolen bonds, 1 ALR 717; 85 ALR 357; 102 ALR 28.

Bona fides of purchaser of note on an executory consideration, performance of which is a condition precedent, 3 ALR 987; 100 ALR 1357.

Fact that note is made payable to maker as affecting bona fides of purchaser, 6 ALR 458.

Effect on bona fides of purchase of promissory note of fact that there is interest due and unpaid upon it, 11 ALR 1277; 40 ALR 832.

Estoppel of maker of nonnegotiable paper to set up against transferee defense good against payee, 17 ALR 862.

Estoppel by delay, after knowledge, in disclosing forgery of commercial paper, 25 ALR 177; 50 ALR 1374.

Rights as between one who buys bill or note after maturity and third person legally or equitably entitled thereto, 33 ALR 699.

Effect of fraud in the inception of a bill or note to throw upon a subsequent holder the burden of proving that he is a holder in due course, 34 ALR 300; 57 ALR 1083.

Liability of party to commercial paper so drawn as to be easily alterable as to amount, 39 ALR 1380.

Renewal of bill or note as precluding defenses available against the original, 41 ALR 963.

Alteration of note before delivery to payee as affecting parties who do not personally consent, 44 ALR 1244.

Genuine making of instrument for purpose of defrauding as constituting forgery, 46 ALR 1529; 51 ALR 568.

Acceleration clause as affecting reissuance of paper by one primarily liable thereon, 58 ALR 180.

Rights as between one who deposits com-

mercial paper for collection without any indication on the paper of that purpose, and one who takes it in good faith from the depository, 58 ALR 259.

Right of purchaser of past-due paper to protection as against defenses or equities between parties to intermediate transfer, 68 ALR 982.

Failure or delay by holder of note to enforce collateral security as releasing endorser, surety, or guarantor, 74 ALR 129.

Necessity in order to negative notice of defenses to negotiable paper purchased by firm or corporation of calling as witnesses all members or officers, or of showing that those not called had no part in transaction, 79 ALR 1139.

Memorandum on negotiable instrument as an alteration, 96 ALR 1102.

Right of purchaser of negotiable paper to the benefit of the position of a former holder who was a holder in due course as affected by notice or purchase after maturity, 98 ALR 296.

Law regarding notice as condition of holding indorser as applied to bill or note with acceleration clause, or payable in installments, 104 ALR 1331.

Waiver of demand and notice as affecting indorsers other than the one above whose name it immediately appears, 110 ALR 1228.

Deposit to individual account of checks or notes drawn or indorsed by agent or fiduciary as charging bank with notice of misappropriation, 115 ALR 648.

Notice which has been forgotten as affecting status as holder in due course, 89 ALR2d 1330.

What constitutes, under the Uniform Negotiable Instruments Law or Commercial Code, a reasonable time for taking a demand instrument, so as to support the taker's status as holder in due course, 10 ALR3d 1199.

Right of pledgor of commercial paper to maintain action thereon in his own name, 43 ALR3d 824.

### 11-3-302. Holder in due course.

(a) Subject to subsection (c) of this Code section and subsection (d) of Code Section 11-3-106, "holder in due course" means the holder of an instrument if:

(1) The instrument when issued or negotiated to the holder does not



bear such apparent evidence of forgery or alteration or is not otherwise so irregular or incomplete as to call into question its authenticity; and

(2) The holder took the instrument:

(i) For value;

(ii) In good faith;

(iii) Without notice that the instrument is overdue or has been dishonored or that there is an uncured default with respect to payment of another instrument issued as part of the same series;

(iv) Without notice that the instrument contains an unauthorized signature or has been altered;

(v) Without notice of any claim to the instrument described in Code Section 11-3-306; and

(vi) Without notice that any party has a defense or claim in recoupment described in subsection (a) of Code Section 11-3-305.

(b) Notice of discharge of a party, other than discharge in an insolvency proceeding, is not notice of a defense under subsection (a) of this Code section, but discharge is effective against a person who became a holder in due course with notice of the discharge. Public filing or recording of a document does not of itself constitute notice of a defense, claim in recoupment, or claim to the instrument.

(c) Except to the extent a transferor or predecessor in interest has rights as a holder in due course, a person does not acquire rights of a holder in due course of an instrument taken (i) by legal process or by purchase in an execution, bankruptcy, or creditor's sale or similar proceeding; (ii) by purchase as part of a bulk transaction not in ordinary course of business of the transferor; or (iii) as the successor in interest to an estate or other organization.

(d) If, under paragraph (1) of subsection (a) of Code Section 11-3-303, the promise of performance that is the consideration for an instrument has been partially performed, the holder may assert rights as a holder in due course of the instrument only to the fraction of the amount payable under the instrument equal to the value of the partial performance divided by the value of the promised performance.

(e) If the person entitled to enforce an instrument has only a security interest in the instrument and the person obliged to pay the instrument has a defense, claim in recoupment, or claim to the instrument that may be asserted against the person who granted the security interest, the person entitled to enforce the instrument may assert rights as a holder in due course only to an amount payable under the instrument which, at the time

of enforcement of the instrument, does not exceed the amount of the unpaid obligation secured.

(f) To be effective, notice must be received at a time and in a manner that gives a reasonable opportunity to act on it.

(g) This Code section is subject to any law limiting status as a holder in due course in particular classes of transactions. (Code 1981, § 11-3-302, enacted by Ga. L. 1996, p. 1306, § 3.)

**Law reviews.** — For article supporting the retention of waiver of defense clauses in credit card agreements, see 10 Ga. St. B.J. 17 (1973). For article discussing judicial activism in cases involving claims and defenses under the Uniform Commercial Code, see 17 Ga. L. Rev. 569 (1983). For article, “The Holder in Due Course Doctrine as a Default Rule,” see 32 Ga. L. Rev. 783 (1998).  
For note, “Pyramid Marketing Plans and Consumer Protection: State and Federal Regulation,” see 21 J. of Pub. L. 445 (1972). For note discussing whether a holder in due course takes free of claims of violations of

the usury laws, see 12 Ga. L. Rev. 814 (1978). For note, “Negotiable Promissory Notes Containing Time and Demand Provisions: The Need for Consistent Interpretation,” see 19 Ga. L. Rev. 717 (1984).  
For comment on *Pendley v. Credit Equip. Corp.*, 92 Ga. App. 658, 89 S.E.2d 567 (1955), see 18 Ga. B.J. 495 (1956). For comment on *Geiger Fin. Co. v. Graham*, 123 Ga. App. 771, 182 S.E.2d 521 (1971), see 8 Ga. St. B.J. 400 (1972). For comment on *Perini Corp. v. First Nat’l Bank*, 553 F.2d 398 (5th Cir. 1977), see 27 Emory L.J. 393 (1978).

JUDICIAL DECISIONS

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- HOLDERS NOT IN DUE COURSE GENERALLY
- HOLDERS NOT IN DUE COURSE—CLAIMS
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- HOLDERS NOT IN DUE COURSE—PAROL EVIDENCE

General Consideration

**Editor’s notes.** — In light of the similarity of the issues dealt with under the provisions, decisions under former Code 1933, §§ 14-305, 14-502, 14-505, 14-507, and 14-508, and former Code Section 11-3-302 are included in the annotations for this section.  
**Holder in due course status defined.** — A holder in due course is one who, in good faith and for value, has taken an instrument that is complete and regular upon its face before it was due, and without notice of any previous dishonor, and who, at the time of taking, had no notice of any infirmity in the

instrument or defect in the title of the person negotiating it. *Equitable Disct. Corp. v. Guest*, 103 Ga. App. 258, 118 S.E.2d 864 (1961) (decided under former Code 1933, §§ 14-502 and 14-507).  
**The 1996 amendments of the UCC** definitions of “good faith” and “holder in due course” (O.C.G.A. §§ 11-3-103 and 11-3-302) did not apply retroactively to transactions before their effective date; rather, the definitions in former Code section § 11-2-201 and the former version of this section applied. *Choo Choo Tire Serv., Inc v. Union Planters Nat’l Bank*, 231 Ga. App. 346, 498 S.E.2d 799 (1998).

**General Consideration** (Cont'd)

**Endorsement required.** — No one can be a holder in due course of an instrument payable to a named payee or order, without endorsement of payee. *Davis v. National City Bank*, 46 Ga. App. 194, 167 S.E. 191 (1932) (decided under former Code 1933, § 14-502).

**Requisites for payee.** — Although payee may be holder in due course, this does not mean payee is per se a holder in due course; for the payee must meet all requisites outlined in this section. *Hall v. Westmoreland, Hall & Bryan*, 123 Ga. App. 809, 182 S.E.2d 539 (1971) (decided under former Code Section 11-3-302).

Payee could be a holder in due course, provided that it met the requirements set out in O.C.G.A. § 11-3-302. *Stebbins v. Georgia Power Co.*, 252 Ga. App. 261, 555 S.E.2d 906 (2001).

**Rights of original payee.** — Original payee of note, as party to transaction for sale of securities, of which the note is but a part, is limited in claim on the note to rights of one not a holder in due course. *Morris v. Durbin*, 123 Ga. App. 383, 180 S.E.2d 925 (1971) (decided under former Code Section 11-3-302).

**Possession as prima facie case of ownership.** — Possession of negotiable instrument establishes prima facie case of ownership. *James Talcott, Inc. v. Allahabad Bank, Ltd.*, 444 F.2d 451 (5th Cir.), cert. denied, 404 U.S. 940, 92 S. Ct. 280, 30 L. Ed. 2d 253 (1971) (decided under former Code Section 11-3-302).

Party can establish status as holder of instruments sued on by producing them in evidence. *James Talcott, Inc. v. Allahabad Bank, Ltd.*, 444 F.2d 451 (5th Cir.), cert. denied, 404 U.S. 940, 92 S. Ct. 280, 30 L. Ed. 2d 253 (1971) (decided under former Code Section 11-3-302).

Proof of possession by production of instrument entitles holder to recover on it unless opposing party establishes defense. *James Talcott, Inc. v. Allahabad Bank, Ltd.*, 444 F.2d 451 (5th Cir.), cert. denied, 404 U.S. 940, 92 S. Ct. 280, 30 L. Ed. 2d 253 (1971) (decided under former Code Section 11-3-302).

**Possession by payee after maturity.** — Evidence tending to show possession of note

by payee after maturity may rebut presumption that holder, who is the transferee, is a holder in due course. *Griffin v. Blackshear Bank*, 66 Ga. App. 821, 19 S.E.2d 325 (1942) (decided under former Code 1933, § 14-502).

**To constitute bad faith by a purchaser** of a negotiable instrument before maturity, the purchaser must have acquired it with actual knowledge of its infirmity, or with a belief based on facts or circumstances as known to the purchaser that there was a defense, or the purchaser must have acted dishonestly. *Citizens & S. Nat'l Bank v. Johnson*, 214 Ga. 229, 104 S.E.2d 123 (1958) (decided under former Code 1933, § 14-502); *Commercial Credit Equip. Corp. v. Reeves*, 110 Ga. App. 701, 139 S.E.2d 784 (1964) (decided under former Code 1933, § 14-502).

**Repurchase by prior holder with notice.** — Sale under a power does not technically come within former subsection (3)(a) of this section, but under former Code section § 11-3-201(1) prior holder with notice of defense or claim against the instrument cannot improve that position by repurchase. *Northside Bldg. & Inv. Co. v. Finance Co. of Am.*, 119 Ga. App. 131, 166 S.E.2d 608 (1969) (decided under former Code Section 11-3-302).

**Repurchase at judicial sale.** — Status of one against whom a defense might have been urged in a prior capacity will not improve by interposing a holder in due course, but in same vein one with rights of holder in due course, and who has not otherwise lost such rights, does not diminish status by purchasing at judicial sale although one may not by virtue of such purchase alone become a due course holder. *Finance Co. of Am. v. Wilson*, 115 Ga. App. 280, 154 S.E.2d 459 (1967).

**Bank as holder in due course.** — Where check is deposited and credited to depositor's account and depositor is allowed to draw against it, the bank is presumed to be holder in due course and in spite of express conditions in deposit contract making bank a mere agent for collection, where there are other facts, namely, that draft was endorsed in blank and bank thereafter paid checks drawn by endorser against such deposit, making bank at least a pledgee, if not absolute owner of the draft, and placing it on same footing as a purchaser. *Southern Fruit*



*Distribs., Inc. v. Citizens' Bank*, 44 Ga. App. 832, 163 S.E. 261 (1932); *Pike v. First Nat'l Bank*, 99 Ga. App. 598, 109 S.E.2d 620 (1959) (decided under former Code 1933, § 14-502).

No matter what the deposit agreement was initially, when bank did in fact credit deposit to its customer, and thereafter permit customer to withdraw funds before collection, the bank became a holder for value of the check as to amount withdrawn, so as to be able to enforce payment against drawer thereof. *Pike v. First Nat'l Bank*, 99 Ga. App. 598, 109 S.E.2d 620 (1959) (decided under former Code 1933, § 14-502).

A bank is not guardian of business activities of its depositors, and there was nothing in record which would have required the bank, in exercise of due diligence, to check on behalf of loan company and ascertain that its lien was paid off from funds deposited therein on a particular date. *Pike v. First Nat'l Bank*, 99 Ga. App. 598, 109 S.E.2d 620 (1959) (decided under former Code 1933, § 14-502).

Even if payee does not personally endorse an instrument, a bank is holder of that instrument as long as it was issued to the bank. *Pazol v. Citizens Nat'l Bank*, 110 Ga. App. 319, 138 S.E.2d 442 (1964) (decided under former Code Section 11-3-302).

A bank never became a holder in due course where a check made payable jointly to the bank's customer and a third party was never endorsed by the third party before deposit in the bank. *Citizens & S. Nat'l Bank v. Sun Belt Elec. Constructors, Inc.*, 64 Bankr. 377 (Bankr. N.D. Ga. 1986) (decided under former Code Section 11-3-302).

Bank was not a holder in due course of a certificate of deposit owned by company A which was indorsed to the bank as security for a loan to company B by an officer who had authority to indorse but not to pledge certificate as security so company B had no interest in the certificate and the bank did not take for value. *Bank S. v. Midstates Group, Inc.*, 185 Ga. App. 342, 364 S.E.2d 58 (1987) (decided under former Code Section 11-3-302).

Where a bank had credited a seller's account with the amount of a buyer's check and subsequently, the buyer issued a stop-payment order on the check but, by the time the bank received notification, the

seller had spent almost all of the buyer's check, the bank was not merely a holder of the buyer's check but was a holder in due course. *Dempsey v. Etowah Bank*, 204 Ga. App. 49, 418 S.E.2d 418 (1992) (decided under former Code Section 11-3-302).

**Lessee's responsibilities.** — A lessee cannot ignore the notice of assignment of the lease signed or disregard responsibilities under the lease because the machine leased does not operate correctly. *Houser v. Tilden Fin. Corp.*, 166 Ga. App. 710, 305 S.E.2d 440 (1983) (decided under former Code Section 11-3-302).

**Right of maker to stop payment.** — Drawee bank being agent of maker, the latter is entitled as a matter of right to stop payment of any check drawn on such bank at any time before presentment to it for payment. This right cannot be exercised in a way and manner that would prejudice rights of holders in due course without incurring liability of maker on the instrument to such holders. *Stewart v. Western Union Tel. Co.*, 83 Ga. App. 532, 64 S.E.2d 327 (1951) (decided under former Code 1933, § 14-507).

**Cited in** *Coastal Plains Trucking Co. v. Thomas County Fed. Sav. & Loan Ass'n*, 224 Ga. App. 885, 482 S.E.2d 493 (1997); *Dal-Tile Corp. v. Cash N' Go, Inc.*, 226 Ga. App. 808, 487 S.E.2d 529 (1997); *Fedeli v. UAPA Ag. Chem., Inc.*, 237 Ga. App. 337, 514 S.E.2d 684 (1999).

### Holder

**Definition of holder is similar to definition under former law.** — Assertion that Uniform Commercial Code definition of holder departs from that of Uniform Negotiable Instruments Law is refuted by Official Code Comment § 1-201:1(20) which describes the definitions as "similar." *West v. FDIC*, 149 Ga. App. 342, 254 S.E.2d 392, aff'd, 244 Ga. 396, 260 S.E.2d 89 (1979) (decided under former Code Section 11-3-305).

**Drawee bank.** — Bank, as drawee of check, is not holder of the instrument so as to become beneficiary of provisions under the Uniform Commercial Code relating to a holder and holder in due course. *West v. FDIC*, 149 Ga. App. 342, 254 S.E.2d 392, aff'd, 244 Ga. 396, 260 S.E.2d 89 (1979).

**Holder** (Cont'd)

**Payee of draft** is a holder subject to any defense available to drawer. *Harford Mut. Ins. Co. v. Barfield*, 105 Ga. App. 266, 124 S.E.2d 294 (1962) (decided under former Code Section 11-3-305).

**Original payee.** — Original payee of note, as party to transaction for sale of securities, of which note is but a part, is limited in claim on the note to rights of one not a holder in due course. *Morris v. Durbin*, 123 Ga. App. 383, 180 S.E.2d 925 (1971) (decided under former Code Section 11-3-305).

**Claims**

A “**claim**” is more than a mere “**defense**” as indicated by this section. *Fulton Nat'l Bank v. Delco Corp.*, 128 Ga. App. 16, 195 S.E.2d 455 (1973) (decided under former Code Section 11-3-305).

**Defenses Generally**

**Immunity of holder fixed at time of negotiation.** — Immunity of holder in due course from defenses available to prior parties, such as want or failure of consideration, becomes fixed at time the instrument is negotiated and subsequent acts of maker short of making payment in full or being adjudicated a bankrupt cannot enhance, diminish or in any way affect right of holder in due course to enforce payment of the instrument free of defenses relative to its consideration. *Credit Equip. Corp. v. Pendley*, 97 Ga. App. 868, 104 S.E.2d 718 (1958) (decided under prior law).

Absence or failure of consideration are matters of defense in a suit on notes as against any person not a holder in due course. However, the instant that a negotiable instrument is negotiated to a holder in due course defense relative to its consideration is precluded. *Credit Equip. Corp. v. Pendley*, 97 Ga. App. 868, 104 S.E.2d 718 (1958) (decided under former Code 1933, §§ 14-305, 14-507, and 14-508).

**Bank's defenses as holder for value.** — Where a bank had credited a seller's account with the amount of a buyer's check and subsequently, the buyer issued a stop-payment order on the check but, by the time the bank received notification, the seller had spent almost all of the buyer's

check, the bank was not merely a holder of the buyer's check but was a holder in due course and subject only to the defenses enumerated in subsection (2). *Dempsey v. Etowah Bank*, 204 Ga. App. 49, 418 S.E.2d 418 (1992) (decided under former Code Section 11-3-305).

**Good faith of bank in issue.** — In a case under the former version of this section on the issue of a bank's status as a “holder in due course,” evidence that the bank may have acted in bad faith when it accepted deposits to the account of an overdrawn depositor and failed to place a hold on the account precluded summary judgment for the bank. *Choo Choo Tire Serv., Inc v. Union Planters Nat'l Bank*, 231 Ga. App. 346, 498 S.E.2d 799 (1998).

**Nonsignature.** — If defendant can prove at trial that defendant did not sign the document at issue, defendant will have a valid defense even against a holder in due course. *Massey-Ferguson Credit Corp. v. Wiley*, 655 F. Supp. 655 (M.D. Ga. 1987) (decided under former Code Section 11-3-305).

**“Fraud in the factum.”** — “Fraud in the factum” is the only type fraud available under the Uniform Commercial Code as a defense against a holder in due course; mere allegations of misrepresentation are not sufficient to prove “fraud in the factum” to withstand plaintiff's motion for summary judgment. *Massey-Ferguson Credit Corp. v. Wiley*, 655 F. Supp. 655 (M.D. Ga. 1987).

The only type of fraud assertable against a holder in due course under former paragraph (2)(c) is fraud in factum. Fraud in the inducement, which does not go to the essence of the agreement but merely induces the party to enter the agreement, would not have the same effect because it would render the instrument merely voidable and capable of transfer. *Milligan v. Gilmore Meyer Inc.*, 775 F. Supp. 400 (S.D. Ga. 1991) (decided under former Code Section 11-3-305).

**Fraud which induces one to enter into contract** resulting in execution of negotiable instrument is a good defense to action on instrument by original payee. *Johnston v. Dollar*, 83 Ga. App. 219, 63 S.E.2d 408 (1951) (decided under former Code 1933, § 14-505).

**Party-to-the-transaction rule.** — For a discussion of the party-to-the-transaction rule as



a defense to the holder in due course status, see *Design Eng'g, Constr. Int'l, Inc. v. Cessna Fin. Corp.*, 164 Ga. App. 159, 296 S.E.2d 195 (1982) (decided under former Code Section 11-3-305).

**Unavailable defenses.** — Where negotiable notes are given in renewal of trade acceptances in hands of holder in due course, defense of failure of consideration is not available to maker against such holder, regardless of whether maker was aware of that defense when notes were made. *Credit Equip. Corp. v. Pendley*, 97 Ga. App. 868, 104 S.E.2d 718 (1958) (decided under former Code 1933, §§ 14-305 and 14-507).

An assignee given the rights of a holder in due course of security agreements takes the instruments free of personal defenses such as failure or lack of consideration, breach of warranty, unconscionability and fraud in the inducement of the contract. *Massey-Ferguson Credit Corp. v. Wiley*, 655 F. Supp. 655 (M.D. Ga. 1987) (decided under former Code Section 11-3-305).

Rule that defenses of fraud in inducement or procurement is not available against holders in due course is kept in force by Uniform Commercial Code. *Moore v. Southern Dist. Co.*, 107 Ga. App. 868, 132 S.E.2d 101 (1963) (decided under former Code Section 11-3-305).

In general, defense of want or failure of consideration is available only against one who does not have rights of a holder in due course. *Ashburn Bank v. Childress*, 120 Ga. App. 632, 171 S.E.2d 768 (1969) (decided under former Code Section 11-3-305).

Failure of consideration is a personal defense and is ineffective against a holder in due course. *Massey-Ferguson Credit Corp. v. Wiley*, 655 F. Supp. 655 (M.D. Ga. 1987) (decided under former Code Section 11-3-305).

**Defense involving post-transfer transaction between payee and maker.** — Conditional sale contract and promissory note in hands of a holder in due course is not subject to defense involving transaction between payee and maker, entered into after transfer of note to holder in due course, unless such holder was party to transaction and released maker from the obligation. *Peoples Loan & Fin. Co. v. Ledbetter*, 69 Ga. App. 729, 26 S.E.2d 671 (1943) (decided under former Code 1933, § 14-502).

## Notice

**Holder taking without notice as collateral for security.** — Holder of instrument as collateral security, who takes without notice, stands upon same footing as innocent purchaser without notice. *Veal v. Jenkins*, 58 Ga. App. 4, 197 S.E. 328 (1938) (decided under former Code 1933, § 14-507).

**Purchaser with notice purchasing from transferor without notice.** — Purchaser of negotiable note, although with notice of an equity as between maker and original payee, is protected in title if purchased from one who previously purchased it from original payee without notice of any infirmity in the note. *Veal v. Jenkins*, 58 Ga. App. 4, 197 S.E. 328 (1938) (decided under former Code 1933, § 14-507).

**Taking without notice of maker's defense of failure of consideration.** — Where, on trial of action upon check against maker who had stopped payment, evidence demands finding that the check, on day it was drawn, was negotiated to plaintiff as payment on an existing indebtedness owed by payee to the plaintiff, in good faith, without notice of maker's defense of failure of consideration, finding was demanded that plaintiff holder was a holder in due course and entitled to recover full amount of the check. *Kemp Motor Sales, Inc. v. Statham*, 120 Ga. App. 515, 171 S.E.2d 389 (1969) (decided under former Code Section 11-3-302).

**Taking with notice instrument is overdue.** — Holder in due course status denied to one taking instrument with notice it is overdue. *Northside Bldg. & Inv. Co. v. Finance Co. of Am.*, 119 Ga. App. 131, 166 S.E.2d 608 (1969) (decided under former Code Section 11-3-302).

**Purchaser who acquires note after default of an installment** is not holder in due course, but takes instrument with notice of its dishonor, and subject to any defense or equity which could be pleaded as against original payee. *Browning v. Rewis*, 152 Ga. App. 45, 262 S.E.2d 174 (1979) (decided under former Code Section 11-3-302).

Deed to land to secure debt and note executed in connection therewith may be transferred and assigned. A purchaser who acquires such note after default as to one of its installments is not a holder in due course, but takes the instrument with notice of its dishonor, and subject to any defense or



**Notice** (Cont'd)

equity which could be pleaded as against the original payee. *Verner v. McLarty*, 213 Ga. 472, 99 S.E.2d 890 (1957), overruled on other grounds, *Ward v. Watkins*, 219 Ga. 629, 135 S.E.2d 421 (1964) (decided under former Code 1933, §§ 14-502 and 14-508).

**Usury on face of note.** — Maker of note cannot ordinarily plead failure of consideration against innocent holder in due course, but usury on face of note would show that holder was not a holder in due course. *Gray v. American Bank*, 122 Ga. App. 442, 177 S.E.2d 207, appeal dismissed, 122 Ga. App. 443, 177 S.E.2d 208 (1970) (decided under former Code Section 11-3-302).

**Purchaser with notice taking from transferor without notice.** — Purchaser of negotiable note, although with notice of an equity as between maker and original payee, is protected in title if the purchase is from one who previously purchased it from original payee without notice of any infirmity in the note. *Veal v. Jenkins*, 58 Ga. App. 4, 197 S.E. 328 (1938) (decided under former Code 1933, § 14-507).

**Actions**

**Burden of showing status as holder.** — In suit on negotiable instruments, burden is initially on party suing to show first that one is a holder of the instruments sued on. *James Talcott, Inc. v. Allahabad Bank, Ltd.*, 444 F.2d 451 (5th Cir.), cert. denied, 404 U.S. 940, 92 S. Ct. 280, 30 L. Ed. 2d 253 (1971) (decided under former Code Section 11-3-302).

**When burden of proving one is holder in due course shifts.** — Production of instrument entitles a holder to recover on it unless defendant establishes a defense, and burden of proving that one is a holder in due course does not shift to holder until it is shown that a defense exists. *James Talcott, Inc. v. Allahabad Bank, Ltd.*, 444 F.2d 451 (5th Cir.), cert. denied, 404 U.S. 940, 92 S. Ct. 280, 30 L. Ed. 2d 253 (1971) (decided under former Code Section 11-3-302).

**Defense of fraud in the factum.** — Under Uniform Commercial Code, defense of fraud in inducement cannot be asserted against a holder in due course. There is no protection against a defense of fraud in the factum, however. *FDIC v. Willis*, 497 F. Supp.

272 (S.D. Ga. 1980) (decided under former Code Section 11-3-302).

Under defense of fraud in the factum, the fraud which defendants attempt to show must be in the factum, or within the loan instrument itself. Such a defense fails, however, where essential terms of note are correct; fact that the instrument incorrectly reflects that loan was secured does not affect validity of underlying transaction. *FDIC v. Willis*, 497 F. Supp. 272 (S.D. Ga. 1980) (decided under former Code Section 11-3-302).

**Party-to-the-transaction rule.** — For a discussion of the party-to-the-transaction rule as a defense to the holder in due course status, see *Design Eng'g, Constr. Int'l, Inc. v. Cessna Fin. Corp.*, 164 Ga. App. 159, 296 S.E.2d 195 (1982) (decided under former Code Section 11-3-302).

Before the "party-to-the-transaction rule" may be asserted as a defense against a holder in due course, there must be evidence showing that the assignee was an "original party" to the underlying transaction or that the assignee exercised sufficient "control" of the underlying transaction to authorize a finding that the assignee was, in reality, a party to the original transaction. *GECC v. Smith*, 183 Ga. App. 897, 360 S.E.2d 443, cert. denied, 183 Ga. App. 906, 360 S.E.2d 443 (1987) (decided under former Code Section 11-3-302).

**Motion to dismiss denied.** — Regarding requirement of former subsection (1)(c) of this section, fact that copy of a check attached as exhibit to petition bears a date more than one year prior to time instrument was alleged to have been transferred to plaintiff bank does not subject petition to general demurrer (now motion to dismiss) on ground that petition shows bank had notice the check was overdue. *Pazol v. Citizens Nat'l Bank*, 110 Ga. App. 319, 138 S.E.2d 442 (1964) (decided under former Code Section 11-3-302).

Allegation that plaintiff bank gave credit for check prior to receiving knowledge or notice of dishonor and without notice of defense against or claim to it on part of any person is sufficient as against a general demurrer (now motion to dismiss) to allege compliance with requirement of former subsection (1)(c) of this section of a holder in due course. *Pazol v. Citizens Nat'l Bank*, 110

Ga. App. 319, 138 S.E.2d 442 (1964) (decided under former Code Section 11-3-302).

**Setoff.** — Where holder of promissory note other than payee named, who has received same in dishonor, institutes suit thereon against maker, the latter may set off to extent of amount due on the note, any sum which may be due from payee to maker which is in any way connected with the debt sued on or the transaction out of which it sprang. *Srochi v. Kamensky*, 118 Ga. App. 182, 162 S.E.2d 889 (1968), later appeal, 121 Ga. App. 518, 174 S.E.2d 263 (1970) (decided under former Code Section 11-3-302).

**Illegality determined by law of forum.** — This section leaves determination of what transactions are illegal to statute law of forum. *Middle Ga. Livestock Sales v. Commercial Bank & Trust Co.*, 123 Ga. App. 733, 182 S.E.2d 533 (1971) (decided under former Code Section 11-3-305).

**Holder in due course of check given for stolen property.** — Holder in due course for value of check given by innocent maker for purchase of cattle which turned out to have been stolen may not recover value of such check from maker. *Middle Ga. Livestock Sales v. Commercial Bank & Trust Co.*, 123 Ga. App. 733, 182 S.E.2d 533 (1971) (decided under former Code Section 11-3-305).

### Holders Not in Due Course Generally

**Provisions qualified by O.C.G.A. § 13-7-7.** — The broad language of this section is qualified by the restrictive provisions of O.C.G.A. § 13-7-7, limiting defenses to demands in some way connected with the debt sued on or the transaction out of which it sprang. *Srochi v. Kamensky*, 121 Ga. App. 518, 174 S.E.2d 263 (1970) (decided under former Code Section 11-3-306).

**Rights of original payee.** — Original payee of note, as party to transaction for sale of securities, of which note is but a part, is limited in claim on the note to rights of one not a holder in due course. *Morris v. Durbin*, 123 Ga. App. 383, 180 S.E.2d 925 (1971) (decided under former Code Section 11-3-306).

**Purchaser acquiring note after default in an installment.** — A deed to land to secure debt and note executed in connection therewith may be transferred and assigned. A purchaser who acquires such note after default as to one of its installments is not a

holder in due course, but takes instrument with notice of its dishonor, and subject to any defense or equity which could be pleaded as against original payee. *Verner v. McLarty*, 213 Ga. 472, 99 S.E.2d 890 (1957), overruled on other grounds, *Ward v. Watkins*, 219 Ga. 629, 135 S.E.2d 421 (1964) (decided under former Code 1933, §§ 14-502 and 14-508).

Purchaser who acquires note after default in an installment is not a holder in due course, but takes with notice of its dishonor, and subject to any defense or equity which could be pleaded as against original payee. *Browning v. Rewis*, 152 Ga. App. 45, 262 S.E.2d 174 (1979) (decided under former Code Section 11-3-306).

**Liability of drawer.** — While drawer of check has right to stop payment of it at any time before it has been certified or paid by drawee, drawer remains liable unless the drawer has a defense good against the holder. *Tidwell v. Bank of Tifton*, 115 Ga. App. 555, 155 S.E.2d 451 (1967) (decided under former Code Section 11-3-306).

Drawer is liable to holder absent existence of defense good against the latter. *Bob's Radio Serv., Inc. v. F.P. Plaza, Inc.*, 125 Ga. App. 133, 186 S.E.2d 552 (1971) (decided under former Code Section 11-3-306).

Bank carrying an account with another bank has right to stop payment on its check, however, it remains liable for value of the item unless legal and valid defense is available to it. *Fulton Nat'l Bank v. Delco Corp.*, 128 Ga. App. 16, 195 S.E.2d 455 (1973) (decided under former Code Section 11-3-306).

### Holders Not in Due Course—Claims

**Word "claim"** descends from the law merchant and indicates certain rights in instrument on which suit is based rather than mere reasons why alleged debtor is not liable for the fund. It is, however, to some extent broader than concept of legal title to instrument. *Fulton Nat'l Bank v. Delco Corp.*, 128 Ga. App. 16, 195 S.E.2d 455 (1973) (decided under former Code Section 11-3-306).

**Scope of claims covered by this section.** — Valid claims under this section include not only claims of legal title, but all liens, equities or other claims of right against the instrument or its proceeds, as well as claims to rescind prior negotiation and to recover



**Holders Not in Due****Course—Claims** (Cont'd)

instrument or its proceeds. *Fulton Nat'l Bank v. Delco Corp.*, 128 Ga. App. 16, 195 S.E.2d 455 (1973) (decided under former Code Section 11-3-306).

**Claims of third party defending action on behalf of defendant drawee bank.** — If third party claims ownership in uncashed check as well as ownership of fund represented by it, then it is a third-party claim available to defendant drawee bank, the party prima facie liable if third party is defending action on its behalf. *Fulton Nat'l Bank v. Delco Corp.*, 128 Ga. App. 16, 195 S.E.2d 455 (1973) (decided under former Code Section 11-3-306).

**Holders Not in Due Course—Defenses**

**Immunity of holder fixed at time of negotiation.** — Immunity of holder in due course from defenses available to prior parties, such as want or failure of consideration, becomes fixed at time the instrument is negotiated and subsequent acts of maker short of making payment in full or being adjudicated a bankrupt cannot enhance, diminish or in any way affect right of holder in due course to enforce payment of the instrument free of defenses relative to its consideration. *Credit Equip. Corp. v. Pendley*, 97 Ga. App. 868, 104 S.E.2d 718 (1958) (decided under former Code 1933, §§ 14-305 and 14-507).

Absences or failure of consideration are matters of defense in a suit on notes as against any person not a holder in due course. However, the instant that a negotiable instrument is negotiated to a holder in due course defense relative to its consideration is precluded. *Credit Equip. Corp. v. Pendley*, 97 Ga. App. 868, 104 S.E.2d 718 (1958) (decided under former Code 1933, §§ 14-305, 14-507, and 14-508).

**Defenses outlined in former paragraph (c) all relate to creation of valid obligation** and not to restrictions upon existing ones. *Tatum v. Bank of Cumming*, 135 Ga. App. 675, 218 S.E.2d 677 (1975) (decided under former Code Section 11-3-306).

**Defense of payment in full.** — One acquiring promissory note who is not a holder in due course is subject to defense of payment in full. *Northside Bldg. & Inv. Co. v. Finance Co. of Am.*, 119 Ga. App. 131, 166

S.E.2d 608 (1969) (decided under former Code Section 11-3-306).

**Payment of installment to payee without notice of prior transfer of instrument.** — Where maker pays installment to payee without notice that payee had no authority to accept payment, in a suit by transferee, maker can set up the payment as a defense even though transferor had not remitted it to transferee. *Northside Bldg. & Inv. Co. v. Finance Co. of Am.*, 119 Ga. App. 131, 166 S.E.2d 608 (1969) (decided under former Code Section 11-3-306).

**Fraud which induces a party to enter into contract** resulting in execution of negotiable instrument is a good defense to action on instrument by original payee. *Johnston v. Dollar*, 83 Ga. App. 219, 63 S.E.2d 408 (1951) (decided under former Code 1933, § 14-508).

**Defense of failure of consideration generally.** — In general, defense of want or failure of consideration is available only against one who does not have rights of a holder in due course. *Ashburn Bank v. Childress*, 120 Ga. App. 632, 171 S.E.2d 768 (1969) (decided under former Code Section 11-3-306).

Absence or failure of consideration is a defense only as against one not a holder in due course, and inadequacy of consideration does not prevent holder of a note from enjoying protection of a bona fide holder. *Commercial Credit Equip. Corp. v. Reeves*, 110 Ga. App. 701, 139 S.E.2d 784 (1964) (decided under former Code 1933, § 14-305).

**Necessary allegations in plea of failure of consideration.** — Defendant's plea of failure of consideration must allege facts showing affirmatively that plaintiff is not a holder in due course. *Henry v. A.L. Zachry Co.*, 93 Ga. App. 536, 92 S.E.2d 225 (1956) (decided under former Code 1933, § 14-305).

**Partial failure of consideration** is a defense pro tanto against one not a holder in due course of a negotiable instrument. *Lanier v. Waddell*, 83 Ga. App. 423, 64 S.E.2d 79 (1951) (decided under former Code 1933, § 14-305).

**Limitation on defense of setoff.** — Defense of setoff is available but it was apparently intention of legislature to limit this defense to demands in some way connected with debt sued on, or transaction out of which it sprang. *Srochi v. Kamensky*, 118 Ga.



App. 182, 162 S.E.2d 889 (1968), later appeal, 121 Ga. App. 518, 174 S.E.2d 263 (1970) (decided under former Code Section 11-3-306).

**Setoff by maker of connected debts of payee.** — Where holder of promissory note, other than payee therein named, who has received same in dishonor, institutes suit thereon against maker, latter may set off to extent of amount due on the note, any sum which may be due from payee to maker which is in any way connected with the debt sued on or the transaction out of which it sprang. *Srochi v. Kamensky*, 118 Ga. App. 182, 162 S.E.2d 889 (1968), later appeal, 121

Ga. App. 518, 174 S.E.2d 263 (1970) (decided under former Code Section 11-3-306).

#### **Holders Not in Due Course—Parol Evidence**

**Admissibility of evidence.** — Where consideration for contract is so expressed as to make it one of its conditions, a party may not under guise of inquiring into its consideration alter terms of instrument by parol, but parol evidence is otherwise admissible to show lack or failure of consideration. The same is true on defense of conditional delivery. *Kelley v. Carson*, 120 Ga. App. 450, 171 S.E.2d 150 (1969) (decided under former Code Section 11-3-306).

### **RESEARCH REFERENCES**

**Am. Jur. 2d.** — 11 Am. Jur. 2d, Banks, § 970. 11 Am. Jur. 2d, Bills and Notes, §§ 189, 207 et seq., 247, 251, 264, 268, 272, 288, 299. 12 Am. Jur. 2d, Bills and Notes, § 683. 15A Am. Jur. 2d, Commercial Code, § 58. 50 Am. Jur. 2d, Letters of Credit, and Credit Cards, §§ 3, 5, 10, 19. 68A Am. Jur. 2d, Secured Transactions, §§ 14, 55, 826, 926-930.

**C.J.S.** — 10 C.J.S., Bills and Notes, § 169 et seq.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 3-302.

**ALR.** — Right of purchaser of stolen bonds, 1 ALR 717; 85 ALR 357; 102 ALR 28.

Crediting the proceeds of negotiable paper to holder's deposit account as constituting bank a holder in due course, 6 ALR 252; 59 ALR2d 1173.

Breach of agreement to return a note to maker as fraud which casts upon an endorsee the burden of showing his bona fide character, 6 ALR 1667.

Absence of revenue stamp as affecting bona fides of purchaser of bill or note, 6 ALR 1701; 21 ALR 1125.

Effect of fraud in the inception of a bill or note to throw upon a subsequent holder the burden of proving that he is a holder in due course, 18 ALR 18; 34 ALR 300; 57 ALR 1083.

Memoranda or notations on paper as affecting one's character as a holder in due course, 34 ALR 1377.

Renewal of note after notice of defenses as destroying bona fide character of holder, 35 ALR 1294.

Effect on bona fides of purchaser of promissory note of fact that there is interest due and unpaid upon it, 40 ALR 832.

Validity and effect of note payable to maker without words of negotiability, 42 ALR 1067; 50 ALR 426.

One taking bill or note as a gift or in consideration of love and affection as a holder for value or in due course protected against defenses between prior parties, 48 ALR 237.

Endorsee of bill or note based on executed consideration who knows of circumstances which might result in rescission as between original parties, as a holder in due course, 59 ALR 1026.

Character as holder in due course of concern which takes paper from its dealers or agents, 61 ALR 694.

Maturity of one or more of series of notes as affecting status of purchaser as holder in due course, 64 ALR 457.

Exchange of negotiable paper as supporting status as holder in due course of one who at time of exchange had no notice of infirmity or defect in paper received, 69 ALR 408.

Endorsement without recourse as affecting character of endorsee or subsequent holder as holder in due course, 77 ALR 487.

Taking negotiable paper as collateral security for or in payment of preexisting indebtedness as sustaining one's character as holder in due course under Uniform Negotiable Instruments Act, 80 ALR 670.

High rate of discount upon sale of nego-

negotiable paper as affecting one's status as holder in due course, 91 ALR 1139.

Possession of bill or note as essential to maintain action thereon as "holder," 102 ALR 460.

Maturity of one or more of installments of note payable in installments as affecting status of purchaser as holder in due course, 170 ALR 1029.

Bills and notes: indication of alteration as affecting transferee's character as holder in due course, 171 ALR 798.

Crediting proceeds of negotiable paper to depositor's account, as constituting bank a holder in due course, 59 ALR2d 1173.

Notice which has been forgotten as affecting status as holder in due course, 89 ALR2d 1330.

Payee as holder in due course, 2 ALR3d 1151; 42 ALR5th 137; 67 ALR3d 144; 78 ALR3d 1020; 88 ALR3d 1100; 97 ALR3d 798; 97 ALR3d 1114; 23 ALR4th 855; 36 ALR4th 212; 45 ALR5th 389.

Fraud in the inducement and fraud in the factum as defenses under UCC sec. 3-305

against holder in due course, 78 ALR3d 1020.

What constitutes unconditional promise to pay under Uniform Commercial Code sec. 3-104(1)(b), 88 ALR3d 1100.

Construction and application of UCC sec. 3-403(2) dealing with personal liability of authorized representative who signs negotiable instrument in his own name, 97 ALR3d 798.

Who is holder of instrument for "value" under UCC sec. 3-303, 97 ALR3d 1114.

Payee's right of recovery, in conversion under UCC sec. 3-419(1)(c), for money paid on unauthorized indorsement, 23 ALR4th 855.

What constitutes taking instrument in good faith, and without notice of infirmities or defenses, to support holder-in-due-course status, under UCC § 3-302, 36 ALR4th 212.

Liability of bank for diversion to benefit of presenter or third party of proceeds of check drawn to bank's order by drawer not indebted to bank, 69 ALR4th 778.

### 11-3-303. Value and consideration.

(a) An instrument is issued or transferred for value if:

(1) The instrument is issued or transferred for a promise of performance, to the extent the promise has been performed;

(2) The transferee acquires a security interest or other lien in the instrument other than a lien obtained by judicial proceeding;

(3) The instrument is issued or transferred as payment of, or as security for, an antecedent claim against any person, whether or not the claim is due;

(4) The instrument is issued or transferred in exchange for a negotiable instrument; or

(5) The instrument is issued or transferred in exchange for the incurring of an irrevocable obligation to a third party by the person taking the instrument.

(b) "Consideration" means any consideration sufficient to support a simple contract. The drawer or maker of an instrument has a defense if the instrument is issued without consideration. If an instrument is issued for a promise of performance, the issuer has a defense to the extent performance of the promise is due and the promise has not been performed. If an instrument is issued for value as stated in subsection (a) of this Code

section, the instrument is also issued for consideration. (Code 1981, § 11-3-303, enacted by Ga. L. 1996, p. 1306, § 3.)

**Law reviews.** — For article discussing judicial activism in cases involving claims and

defenses under the Uniform Commercial Code, see 17 Ga. L. Rev. 569 (1983).

### JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Code Section 11-3-303 are included in the annotations for this article.

**Irrevocable payment to third person.** — Payee takes for value by irrevocable payment

of consideration to third person at direction of maker. *Ashburn Bank v. Childress*, 120 Ga. App. 632, 171 S.E.2d 768 (1969) (decided under former Code Section 11-3-303).

**Cited in** *Fedeli v. UAPA Ag. Chem., Inc.*, 237 Ga. App. 337, 514 S.E.2d 684 (1999).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 11 Am. Jur. 2d, Banks and Financial Institutions, §§ 854, 855. 11 Am. Jur. 2d, Bills and Notes, §§ 141, 207, 268 et seq., 288, 389 et seq. 15A Am. Jur. 2d, Commercial Code, § 8. *Dal-Tile Corp. v. Cash N' Go, Inc.*, 226 Ga. App. 808; 487 S.E.2d 529 (1997).

**C.J.S.** — 10 C.J.S., Bills and Notes, § 185 *Fedeli v. UAPA Ag. Chem., Inc.*, 237 Ga. App. 337; 514 S.E.2d 684 (1999).

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 3-303.

**ALR.** — Right of purchaser of stolen bonds, 1 ALR 717; 85 ALR 357; 102 ALR 28.

Cross notes, bills, or checks as consideration for each other, 7 ALR 1569.

Effect of Negotiable Instruments Act on statute invalidating instrument given for gambling consideration, 8 ALR 314; 11 ALR 211; 37 ALR 698; 46 ALR 959.

Note or check itself as subject of levy and seizure under attachment or garnishment, 41 ALR 1003.

One taking bill or note as a gift or in consideration of love and affection as a holder for value or in due course protected against defenses between prior parties, 48 ALR 237.

Consideration for assumption of obligation as guarantor, surety, endorser, or indemnitor, after execution and delivery of principal contract, as predicable upon an antecedent promise to assume or furnish such obligation, 167 ALR 1174.

Maturity of one or more of installments of note payable in installments as affecting status of purchaser as holder in due course, 170 ALR 1029.

Crediting proceeds of negotiable paper to depositor's account, as constituting bank a holder in due course, 59 ALR2d 1173.

When is instrument issued or transferred for "value" under UCC § 3-303, 77 ALR5th 429.

### 11-3-304. Overdue instrument.

(a) An instrument payable on demand becomes overdue at the earliest of the following times:

- (1) On the day after the day demand for payment is duly made;
- (2) If the instrument is a check, 90 days after its date; or

(3) If the instrument is not a check, when the instrument has been outstanding for a period of time after its date which is unreasonably long under the circumstances of the particular case in light of the nature of the instrument and usage of the trade.



(b) With respect to an instrument payable at a definite time the following rules apply:

(1) If the principal is payable in installments and a due date has not been accelerated, the instrument becomes overdue upon default under the instrument for nonpayment of an installment, and the instrument remains overdue until the default is cured;

(2) If the principal is not payable in installments and the due date has not been accelerated, the instrument becomes overdue on the day after the due date; or

(3) If a due date with respect to principal has been accelerated, the instrument becomes overdue on the day after the accelerated due date.

(c) Unless the due date of principal has been accelerated, an instrument does not become overdue if there is default in payment of interest but no default in payment of principal. (Code 1981, § 11-3-304, enacted by Ga. L. 1996, p. 1306, § 3.)

#### JUDICIAL DECISIONS

**Cited** in *Southtrust Bank v. Parker*, 226 Ga. App. 292, 486 S.E.2d 402 (1997); *Fedeli v. UAPÀ Ag. Chem., Inc.*, 237 Ga. App. 337, 514 S.E.2d 684 (1999).

#### RESEARCH REFERENCES

**U.L.A.** — Uniform Commercial Code  
(U.L.A.) § 3-304.

#### **11-3-305. Defenses and claims in recoupment.**

(a) Except as stated in subsection (b) of this Code section, the right to enforce the obligation of a party to pay an instrument is subject to the following:

(1) A defense of the obligor based on:

(i) Infancy of the obligor to the extent it is a defense to a simple contract;

(ii) Duress, lack of legal capacity, or illegality of the transaction which, under other law, nullifies the obligation of the obligor;

(iii) Fraud that induced the obligor to sign the instrument with neither knowledge nor reasonable opportunity to learn of its character or its essential terms; or

(iv) Discharge of the obligor in insolvency proceedings;

(2) A defense of the obligor stated in another section of this article or a defense of the obligor that would be available if the person entitled to

enforce the instrument were enforcing a right to payment under a simple contract; and

(3) A claim in recoupment of the obligor against the original payee of the instrument if the claim arose from the transaction that gave rise to the instrument; but the claim of the obligor may be asserted against a transferee of the instrument only to reduce the amount owing on the instrument at the time the action is brought.

(b) The right of a holder in due course to enforce the obligation of a party to pay the instrument is subject to defenses of the obligor stated in paragraph (1) of subsection (a) of this Code section, but is not subject to defenses of the obligor stated in paragraph (2) of subsection (a) of this Code section or claims in recoupment stated in paragraph (3) of subsection (a) of this Code section against a person other than the holder.

(c) Except as stated in subsection (d) of this Code section, in an action to enforce the obligation of a party to pay the instrument, the obligor may not assert against the person entitled to enforce the instrument a defense, claim in recoupment, or claim to the instrument of another person pursuant to Code Section 11-3-306, but the other person's claim to the instrument may be asserted by the obligor if the other person is joined in the action and personally asserts the claim against the person entitled to enforce the instrument. An obligor is not obliged to pay the instrument if the person seeking enforcement of the instrument does not have rights of a holder in due course and the obligor proves that the instrument is a lost or stolen instrument.

(d) In an action to enforce the obligation of an accommodation party to pay an instrument, the accommodation party may assert against the person entitled to enforce the instrument any defense or claim in recoupment under subsection (a) of this Code section that the accommodated party could assert against the person entitled to enforce the instrument, except the defenses of discharge in insolvency proceedings, infancy, and lack of legal capacity. (Code 1981, § 11-3-305, enacted by Ga. L. 1996, p. 1306, § 3.)

## JUDICIAL DECISIONS

**Illegality referred to in former subsection (2)(b).** — Among those defenses available even against holder in due course, former subsection (2)(b) of this section referring to “such ... illegality of the transaction as renders the obligation of the party a nullity” refers to those defects which render instrument void, not merely voidable. *Citizens Nat'l Bank v. Brazil*, 141 Ga. App. 388, 233 S.E.2d 482 (1977); *Milligan v. Gilmore*

*Meyer Inc.*, 775 F. Supp. 400 (S.D. Ga. 1991) (decided under former Code Section 11-3-305); *Dal-Tile Corp. v. Cash N' Go, Inc.*, 226 Ga. App. 808, 487 S.E.2d 529 (1997).

**Cited in** *Union Planters Nat'l Bank v. Crook*, 225 Ga. App. 578, 484 S.E.2d 327 (1997); *Southtrust Bank v. Parker*, 226 Ga. App. 292, 486 S.E.2d 402 (1997); *Fedeli v. UAPA Ag. Chem., Inc.*, 237 Ga. App. 337, 514 S.E.2d 684 (1999).

## RESEARCH REFERENCES

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 3-305.

**ALR.** — What constitutes “dealing” under UCC § 3-305(2), providing that holder in due course takes instrument free from all defenses of any party to instrument with whom holder has not dealt, 42 ALR5th 137.

Duress, incapacity, illegality, or similar defense rendering obligation a nullity as affecting enforceability of negotiable instrument against holder in due course under UCC § 3-305(a)(1)(ii), 89 ALR5th 577.

**11-3-306. Claims to an instrument.**

A person taking an instrument, other than a person having rights of a holder in due course, is subject to a claim of a property or possessory right in the instrument or its proceeds, including a claim to rescind a negotiation and to recover the instrument or its proceeds. A person having rights of a holder in due course takes free of the claim to the instrument. (Code 1981, § 11-3-306, enacted by Ga. L. 1996, p. 1306, § 3.)

## RESEARCH REFERENCES

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 3-306.

**11-3-307. Notice of breach of fiduciary duty.**

(a) In this Code section:

(1) “Fiduciary” means an agent, trustee, partner, corporate officer or director, or other representative owing a fiduciary duty with respect to an instrument; and

(2) “Represented person” means the principal, beneficiary, partnership, corporation, or other person to whom the duty stated in paragraph (1) of subsection (a) of this Code section is owed.

(b) If an instrument is taken from a fiduciary for payment or collection or for value, the taker has knowledge of the fiduciary status of the fiduciary, and the represented person makes a claim to the instrument or its proceeds on the basis that the transaction of the fiduciary is a breach of fiduciary duty, the following rules apply:

(1) Notice of breach of fiduciary duty by the fiduciary is notice of the claim of the represented person; and

(2) In the case of an instrument payable to the represented person or the fiduciary as such, the taker has notice of the breach of fiduciary duty if the instrument is:

(i) Taken in payment of or as security for a debt known by the taker to be the personal debt of the fiduciary;



(ii) Taken in a transaction known by the taker to be for the personal benefit of the fiduciary; or

(iii) Deposited to an account other than an account of the fiduciary, as such, or an account of the represented person;

(3) If an instrument is issued by the represented person or the fiduciary as such, and made payable to the fiduciary personally, the taker does not have notice of the breach of fiduciary duty unless the taker knows of the breach of fiduciary duty; and

(4) If an instrument is issued by the represented person or the fiduciary as such, to the taker as payee, the taker has notice of the breach of fiduciary duty if the instrument is:

(i) Taken in payment of or as security for a debt known by the taker to be the personal debt of the fiduciary;

(ii) Taken in a transaction known by the taker to be for the personal benefit of the fiduciary; or

(iii) Deposited to an account other than an account of the fiduciary, as such, or an account of the represented person. (Code 1981, § 11-3-307, enacted by Ga. L. 1996, p. 1306, § 3.)

#### JUDICIAL DECISIONS

**Accord and satisfaction.** — Accord and satisfaction must be set forth in pleading to a preceding pleading; where not pleaded, it is waived. *George v. Roberts*, 220 Ga. App. 583, 469 S.E.2d 249 (1996).

**Cited in** *George v. Roberts*, 220 Ga. App.

583, 469 S.E.2d 249 (1996); *Rodgers v. First Union Nat'l Bank*, 220 Ga. App. 821, 470 S.E.2d 246 (1996); *Southtrust Bank v. Parker*, 226 Ga. App. 292, 486 S.E.2d 402 (1997).

#### RESEARCH REFERENCES

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 3-307.

#### 11-3-308. Proof of signatures and status as holder in due course.

(a) In an action with respect to an instrument, the authenticity of and authority to make each signature on the instrument is admitted unless specifically denied in the pleadings. If the validity of a signature is denied in the pleadings, the burden of establishing validity is on the person claiming validity, but the signature is presumed to be authentic and authorized unless the action is to enforce the liability of the purported signer and the signer is dead or incompetent at the time of trial of the issue of validity of the signature. If an action to enforce the instrument is brought against a person as the undisclosed principal of a person who signed the instrument as a party to the instrument, the plaintiff has the burden of establishing that the

defendant is liable on the instrument as a represented person under subsection (a) of Code Section 11-3-402.

(b) If the validity of signatures is admitted or proved and there is compliance with subsection (a) of this Code section, a plaintiff producing the instrument is entitled to payment if the plaintiff proves entitlement to enforce the instrument under Code Section 11-3-301, unless the defendant proves a defense or claim in recoupment. If a defense or claim in recoupment is proved, the right to payment of the plaintiff is subject to the defense or claim, except to the extent the plaintiff proves that the plaintiff has rights of a holder in due course which are not subject to the defense or claim. (Code 1981, § 11-3-308, enacted by Ga. L. 1996, p. 1306, § 3.)

**Law reviews.** — For article discussing parol evidence in the law of commercial paper, see 13 Ga. L. Rev. 53 (1978).

For note, "The Law of Evidence in the Uniform Commercial Code," see 1 Ga. L. Rev. 44 (1966).

For comment discussing imposition upon holder in due course of a greater burden of proof under this section of Uniform Com-

mercial Code than that previously required under Uniform Negotiable Instruments Law before its repeal, in light of Budget Charge Accounts, Inc. v. Mullaney, 187 Pa. Super. Ct. 190, 144 A.2d 438 (1958), see 10 Mercer L. Rev. 211 (1958). For comment on Perini Corp. v. First Nat'l Bank, 553 F.2d 398 (5th Cir. 1977), see 27 Emory L.J. 393 (1978).

## JUDICIAL DECISIONS

### ANALYSIS

#### GENERAL CONSIDERATION

#### SIGNATURES

#### DEFENSES

#### ESTABLISHING DUE COURSE STATUS

### General Consideration

**Editor's notes.** — In light of the similarity of the issues dealt with in the provisions, decisions under former Civil Code 1910, § 4290, former Code 1933, §§ 14-223, 14-305, 14-405, 14-505, and former Code Section 11-3-307 are included in the annotations for this section.

**Former subsection (2) inapplicable to nonnegotiable notes.** — Where language of promissory note revealed that it was not payable on demand or at a definite time, and was therefore not negotiable, it was not subject to former subsection (2) of this section. Barton v. Scott Hudgens Realty & Mtg., Inc., 136 Ga. App. 565, 222 S.E.2d 126 (1975) (decided under former Code Section 11-3-307).

**Direct action on instrument without alleging facts creating underlying obligation.** — Under Uniform Commercial Code, as formerly, one may bring action upon debt

evidenced by commercial paper in form of suing directly on instrument which imports its own consideration without setting forth facts creating obligation evidenced by the paper. Riddick v. Evans, 155 Ga. App. 868, 274 S.E.2d 40 (1980) (decided under former Code Section 11-3-307).

**Prima facie case for holder.** — With admission by defendant of execution of note to plaintiff, plaintiff has a prima facie right to judgment sought and defendant then has burden of establishing any claimed defense to the action. Crosby v. Jordan, 123 Ga. App. 83, 179 S.E.2d 537 (1970); Freezomatic Corp. v. Brigadier Indus. Corp., 125 Ga. App. 767, 189 S.E.2d 108 (1972); Malone v. Price, 138 Ga. App. 514, 226 S.E.2d 623 (1976); Brooks v. McCorkle, 174 Ga. App. 132, 329 S.E.2d 214 (1985) (decided under former Code Section 11-3-307).

Where evidence establishes that face amount of notes at time of execution was

due to plaintiff payee by defendant maker, and defendant admits execution of such notes which bear defendant's signature, plaintiff has made out a case as a matter of law as to face amount of notes and specified interest. *General Tire & Rubber Co. v. Solomon*, 124 Ga. App. 308, 183 S.E.2d 573 (1971) (decided under former Code Section 11-3-307).

Proof of possession by production of instrument entitles holder to recover on it unless opposing party establishes a defense. *James Talcott, Inc. v. Allahabad Bank, Ltd.*, 444 F.2d 451 (5th Cir.), cert. denied, 404 U.S. 940, 92 S. Ct. 280, 30 L. Ed. 2d 253 (1971); *Brooks v. McCorkle*, 174 Ga. App. 132, 329 S.E.2d 214 (1985) (decided under former Code Section 11-3-307).

Where holder introduced promissory note, established its authenticity and that its consideration was purchase of half interest in partnership business, and maker failed to establish an affirmative defense, holder made out prima-facie case entitling the holder to recovery on note. *Peters v. Thomason*, 157 Ga. App. 513, 277 S.E.2d 798 (1981) (decided under former Code Section 11-3-307).

Introduction of a promissory note (together with related documents, where appropriate) makes a prima facie case for the plaintiff and imposes upon the defendant the burden of raising defenses in rebuttal of the plaintiff's evidence. *First Nat'l Bank v. Damil, Inc.*, 171 Ga. App. 237, 319 S.E.2d 54 (1984) (decided under former Code Section 11-3-307).

Where guarantors admitted they signed the note, received the money, and defaulted, the lender had a prima facie right to recover the face value due on the note. *Hovendick v. Presidential Fin. Corp.*, 230 Ga. App. 502, 497 S.E.2d 269 (1998).

**Production of promissory note establishes prima facie case which cannot be rebutted by parol evidence.** *Tatum v. Bank of Cumming*, 135 Ga. App. 675, 218 S.E.2d 677 (1975) (decided under former Code Section 11-3-307).

**Rebuttable presumption.** — While a party is entitled ordinarily to rely on a notarized signature to sue on an indemnification agreement, where the evidence showed that the plaintiff knew months before filing the action that the defendant denied both know-

ing anything about or having signed the agreement, and that this denial was supported by a handwriting examiner's opinion that the defendant did not sign the document, any presumption arising from the notarized signature was rebutted. Additionally, as the evidence showed there noticeably was no notary seal on that portion of the agreement, purporting to acknowledge the alleged signature, the notarization did not comply with O.C.G.A. § 45-17-6(a)(1), and, accordingly, the notary's signature standing alone did not give rise even to a rebuttable presumption. *Fabe v. Floyd*, 199 Ga. App. 322, 405 S.E.2d 265 (1991), cert. denied, 199 Ga. App. 906, 405 S.E.2d 265 (1991) (decided under former Code Section 11-3-307).

**Inquiry into plaintiff's title.** — In suit instituted by person claiming to be owner and holder of promissory note for purpose of recovering thereon against maker and another alleged to have assumed the debt, it is permissible for the later to inquire into plaintiff's title to the note, if necessary either for the other's protection or to let in any valid defense which the other seeks to make. *Austell Bank v. National Bondholders Corp.*, 188 Ga. 757, 4 S.E.2d 913 (1939) (decided under former Code 1933, §§ 14-223 and 14-505).

**Cited in** *Vandegriff v. Hamilton*, 238 Ga. App. 603, 519 S.E.2d 702 (1999); *City of Bremen v. Regions Bank*, 274 Ga. 733, 559 S.E.2d 440 (2002).

## Signatures

**Signature presumed to be authorized.** — Signature executed as provided for in former Code section § 11-3-403(3) is presumed to be authorized, and if one desires to challenge its effectiveness it must be specifically denied in pleadings. *Modern Free & Accepted Masons of World v. Cliff M. Averett, Inc.*, 118 Ga. App. 641, 165 S.E.2d 166 (1968) (decided under former Code Section 11-3-307).

Until evidence is introduced to support finding that signature is forged or unauthorized, party claiming under the signature is not required to prove its authenticity. *Perini Corp. v. First Nat'l Bank*, 553 F.2d 398 (5th Cir. 1977) (decided under former Code Section 11-3-307).

**Apparent authority of agent must be specifically denied.** — Where petition alleged



**Signatures** (Cont'd)

that drawer had stopped payment on a check on drawer's account, bearing drawer's imprinted trade name, underneath which appeared signature of drawer's wife who had apparent authority as agent or representative, in absence of pleading that wife had no such authority to draw checks on that account, this must be construed as an admission of wife's authority. *Gate City Furn. Co. v. Rumsey*, 115 Ga. App. 753, 156 S.E.2d 221 (1967) (decided under former Code Section 11-3-307).

**Proving genuineness of endorsement.** — Where one sued upon negotiable instrument, which is complete and regular upon its face, files answer under oath denying that transfer and endorsement to plaintiff is genuine, but which answer does not amount to a plea of non est factum, burden is cast upon plaintiff to prove genuineness of endorsement before such note can be introduced into evidence. *Equitable Disct. Corp. v. Guest*, 103 Ga. App. 258, 118 S.E.2d 864 (1961) (decided under former Code 1933, § 14-405).

**Defenses**

**Recovery for holder if defenses overcome.** — Holder of instrument may recover on it if the holder can successfully overcome any defense raised. *Gate City Furn. Co. v. Rumsey*, 115 Ga. App. 753, 156 S.E.2d 221 (1967) (decided under former Code Section 11-3-307).

**Burden of establishing defense.** — Where suit is brought upon promissory note, and defendant pleads that note was without consideration, burden is on defendant to sustain plea by showing by preponderance of evidence the want of consideration. *Morgan's, Inc. v. Mons*, 79 Ga. App. 525, 54 S.E.2d 498 (1949), later appeal, 83 Ga. App. 814, 65 S.E.2d 34 (1951) (decided under former Code 1933, § 14-305).

With admission by defendant of execution of note to plaintiff, the plaintiff had a prima facie right to judgment sought and defendant then had burden of establishing any claimed defense to action. *FDIC v. Kucera Bldrs., Inc.*, 503 F. Supp. 967 (N.D. Ga. 1980) (decided under former Code Section 11-3-307).

Where it was undisputed that

defendant-maker executed note evidencing indebtedness and plaintiff held all right, title and interest that payee originally held in said note, plaintiff established prima-facie right to judgment sought and burden shifted to defendants to interpose viable defense. *Slappey Bldrs., Inc. v. FDIC*, 157 Ga. App. 343, 277 S.E.2d 328 (1981) (decided under former Code Section 11-3-307).

When a plaintiff established execution of a note, the burden was on the defendant to establish an affirmative defense, but on plaintiff's motion for summary judgment it was plaintiff's burden to establish non-existence of a genuine issue of fact as to each affirmative defense, and all doubts were resolved against plaintiff as movant; plaintiff's papers are carefully scrutinized, while the respondents' papers are treated with considerable indulgence. *Maddox v. Leaphart*, 214 Ga. App. 340, 447 S.E.2d 694 (1994) (decided under former Code Section 11-3-307).

The trial court erred when it ruled at an initial traverse hearing that the payors under a promissory note were liable solely because they admitted the genuineness of their signatures, since the payee would not have been entitled to recover fully or at all if the payors had totally or partially proven their defense of breach of contract. *Lowery v. Dallis*, 237 Ga. App. 309, 513 S.E.2d 740 (1999).

**Failure to establish defense.** — Since it appears conclusively from evidence that defendant had not established any defense to the note, defendant cannot dispute title of plaintiff as transferee upon ground that plaintiff was not a bona fide purchaser for value. *Jones v. Roper*, 39 Ga. App. 309, 147 S.E. 156 (1929) (decided under former Civil Code 1910, § 4290).

When the maker of a note was unable to establish a valid defense to payment, the payee was entitled as a matter of law to recover on the note. *Brooks v. McCorkle*, 174 Ga. App. 132, 329 S.E.2d 214 (1985) (decided under former Code Section 11-3-307).

**Mere denial of indebtedness is not defense.** — Defendant's answer admitting execution of the notes but denying indebtedness because the notes were "part of a series of actions dealing with stock of the two companies, stock options and other matters" is not a defense to an action on prom-

issory notes. *Freezomatic Corp. v. Brigadier Indus. Corp.*, 125 Ga. App. 767, 189 S.E.2d 108 (1972) (decided under former Code Section 11-3-307).

Where defendant admits execution of note, mere denial of debt for various general reasons not contained in O.C.G.A. § 9-11-8 does not constitute a defense under this section. *Malone v. Price*, 138 Ga. App. 514, 226 S.E.2d 623 (1976) (decided under former Code Section 11-3-307).

**Want or absence of consideration may be pleaded** in suit on promissory note executed under seal, in same manner as has uniformly been allowed in this state in case of failure of consideration. *Citizens' Bank v. Hall*, 179 Ga. 662, 177 S.E. 496 (1934) (decided under former Code 1933, § 14-305).

**When defense of failure of consideration not available.** — Where note is renewed, defense of failure of consideration is not available under this section. *Mercantile Nat'l Bank v. Berger*, 129 Ga. App. 707, 200 S.E.2d 921 (1973), *aff'd*, 231 Ga. 680, 203 S.E.2d 479 (1974) (decided under former Code Section 11-3-307).

**Receipt of money by one comaker.** — Where two parties execute note as comakers, one comaker is not allowed to plead failure of consideration because that party does not receive money named on face of note. If either of them receives money, both are bound. *Mercantile Nat'l Bank v. Berger*, 129 Ga. App. 707, 200 S.E.2d 921 (1973), *aff'd*, 231 Ga. 680, 203 S.E.2d 479 (1974) (decided under former Code Section 11-3-307).

**Defense that transfer by payee not genuine.** — Payment of promissory note to supposed transferee, holding by virtue of forged endorsement, will not protect maker or one who has assumed the debt against payment to true owner; and, consequently, in a suit by such alleged transferee to enforce liability against such parties, assumer may utilize defense that alleged transfer by payee was not genuine. *Austell Bank v. National Bondholders Corp.*, 188 Ga. 757, 4 S.E.2d 913 (1939) (decided under former Code 1933, § 14-223).

**No viable defense established.** — See *Harbage v. Dollar Farm Prods. Co.*, 166 Ga. App. 561, 305 S.E.2d 25 (1983) (decided under former Code Section 11-3-307).

An accommodation party argued that no liability should arise on certain notes, be-

cause commercial loan officers of the bank breached an oral agreement not to make loans to the accommodated parties without that party's prior knowledge and consent. The accommodated party's signature on the notes sued on, the authenticity of which was not contested, eliminated this defense. *Richards v. First Union Nat'l Bank*, 199 Ga. App. 636, 405 S.E.2d 705, cert. denied, 199 Ga. App. 907, 405 S.E.2d 705 (1991) (decided under former Code Section 11-3-307).

**Pleading defense of denial of execution of note.** — In debtor-creditor case, general denial by plaintiff of allegations in defendant's counterclaim was sufficient to raise defense of non est factum, since that defense need no longer be affirmatively pleaded; and, therefore, plaintiff did not admit the signature within meaning of this section. *Spurlock v. Commercial Banking Co.*, 151 Ga. App. 649, 260 S.E.2d 912 (1979) (decided under former Code Section 11-3-307).

Borrower's general denial of the allegations contained in lender's complaint was sufficient to raise the defense of denial of the execution of a note, which, in turn, meant that borrower did not admit the signature within the meaning of this Code section. *Jones v. Kim*, 189 Ga. App. 5, 374 S.E.2d 820 (1988) (decided under former Code Section 11-3-307).

### Establishing Due Course Status

**When burden of proof shifts to holder.** — Burden of proving that one is a holder in due course does not shift to holder until it is shown that a defense exists. *James Talcott, Inc. v. Allahabad Bank, Ltd.*, 444 F.2d 451 (5th Cir.), cert. denied, 404 U.S. 940, 92 S. Ct. 280, 30 L. Ed. 2d 253 (1971) (decided under former Code Section 11-3-307).

Showing of any defense provided by O.C.G.A. § 11-3-305 or § 11-3-306, against holders in due course as well as holders not in due course, is what is required to cast burden on plaintiff holder. *Pitillo v. Demetry*, 112 Ga. App. 643, 145 S.E.2d 792 (1965) (decided under former Code Section 11-3-307).

**"In all respects"** as used in former subsection (3) of this section means that the person must sustain burden of proving that the person is a holder in due course by affirmative proof that the instrument was taken for value, in good faith, and without notice.



**Establishing Due Course Status** (Cont'd)

181 (1969) (decided under former Code Section 11-3-307).

Brown v. Kelley, 120 Ga. App. 788, 172 S.E.2d

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 11 Am. Jur. 2d, Bills and Notes, §§ 105, 215, 216, 299. 12 Am. Jur. 2d, Bills and Notes, §§ 557, 650 et seq., 681. 15A Am. Jur. 2d, Commercial Code, §§ 73, 74.

**C.J.S.** — 10 C.J.S., Bills and Notes, § 284 et seq.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 3-308.

**ALR.** — Necessity of endorsement by all payees before maturity to make a transferee a bona fide holder, 25 ALR 163.

Necessity of proof of title by one in possession of a negotiable instrument bearing his endorsement, 30 ALR 328.

Burden of proof as to alteration not apparent on face of instrument, 31 ALR 1455.

Stamped, printed, or typewritten signature as compliance with requirement that process or document be “under his hand,” 37 ALR 87.

Character as holder in due course protected against defenses of prior party as affected by lack of bona fides toward intermediate party, 52 ALR 516.

Rights as between one who deposits commercial paper for collection without any indication on the paper of that purpose, and one who takes it in good faith from the depositary, 58 ALR 259.

Proof or admission that title to negotiable paper was defective as between intermediate holders as affecting presumption that subsequent holder was a holder in due course, 70 ALR 1228.

Renewal of bill or note as precluding defense available against the original, 72 ALR 600.

Production of paper purporting to be endorsed in blank by payee or by a special endorsee as prima facie evidence of plaintiff's title, 85 ALR 304.

Burden of proof as to consideration for bill or note when plaintiff not protected as a holder in due course, 127 ALR 1003.

Deception as to character of paper signed as defense as against bona fide holder of negotiable paper, 160 ALR 1295.

**11-3-309. Enforcement of lost, destroyed, or stolen instrument.**

(a) A person not in possession of an instrument is entitled to enforce the instrument if (i) the person was in possession of the instrument and entitled to enforce it when loss of possession occurred; (ii) the loss of possession was not the result of a transfer by the person or a lawful seizure; and (iii) the person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process.

(b) A person seeking enforcement of an instrument under subsection (a) of this Code section must prove the terms of the instrument and the person's right to enforce the instrument. If that proof is made, Code Section 11-3-308 applies to the case as if the person seeking enforcement had produced the instrument. The court may not enter judgment in favor of the person seeking enforcement unless it finds that the person required to pay the instrument is adequately protected against loss that might occur by reason of a claim by another person to enforce the instrument. Adequate



protection may be provided by any reasonable means. (Code 1981, § 11-3-309, enacted by Ga. L. 1996, p. 1306, § 3.)

#### RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 3-309.

#### **11-3-310. Effect of instrument on obligation for which taken.**

(a) Unless otherwise agreed, if a certified check, cashier's check, or teller's check is taken for an obligation, the obligation is discharged to the same extent discharge would result if an amount of money equal to the amount of the instrument were taken in payment of the obligation. Discharge of the obligation does not affect any liability that the obligor may have as an indorser of the instrument.

(b) Unless otherwise agreed and except as provided in subsection (a) of this Code section, if a note or an uncertified check is taken for an obligation, the obligation is suspended to the same extent the obligation would be discharged if an amount of money equal to the amount of the instrument were taken, and the following rules apply:

(1) In the case of an uncertified check, suspension of the obligation continues until dishonor of the check or until it is paid or certified. Payment or certification of the check results in discharge of the obligation to the extent of the amount of the check;

(2) In the case of a note, suspension of the obligation continues until dishonor of the note or until it is paid. Payment of the note results in discharge of the obligation to the extent of the payment;

(3) Except as provided in paragraph (4) of this subsection, if the check or note is dishonored and the obligee of the obligation for which the instrument was taken is the person entitled to enforce the instrument, the obligee may enforce either the instrument or the obligation. In the case of an instrument of a third person which is negotiated to the obligee by the obligor, discharge of the obligor on the instrument also discharges the obligation; and

(4) If the person entitled to enforce the instrument taken for an obligation is a person other than the obligee, the obligee may not enforce the obligation to the extent the obligation is suspended. If the obligee is the person entitled to enforce the instrument but no longer has possession of it because it was lost, stolen, or destroyed, the obligation may not be enforced to the extent of the amount payable on the instrument, and to that extent the obligee's rights against the obligor are limited to enforcement of the instrument.

(c) If an instrument other than one described in subsection (a) or (b) of this Code section is taken for an obligation, the effect is (i) that stated in

subsection (a) of this Code section if the instrument is one on which a bank is liable as maker or acceptor; or (ii) that stated in subsection (b) of this Code section in any other case. (Code 1981, § 11-3-310, enacted by Ga. L. 1996, p. 1306, § 3.)

#### RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 3-310.

#### **11-3-311. Accord and satisfaction by use of instrument.**

(a) If a person against whom a claim is asserted proves that (i) such person in good faith tendered an instrument to the claimant as full satisfaction of the claim; (ii) the amount of the claim was unliquidated or subject to a bona fide dispute; and (iii) the claimant obtained payment of the instrument, then subsections (b), (c), and (d) of this Code section shall apply.

(b) Unless subsection (c) of this Code section applies, the claim is discharged if the person against whom the claim is asserted proves that the instrument or an accompanying written communication contained a conspicuous statement to the effect that the instrument was tendered as full satisfaction of the claim.

(c) Subject to subsection (d) of this Code section, a claim is not discharged under subsection (b) of this Code section if either of the following applies:

(1) The claimant, if an organization, proves that:

(i) Within a reasonable time before the tender, the claimant sent a conspicuous statement to the person against whom the claim is asserted that communications concerning disputed debts, including an instrument tendered as full satisfaction of a debt, are to be sent to a designated person, office, or place; and

(ii) The instrument or accompanying communication was not received by that designated person, office, or place; or

(2) The claimant, whether or not an organization, proves that within 90 days after payment of the instrument, the claimant tendered repayment of the amount of the instrument to the person against whom the claim is asserted. This paragraph does not apply if the claimant is an organization that sent a statement complying with subparagraph (i) of paragraph (1) of this subsection.

(d) A claim is discharged if the person against whom the claim is asserted proves that within a reasonable time before collection of the instrument was initiated, the claimant or an agent of the claimant having direct responsi-

bility with respect to the disputed obligation knew that the instrument was tendered in full satisfaction of the claim. (Code 1981, § 11-3-311, enacted by Ga. L. 1996, p. 1306, § 3.)

#### RESEARCH REFERENCES

**U.L.A.** — Uniform Commercial Code  
(U.L.A.) § 3-311.

#### **11-3-312. Lost, destroyed, or stolen cashier's check, teller's check, or certified check.**

(a) In this Code section:

(1) "Check" means a cashier's check, teller's check, or certified check;

(2) "Claimant" means a person who claims the right to receive the amount of a cashier's check, teller's check, or certified check that was lost, destroyed, or stolen;

(3) "Declaration of loss" means a written statement, made under penalty of perjury, to the effect that:

(i) The declarer lost possession of a check;

(ii) The declarer is the drawer or payee of the check, in the case of a certified check, or the remitter or payee of the check, in the case of a cashier's check or teller's check;

(iii) The loss of possession was not the result of a transfer by the declarer or a lawful seizure; and

(iv) The declarer cannot reasonably obtain possession of the check because the check was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process; and

(4) "Obligated bank" means the issuer of a cashier's check or teller's check or the acceptor of a certified check.

(b) A claimant may assert a claim to the amount of a check by a communication to the obligated bank describing the check with reasonable certainty and requesting payment of the amount of the check, if the claimant is the drawer or payee of a certified check or the remitter or payee of a cashier's check or teller's check, the communication contains or is accompanied by a declaration of loss of the claimant with respect to the check, the communication is received at a time and in a manner affording the bank a reasonable time to act on it before the check is paid, and the claimant provides reasonable identification if requested by the obligated bank. Delivery of a declaration of loss is a warranty of the truth of the



statements made in the declaration. If a claim is asserted in compliance with this subsection, the following rules apply:

(1) The claim becomes enforceable at the later of:

(i) The time the claim is asserted;

(ii) The ninetieth day following the date of the check in the case of a cashier's check or teller's check; or

(iii) The ninetieth day following the date of the acceptance in the case of a certified check;

(2) Until the claim becomes enforceable, it has no legal effect and the obligated bank may pay the check or, in the case of a teller's check, may permit the drawee to pay the check. Payment to a person entitled to enforce the check discharges all liability of the obligated bank with respect to the check;

(3) If the claim becomes enforceable before the check is presented for payment, the obligated bank is not obliged to pay the check; and

(4) When the claim becomes enforceable, the obligated bank becomes obliged to pay the amount of the check to the claimant if payment of the check has not been made to a person entitled to enforce the check. Subject to paragraph (1) of subsection (a) of Code Section 11-4-302, payment to the claimant discharges all liability of the obligated bank with respect to the check.

(c) If the obligated bank pays the amount of a check to a claimant under paragraph (4) of subsection (b) of this Code section and the check is presented for payment by a person having rights of a holder in due course, the claimant is obliged to (i) refund the payment to the obligated bank if the check is paid; or (ii) pay the amount of the check to the person having rights of a holder in due course if the check is dishonored.

(d) If a claimant has the right to assert a claim under subsection (b) of this Code section and is also a person entitled to enforce a cashier's check, teller's check, or certified check which is lost, destroyed, or stolen, the claimant may assert rights with respect to the check either under this Code section or Code Section 11-3-309. (Code 1981, § 11-3-312, enacted by Ga. L. 1996, p. 1306, § 3.)

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 1996, "ninetieth" was substituted for "90th" in subparagraphs (b)(1)(ii) and (b)(1)(iii).

#### RESEARCH REFERENCES

**U.L.A.** — Uniform Commercial Code  
(U.L.A.) § 3-312.

## PART 4

## LIABILITY OF PARTIES

**Cross references.** — Form of complaint on promissory note, § 9-11-103. Forgery generally, § 16-9-1 et seq. Lien of payee on merchandise when stop payment issued on check used to purchase the merchandise, § 44-14-516.

## RESEARCH REFERENCES

**ALR.** — Liability of check printer for errors in identification or routing codes printed on check, 18 ALR4th 923.

**11-3-401. Signature.**

(a) A person is not liable on an instrument unless (i) the person signed the instrument; or (ii) the person is represented by an agent or representative who signed the instrument and the signature is binding on the represented person under Code Section 11-3-402.

(b) A signature may be made (i) manually or by means of a device or machine; and (ii) by the use of any name, including a trade or assumed name or by a word, mark, or symbol executed or adopted by a person with present intention to authenticate a writing. (Code 1981, § 11-3-401, enacted by Ga. L. 1996, p. 1306, § 3.)

**Law reviews.** — For article discussing parol evidence in the law of commercial paper, see 13 Ga. L. Rev. 53 (1978).

## JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Code 1933, § 14-6-4 and former Code Sections 11-3-401, 11-3-402, are included in the annotations for this section.

**An account in a fictitious name** is recognized in Georgia. *National Factor & Inv. Corp. v. State Bank of Cochran*, 224 Ga. 535, 163 S.E.2d 817 (1968) (decided under former Code Section 11-3-401).

**Trade name.** — Under Georgia law, a person operating a business under a trade name may endorse personally checks drawn to that person under the trade name. *Perini Corp. v. First Nat'l Bank*, 553 F.2d 398 (5th Cir. 1977) (decided under former Code Section 11-3-401).

**General endorsers.** — All who sign their names without qualification, and in absence of any contrary agreement, are placed in

same category, as to presentment and notice of dishonor, as technical or general endorsers; that is, those who endorse for the purpose of transferring title. *Massell v. Prudential Ins. Co. of Am.*, 57 Ga. App. 460, 196 S.E. 115 (1938) (decided under former Code 1933, § 14-6-4).

**Signing back of instrument.** — One who places signature on back of instrument without indicating intention to be bound in capacity other than endorser is deemed to be an endorser in legal sense of the word, and is entitled to have note presented to the one primarily liable, and, if it is not paid, to notice of dishonor. *McCarroll v. First Inv. Co.*, 109 Ga. App. 748, 137 S.E.2d 319 (1964) (decided under former Code 1933, § 14-6-4).

One signing back of negotiable instrument other than as maker, drawer, or accep-

tor is an endorser and not a surety. *Pitman v. Pitman*, 215 Ga. 585, 111 S.E.2d 721 (1959) (decided under former Code 1933, § 14-604).

**One signing, without more, for accommodation of maker.** — One who places name on back of promissory note, without more, for purpose of lending credit to the instrument for accommodation of maker, is nevertheless an endorser in the legal sense of the word, and is not a surety, unless as between the original parties one is shown to be a surety by agreement of the parties thereto. *Massell v. Prudential Ins. Co. of Am.*, 57 Ga. App. 460, 196 S.E. 115 (1938) (decided under former Code 1933, § 14-604).

Where evidence showed only that defendant signed name on back of a promissory note for sole purpose of lending credit to maker, the fact of suretyship was not established, and statute of limitations applicable to such endorser was same as that applicable to parties on the face of the instrument. *Cantrell v. Byars*, 66 Ga. App. 672, 19 S.E.2d 44 (1942) (decided under former Code 1933, § 14-604).

**One may prove, as between immediate parties, intention to be other than endorser.** — Section does not prevent endorser from alleging and proving as between immediate

parties to note, endorser's intention to be bound in a capacity other than endorser. *Hopkins Auto. Equip. Co. v. Lyon*, 59 Ga. App. 468, 1 S.E.2d 460 (1939) (decided under former Code 1933, § 14-604).

**To establish prima facie that one is not an endorser** one must clearly indicate by appropriate words an intention to be bound in some other capacity. *Hopkins Auto. Equip. Co. v. Lyon*, 59 Ga. App. 468, 1 S.E.2d 460 (1939) (decided under former Code 1933, § 14-604).

**Admissibility of parol evidence.** — Where a person places signature on back of note without indicating by appropriate words one's intention to be bound in capacity other than endorser, it may be alleged and shown by parol evidence in this state, as between immediate persons, or those taking with notice of dishonor, or actual facts of such endorsement, that the one so placing name on the back of the instrument was to be bound in some other capacity. *Massell v. Prudential Ins. Co. of Am.*, 57 Ga. App. 460, 196 S.E. 115 (1938) (decided under former Code 1933, § 14-604).

**Cited in** *Willard v. Stewart Title Guar. Co.*, 264 Ga. 555, 448 S.E.2d 696 (1994); *Southtrust Bank v. Parker*, 226 Ga. App. 292, 486 S.E.2d 402 (1997).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 11 Am. Jur. 2d, Bills and Notes, § 60 et seq. 12 Am. Jur. 2d, Bills and Notes, § 497 et seq.

**C.J.S.** — 10 C.J.S., Bills and Notes, §§ 27 et seq., 80. 80 C.J.S., Signatures, § 1 et seq.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 3-401.

**ALR.** — Place of maker's signature on bill or note, 20 ALR 394.

Necessity of endorsement by all payees before maturity to make a transferee a bona fide holder, 25 ALR 163.

Sufficiency of signing or endorsing bill or note by printing or stamping, 46 ALR 1498.

Necessity that checks be signed by all persons in whose name the deposit stands, 61 ALR 967.

Addition of word indicating representative or fiduciary capacity after name of payee, endorser, or endorsee on commercial paper as charging transferee with notice of trust in favor of third parties or of defenses in maker, 61 ALR 1389.

## 11-3-402. Signature by representative.

(a) If a person acting or purporting to act as a representative signs an instrument by signing either the name of the represented person or the name of the signer, the represented person is bound by the signature to the same extent the represented person would be bound if the signature were on a simple contract. If the represented person is bound, the signature of the representative is the "authorized signature of the represented person"



and the represented person is liable on the instrument, whether or not identified in the instrument.

(b) If a representative signs the name of the representative to an instrument and the signature is an authorized signature of the represented person, the following rules apply:

(1) If the form of the signature shows unambiguously that the signature is made on behalf of the represented person who is identified in the instrument, the representative is not liable on the instrument; and

(2) Subject to subsection (c) of this Code section, if the form of the signature does not show unambiguously that the signature is made in a representative capacity or the represented person is not identified in the instrument, the representative is liable on the instrument to a holder in due course that took the instrument without notice that the representative was not intended to be liable on the instrument. With respect to any other person, the representative is liable on the instrument unless the representative proves that the original parties did not intend the representative to be liable on the instrument.

(c) If a representative signs the name of the representative as drawer of a check without indication of the representative status and the check is payable from an account of the represented person who is identified on the check, the signer is not liable on the check if the signature is an authorized signature of the represented person. (Code 1981, § 11-3-402, enacted by Ga. L. 1996, p. 1306, § 3.)

**Cross references.** — Liability of person signing instrument as agent, trustee, etc., generally, § 10-6-86.

**Law reviews.** — For article discussing parol evidence in the law of commercial

paper, see 13 Ga. L. Rev. 53 (1978). For annual survey article on commercial law, see 50 Mercer L. Rev. 193 (1998). Commercial Law, see 53 Mercer L. Rev. 153 (2001).

JUDICIAL DECISIONS

ANALYSIS

- GENERAL CONSIDERATION
- REPRESENTATIVE CAPACITY OF SIGNATURE
- PLEADINGS
- PAROL EVIDENCE

General Consideration

**Editor’s notes.** — In light of the similarity of the provisions, decisions under former Code 1933, §§ 14-219, 14-220 and former Code Section 11-3-403 are included in the annotations for this section.

**This section inapplicable in suit not on instrument itself** but on underlying debt caused by overdrafts. FDIC v. West, 244 Ga.

396, 260 S.E.2d 89 (1979) (decided under former Code Section 11-3-403).

**History of former paragraph (2)(b).** — Former paragraph (2)(b) is an adoption of common-law minority rule of Megowan v. Peterson, 173 N.Y. 1, 65 N.E. 738 (1902). Kramer v. Johnson, 121 Ga. App. 848, 176 S.E.2d 108 (1970) (decided under former Code Section 11-3-403).

**The 1996 amendments** relating to the

**General Consideration (Cont'd)**

conditions whereby an authorized representative's signature on a note may make the representative personally liable for the obligation created a substantive change in the law; thus, the prior version of O.C.G.A. § 11-3-403 applied to notes signed in 1993. *Marek Interior Sys. v. White*, 230 Ga. App. 518, 496 S.E.2d 749 (1998).

**Cited in** *Heath v. Wheeler*, 234 Ga. App. 606, 507 S.E.2d 508 (1998).

**Representative Capacity of Signature**

**Legislative intent.** — The General Assembly intended that both the name of the organization and the office (official capacity) of an authorized individual be included before a signature would be deemed "a signature made in a representative capacity." In other words, former subsection (3) of this section relieves the signer of an instrument from the burden of establishing that one signed it in a representative capacity, as required by former subsection (2), but only when the conditions stated therein are met. *Yeomans v. Coleman, Meadows, Pate Drug Co.*, 167 Ga. App. 646, 307 S.E.2d 121 (1983) (decided under former Code Section 11-3-403).

**One signing in a representative capacity need not follow any set formal mode of signing** but may use words such as to indicate that one is signing in a representative capacity and negative personal liability. *Duke v. Williams*, 92 Ga. App. 151, 88 S.E.2d 289 (1955) (decided under former Code 1933, § 14-220).

**One signing document without showing signature "in a representative capacity" is personally obligated** under this section. *Barnett v. Leasing Int'l, Inc.*, 151 Ga. App. 715, 261 S.E.2d 452 (1979) (decided under former Code Section 11-3-403).

Absent proof that signature was made as representative, this section applies, resulting in personal liability. *Casey v. Carrollton Ford Co.*, 152 Ga. App. 105, 262 S.E.2d 255 (1979) (decided under former Code Section 11-3-403).

**An authorized representative was not personally liable** where the representative signed a check imprinted with the name of the represented business even though the instrument did not indicate on its face that it

was being signed in a representative capacity. *Peterson v. Holtrachem, Inc.*, 239 Ga. App. 838, 521 S.E.2d 648 (1999).

An authorized signatory on a corporate account can be held personally liable for corporate checks returned for insufficient funds. *Helmer v. Rumarson Techs., Inc.*, 245 Ga. App. 598, 538 S.E.2d 504 (2000).

**Defendant liable when note signed in individual capacity.** — Although the stationery on which the note was typed showed that the defendant served as president of the corporation, the note itself was signed in an individual and not a representative capacity and thus the defendant was personally liable for the note. *Avery v. Whitworth*, 202 Ga. App. 508, 414 S.E.2d 725 (1992) (decided under former Code Section 11-3-403); *Talmadge v. Respess*, 224 Ga. App. 768, 482 S.E.2d 709 (1997) (decided under former Code Section 11-3-403).

**No indication of agency appearing on instrument.** — Where defendant admits to executing instrument but contends that it was done in corporate capacity at request of plaintiff's representative or agent, defendant is still personally obligated if instrument neither names person represented nor shows that representative signed in representative capacity. *Barnett v. Leasing Int'l, Inc.*, 151 Ga. App. 715, 261 S.E.2d 452 (1979) (decided under former Code Section 11-3-403).

One who executes note in own name with nothing on face of note showing agency cannot introduce parol evidence to show that one executed it for a principal, or that payee knew that one intended to execute it as agent, and under this section, one is personally obligated if instrument neither names person represented nor shows that representative signed in representative capacity. *Stone v. First Nat'l Bank*, 159 Ga. App. 812, 285 S.E.2d 207 (1981) (decided under former Code Section 11-3-403).

Where the contract itself was ambiguous as to the capacity in which defendant signed because defendant's signature appeared above the name of the allegedly represented entity but failed to reflect defendant's office or otherwise show that defendant was signing in a representative capacity, the jury could conclude that defendant signed the contract in an individual capacity, and not as an agent, and the trial court did not err in



denying defendant's motion for directed verdict. *Griffin v. Associated Payphone*, 244 Ga. App. 183, 534 S.E.2d 540 (2000).

**Signature on lower right side, without limiting or descriptive words.** — Signature of individual on lower right side of face of note, without limiting or descriptive words before or after it, is universal method of signing a contract to assume personal obligation. *Bostwick Banking Co. v. Arnold*, 227 Ga. 18, 178 S.E.2d 890 (1970) (decided under former Code Section 11-3-403).

**Conditional sale contract naming company represented.** — Where conditional sale contract named company defendant was representing but did not show that defendant signed instrument in representative capacity, trial judge did not err in finding defendant personally liable. *Blayton v. Ford Motor Credit Co.*, 118 Ga. App. 517, 164 S.E.2d 262 (1968) (decided under former Code Section 11-3-403).

**Name similar to that of asserted real maker appearing in address.** — Fact that name similar to that of corporation asserted to be real maker of note appears in address does not name person represented within meaning of former subsection (2)(b) so as to make a question of fact as to whether signer was acting in representative capacity. *Southern Oxygen Supply Co. v. Golian*, 230 Ga. 405, 197 S.E.2d 374 (1973) (decided under former Code Section 11-3-403).

**Principal officers of corporation who executed promissory note** in individual capacity were individually liable on the note. (decided under former Code Section 11-3-403).

Trial court erred in finding there was any issue of fact as to whether officers of a corporation executed a note in a representative capacity, where the face of the document showed they did not. *Vick v. Mercer*, 194 Ga. App. 785, 391 S.E.2d 680 (1990) (decided under former Code Section 11-3-403).

**Oral authorization of agent.** — An agent may be orally authorized to endorse negotiable instruments on behalf of a principal. *Atlantic Nat'l Bank v. Edmund*, 108 Ga. App. 63, 132 S.E.2d 103 (1963) (decided under former Code 1933, § 14-219).

**One signing as administrator, when one had no such authority.** — Defendant's contention that at time of executing note sued on one was acting as agent for an estate and

that it was intention of defendant and plaintiff payee that defendant not be bound individually was without merit; defendant could not make note as agent for the estate because defendant was without authority to do so and the obligation was defendant's individual undertaking. *Burk v. Hammond*, 98 Ga. App. 416, 105 S.E.2d 807 (1958) (decided under former Code 1933, § 14-220).

**Apparent authority.** — Where its president-treasurer had at least apparent authority—if not actual authority—to execute indorsements, a corporation could not defeat such indorsements merely by alleging that in truth and in fact president-treasurer had no such authority and that action of indorsing the paper had not been ratified. *Bank S. v. Midstates Group, Inc.*, 185 Ga. App. 342, 364 S.E.2d 58 (1987) (decided under former Code Section 11-3-403).

Where a corporate officer has at least apparent authority, if not actual authority, to place the corporate indorsement upon negotiable instruments, the defendant cannot defeat such indorsements merely by alleging that in truth and in fact the officer had no such authority and that the officer's act in indorsing the paper had not been ratified. *Holliday Constr. Co. v. Sandy Springs Assocs.*, 198 Ga. App. 20, 400 S.E.2d 380 (1990) (decided under former Code Section 11-3-403).

**Representative capacity of signature.** — Seller was not personally liable to a developer on a real estate contract even though the seller did not sign the contract in a representative capacity where the evidence, including the deeds from the seller to the developer, showed that the seller was a corporation and that the developer was aware of that fact. *Bowen Bldrs. Group, Inc. v. Reed*, 252 Ga. App. 54, 555 S.E.2d 754 (2001).

### Pleadings

**Allegation that check was signed with apparent authority must be specifically denied.** — Where petition alleged that drawer had stopped payment on check on drawer's account, bearing the drawer's imprinted trade name, underneath which appeared the signature of the drawer's wife who had apparent authority as agent or representative, in absence of pleading that wife had no such authority to draw checks on the account, this



**Pleadings (Cont'd)**

must be construed as an admission of the wife's authority. *Gate City Furn. Co. v. Rumsey*, 115 Ga. App. 753, 156 S.E.2d 221 (1967) (decided under former Code Section 11-3-403).

**Challenge to signature executed in accordance with former subsection (3) must be specifically pleaded.** — Signature executed as provided for in former subsection (3) of this section is presumed to be authorized, and if one desires to challenge its effectiveness it must be specifically denied in pleadings. *Modern Free & Accepted Masons of World v. Cliff M. Averett, Inc.*, 118 Ga. App. 641, 165 S.E.2d 166 (1968) (decided under former Code Section 11-3-403).

**Judgment on pleadings improper where answer raises issue of representative capacity of signature.** — In suit to hold agent personally liable on note, judgment on pleadings is improper where answer raises factual issue of understanding of parties as to signature in representative capacity, and form of signature indicates a representative capacity although principal is not named. (decided under former Code Section 11-3-403).

**Parol Evidence**

**Former subsection (2)(b) admits parol evidence in litigation between the immediate parties** to prove signature by agent in representative capacity. *Kramer v. Johnson*, 121 Ga. App. 848, 176 S.E.2d 108 (1970); *Nash v. Johnson*, 192 Ga. App. 412, 385 S.E.2d 294 (1989).

**Drawee bank is an original party to an instrument** within meaning of former subsection (2) of this section permitting parol evidence to establish capacity in which other party to check signed. *West v. FDIC*, 149 Ga. App. 342, 254 S.E.2d 392, aff'd, 244 Ga. 396, 260 S.E.2d 89 (1979) (decided under former Code Section 11-3-403).

**"Except as otherwise established" language as authorizing parol evidence.** — "Except as otherwise established," as used in former subsection (2)(b) of this section has been held to authorize admission of parol evidence to prove signature was made in representative capacity. *Seamon v. Acree*, 142 Ga. App. 662, 236 S.E.2d 688 (1977) (decided under former Code Section 11-3-403).

"Except as otherwise established" clause in former subsection (2) of this section authorizes admission of parol evidence as between original parties to the instrument to prove signature was made in representative capacity. *West v. FDIC*, 149 Ga. App. 342, 254 S.E.2d 392, aff'd, 244 Ga. 396, 260 S.E.2d 89 (1979) (decided under former Code Section 11-3-403).

**If signature made in representative form, or principal is named, parol evidence admissible.** — If instrument names person represented but signature is not made in representative form, or if there is a signature in representative form but principal's name does not appear, parol evidence is admissible in litigation between immediate parties to a note to prove capacity in which signature was affixed. *Phoenix Air Conditioning Co. v. Pound*, 123 Ga. App. 523, 181 S.E.2d 719 (1971) (decided under former Code Section 11-3-403).

**The presence of an unattested corporate seal and an individual signature on a promissory note placed the instrument within former paragraph (2)(b) so as to permit the introduction of parol evidence to show agency.** *Hartkopf v. Heinrich Ad. Berkemann*, 200 Ga. App. 355, 408 S.E.2d 450, cert. denied, 200 Ga. App. 896, 408 S.E.2d 450 (1991) (decided under former Code Section 11-3-403).

**Where one signs with no indication of agency, parol evidence inadmissible to establish agency.** — One executing note in own name with nothing on its face showing agency cannot introduce parol evidence to show that it was executed for a principal, or that payee knew that it was intended to be executed as agent. *Bostwick Banking Co. v. Arnold*, 227 Ga. 18, 178 S.E.2d 890 (1970); *Barnett v. Leasing Int'l, Inc.*, 151 Ga. App. 715, 261 S.E.2d 452 (1979) (decided under former Code Section 11-3-403).

If one signs name in nonrepresentative form to instrument which does not name the principal, notwithstanding that one is authorized and can prove such, that person is personally obligated thereon and parol evidence is not admissible to alter the obligation. *Phoenix Air Conditioning Co. v. Pound*, 123 Ga. App. 523, 181 S.E.2d 719 (1971) (decided under former Code Section 11-3-403).

**Where parol evidence is conflicting.** — Where a note has all the appearances of a

personal, rather than a corporate, obligation and the parol evidence offered by the parties is conflicting, the trial court, as the trier of fact, is authorized to conclude from the evidence that the note was not signed in a representative capacity. *Yeomans v.*

*Coleman, Meadows, Pate Drug Co.*, 167 Ga. App. 646, 307 S.E.2d 121 (1983); *Cooley v. Dickerson & Swift Entertainment, Inc.*, 177 Ga. App. 855, 341 S.E.2d 504 (1986) (decided under former Code Section 11-3-403).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 3 Am. Jur. 2d, Agency, § 149. 10 Am. Jur. 2d, Banks and Financial Institutions, §§ 913, 914, 918. 11 Am. Jur. 2d, Bills and Notes, §§ 203, 212, 294. 12 Am. Jur. 2d, Bills and Notes, §§ 486 et seq., 586, 608 et seq., 671. 31 Am. Jur. 2d, Executors and Administrators, § 405.

**C.J.S.** — 10 C.J.S., Bills and Notes, § 12.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 3-402.

**ALR.** — Sufficiency of signing or indorsing a bill or note by printing or stamping, 7 ALR 672; 46 ALR 1498.

Accord and satisfaction by authorized endorsement and transfer of commercial pa-

per by agent having no authority to compromise, 46 ALR 1522.

Addition of word indicating representative or fiduciary capacity after name of payee, endorser, or endorsee on commercial paper as charging transferee with notice of trust in favor of third parties or of defenses in maker, 61 ALR 1389.

Authority of agent to indorse and transfer commercial paper, 37 ALR2d 453.

Construction and application of UCC § 3-403(2) dealing with personal liability of authorized representative who signs negotiable instrument in his own name, 97 ALR3d 798.

## 11-3-403. Unauthorized signature.

(a) Unless otherwise provided in this article or Article 4 of this title, an unauthorized signature is ineffective except as the signature of the unauthorized signer in favor of a person who in good faith pays the instrument or takes it for value. An unauthorized signature may be ratified for all purposes of this article.

(b) If the signature of more than one person is required to constitute the authorized signature of an organization, the signature of the organization is unauthorized if one of the required signatures is lacking.

(c) The civil or criminal liability of a person who makes an unauthorized signature is not affected by any provision of this article which makes the unauthorized signature effective for the purposes of this article. (Code 1981, § 11-3-403, enacted by Ga. L. 1996, p. 1306, § 3.)

## JUDICIAL DECISIONS

### ANALYSIS

#### GENERAL CONSIDERATION RATIFICATION

##### General Consideration

**Editor's notes.** — In light of the similarity of the provisions, decisions under former

Code 1933, §§ 14-223, 14-505 and former Code Section 11-3-404 are included in the annotations for this section.

**A forged endorsement is wholly ineffec-**

**General Consideration (Cont'd)**

tive to pass any title to or confer any interest in the instrument. *Citizens & S. Nat'l Bank v. New York Cas. Co.*, 84 Ga. App. 47, 65 S.E.2d 461 (1951) (decided under former Code 1933, § 14-223).

**Payment over forged endorsement not protection against true owner.** — Payment of a promissory note to a supposed transferee, holding it by virtue of a forged endorsement, will not protect the maker or one who has assumed the debt, against payment to the true owner; and, consequently, in a suit by such an alleged transferee to enforce liability against such parties, the assumer may avail self of the defense that the alleged transfer by the payee was not genuine. *Austell Bank v. National Bondholders Corp.*, 188 Ga. 757, 4 S.E.2d 913 (1939) (decided under former Code 1933, § 14-223).

**Former §§ 11-3404(1) and 11-3406 must be read together.** *Trust Co. of Ga. Bank v. Port Term. & Warehousing Co.*, 153 Ga. App. 735, 266 S.E.2d 254 (1980) (decided under former Code Section 11-3404).

**Estoppel based on negligence.** — Former paragraph (1) does not establish separate and distinct estoppel by negligence defense for payor who pays instrument over forged endorsement. *Trust Co. of Ga. Bank v. Port Term. & Warehousing Co.*, 153 Ga. App. 735, 266 S.E.2d 254 (1980) (decided under former Code Section 11-3404).

When one who has paid an instrument asserts that another is estopped by negligence from denying that unauthorized signature on it operates as own, payor personally must have paid in good faith and in accordance with reasonable commercial standards of one's business. *Trust Co. of Ga. Bank v. Port Term. & Warehousing Co.*, 153 Ga. App. 735, 266 S.E.2d 254 (1980) (decided under former Code Section 11-3404).

When payor seeks to estop or preclude another from asserting that payor's signature on an instrument is forged under former paragraph (1) of this section and the basis for asserting this estoppel or preclusion is neglect of one whose "signature" appears, O.C.G.A. § 11-3406 controls. *Trust Co. of Ga. Bank v. Port Term. & Warehousing Co.*, 153 Ga. App. 735, 266 S.E.2d 254 (1980) (decided under former Code Section 11-3404).

The word "precluded" has been held to be synonymous with "estoppel," and not to include ratification or adoption of the instrument or signature thereon unless these involve also the elements of estoppel. To create such an estoppel, there must be actual injury or damage. *Beeland v. Clark*, 47 Ga. App. 77, 169 S.E. 681 (1933) (decided under former Code 1933, § 14-223).

**Inquiry into plaintiff's title permissible.** — In suit instituted by person claiming to be owner and holder of promissory note for purpose of recovering thereon against maker and another alleged to have assumed the debt, it is permissible for the latter to inquire into plaintiff's title to the note, if necessary either for that one's protection or to let in any valid defense which that individual may seek to make. *Austell Bank v. National Bondholders Corp.*, 188 Ga. 757, 4 S.E.2d 913 (1939) (decided under former Code 1933, §§ 14-223 and 14-505).

**Cited in** *Southtrust Bank v. Parker*, 226 Ga. App. 292, 486 S.E.2d 402 (1997); *Kolodkin v. Cohen*, 230 Ga. App. 384, 496 S.E.2d 515 (1998); *Dewberry Painting Ctrs., Inc. v. Duron, Inc.*, 235 Ga. App. 40, 508 S.E.2d 438 (1998).

**Ratification**

**In order to infer ratification**, by principal either from declarations or acts, it must appear affirmatively that at time of making the declarations or doing the acts, the principal knew that agent had performed act claimed to have been ratified. *National Bank v. Refrigerated Transp. Co.*, 147 Ga. App. 240, 248 S.E.2d 496 (1978) (decided under former Code Section 11-3404).

**Ratification of attorney's signature.** — If a bank customer, by the customer's own conduct, ratified attorney's unauthorized signature on a check, the customer was precluded from recovering on a claim for conversion against the bank which accepted for deposit to the attorney's escrow account a check payable to the customer bearing an allegedly forged endorsement. *Hendrix v. First Bank*, 195 Ga. App. 510, 394 S.E.2d 134 (1990) (decided under former Code Section 11-3404).



## RESEARCH REFERENCES

**C.J.S.** — 10 C.J.S., Bills and Notes, § 27 et seq., 80.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 3-403.

**ALR.** — Payment of check upon forged or unauthorized indorsement as affecting the right of true owner against the bank, 14 ALR 764; 69 ALR 1076; 137 ALR 874.

Necessity of endorsement by all payees before maturity to make a transferee a bona fide holder, 25 ALR 163.

Construction of savings bank by-law expressly assented to by depositor, relieving bank from liability for payment to unauthorized person, 52 ALR 760.

Ratification of forged or unauthorized signature on negotiable instrument under the provision of the Negotiable Instruments Act negating effect of such signature unless the party against whom it is sought to enforce a right thereunder is precluded from setting up the forgery or want of authority, 150 ALR 978.

Invalid instrument as subject of forgery, 174 ALR 1300.

Rights of one who acquires lost or stolen traveler's checks, 42 ALR3d 846.

What constitutes ratification of unauthorized signature under UCC § 3-404, 93 ALR3d 967.

**11-3-404. Impostors; fictitious payees.**

(a) If an impostor, by use of the mails or otherwise, induces the issuer of an instrument to issue the instrument to the impostor, or to a person acting in concert with the impostor, by impersonating the payee of the instrument or a person authorized to act for the payee, an indorsement of the instrument by any person in the name of the payee is effective as the indorsement of the payee in favor of a person who, in good faith, pays the instrument or takes it for value or for collection.

(b) If a person whose intent determines to whom an instrument is payable in accordance with subsection (a) or (b) of Code Section 11-3-110 does not intend the person identified as payee to have any interest in the instrument or the person identified as payee of an instrument is a fictitious person, the following rules apply until the instrument is negotiated by special indorsement:

(1) Any person in possession of the instrument is its holder; and

(2) An indorsement by any person in the name of the payee stated in the instrument is effective as the indorsement of the payee in favor of a person who, in good faith, pays the instrument or takes it for value or for collection.

(c) Under subsection (a) or (b) of this Code section, an indorsement is made in the name of a payee if (i) it is made in a name substantially similar to that of the payee; or (ii) the instrument, whether or not indorsed, is deposited in a depository bank to an account in a name substantially similar to that of the payee.

(d) With respect to an instrument to which subsection (a) or (b) of this Code section applies, if a person paying the instrument or taking it for value or for collection fails to exercise ordinary care in paying or taking the

instrument and that failure substantially contributes to loss resulting from payment of the instrument, the person bearing the loss may recover from the person failing to exercise ordinary care to the extent the failure to exercise ordinary care contributed to the loss. (Code 1981, § 11-3-404, enacted by Ga. L. 1996, p. 1306, § 3.)

**Law reviews.** — For comment on *Perini Corp. v. First Nat'l Bank*, 553 F.2d 398 (5th Cir. 1977), see 27 Emory L.J. 393 (1978). For comment on *Trust Co. v. Refrigeration Supplies, Inc.*, 241 Ga. 406, 246 S.E.2d 282

(1978), discussing liability of collecting and payor banks for payment of check over missing endorsement of copayee, see 13 Ga. L. Rev. 677 (1979).

### JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Code Section 11-3-405 are included in the annotations for this section.

**"Impostor"** refers to impersonation not to false representation that party is authorized agent of payee; this section does not cover one who represents self as agent of a principal and procures check payable to order of the principal. *Thornton & Co. v. Gwinnett Bank & Trust Co.*, 151 Ga. App. 641, 260 S.E.2d 765 (1979) (decided under former Code Section 11-3-405).

**Applicable in forged check cases.** — Nothing in this section limits its application to cases in which drawer's signature is authorized. The provision has also been applied in forged check cases. *Perini Corp. v. First Nat'l*

*Bank*, 553 F.2d 398 (5th Cir. 1977) (decided under former Code Section 11-3-405).

**Negligence by bank.** — Any loss arising from situations provided for in this section should fall upon the employer of a faithless employee who cashes numerous checks payable to fictitious persons, and negligence on the part of the bank in cashing the checks is irrelevant. Only bad faith by a bank prevents invoking the code section to defeat a claim. *Northbrook Property & Cas. Ins. Co. v. Citizens & S. Nat'l Bank*, 184 Ga. App. 326, 361 S.E.2d 531 (1987) (decided under former Code Section 11-3-405).

**Cited in** *Southtrust Bank v. Parker*, 226 Ga. App. 292, 486 S.E.2d 402 (1997); *Kolodkin v. Cohen*, 230 Ga. App. 384, 496 S.E.2d 515 (1998).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 11 Am. Jur. 2d, Banks and Financial Institutions, § 921. 11 Am. Jur. 2d, Bills and Notes, §§ 82, 88, 222, 223. 12 Am. Jur. 2d, Bills and Notes, §§ 547, 612.

**C.J.S.** — 10 C.J.S., Bills and Notes, §§ 129, 192, 220.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 3-404.

**ALR.** — Payment of check upon forged or unauthorized indorsement as affecting the right of true owner against the bank, 14 ALR 764; 69 ALR 1076; 137 ALR 874.

Necessity of endorsement by all payees before maturity to make a transferee a bona fide holder, 25 ALR 163.

Construction of savings bank by-law expressly assented to by depositor, relieving bank from liability for payment to unauthorized person, 52 ALR 760.

Criminal charge predicated upon fraudulently obtaining a check, note, etc., or signature thereon, from the person executing the same, 141 ALR 210.

Ratification of forged or unauthorized signature on negotiable instrument under the provision of the Negotiable Instruments Act negating effect of such signature unless the party against whom it is sought to enforce a right thereunder is precluded from setting up the forgery or want of authority, 150 ALR 978.

Deception as to character of paper signed as defense as against bona fide holder of negotiable paper, 160 ALR 1295.

Invalid instrument as subject of forgery, 174 ALR 1300.

Who must bear loss as between drawer or indorser who delivers check to an impostor

and one who purchases, cashes, or pays it upon the impostor's indorsement, 81 ALR2d 1365.

Bank's liability to nonsigning payee for payment of check drawn to joint payees without obtaining endorsement by both, 47 ALR3d 537.

Bills and notes: nominal payee rule of UCC § 3-405(1)(b), 92 ALR3d 268.

Construction and application of UCC § 3-405(1)(a) involving issuance of negotiable instrument induced by impostor, 92 ALR3d 608.

Liability of bank for diversion to benefit of presenter or third party of proceeds of check drawn to bank's order by drawer not indebted to bank, 69 ALR4th 778.

### **11-3-405. Employer's responsibility for fraudulent indorsement by employee.**

(a) In this Code section:

(1) "Employee" includes an independent contractor and an employee of an independent contractor retained by the employer;

(2) "Fraudulent indorsement" means:

(i) In the case of an instrument payable to the employer, a forged indorsement purporting to be that of the employer; or

(ii) In the case of an instrument with respect to which the employer is the issuer, a forged indorsement purporting to be that of the person identified as payee; and

(3) "Responsibility" with respect to instruments means authority to:

(i) Sign or indorse instruments on behalf of the employer;

(ii) Process instruments received by the employer for bookkeeping purposes, for deposit to an account, or for other disposition;

(iii) Prepare or process instruments for issue in the name of the employer;

(iv) Supply information determining the names or addresses of payees of instruments to be issued in the name of the employer;

(v) Control the disposition of instruments to be issued in the name of the employer; or

(vi) Act otherwise with respect to instruments in a responsible capacity.

"Responsibility" does not include authority that merely allows an employee to have access to instruments or blank or incomplete instrument forms that are being stored or transported or are part of incoming or outgoing mail or similar access.

(b) For the purpose of determining the rights and liabilities of a person who, in good faith, pays an instrument or takes it for value or for collection,



if an employer entrusted an employee with responsibility with respect to the instrument and the employee or a person acting in concert with the employee makes a fraudulent indorsement of the instrument, the indorsement is effective as the indorsement of the person to whom the instrument is payable if it is made in the name of that person. If the person paying the instrument or taking it for value or for collection fails to exercise ordinary care in paying or taking the instrument and that failure substantially contributes to loss resulting from the fraud, the person bearing the loss may recover from the person failing to exercise ordinary care to the extent the failure to exercise ordinary care contributed to the loss.

(c) Under subsection (b) of this Code section, an indorsement is made in the name of the person to whom an instrument is payable if (i) it is made in a name substantially similar to the name of that person; or (ii) the instrument, whether or not indorsed, is deposited in a depository bank to an account in a name substantially similar to the name of that person. (Code 1981, § 11-3-405, enacted by Ga. L. 1996, p. 1306, § 3.)

#### RESEARCH REFERENCES

**U.L.A.** — Uniform Commercial Code ded payroll” rule of UCC § 3-405, 45 (U.L.A.) § 3-405. ALR5th 389.

**ALR.** — Construction and effect of “pad-

#### **11-3-406. Negligence contributing to forged signature or alteration of instrument.**

(a) A person whose failure to exercise ordinary care substantially contributes to an alteration of an instrument or to the making of a forged signature on an instrument is precluded from asserting the alteration or the forgery against a person who, in good faith, pays the instrument or takes it for value or for collection.

(b) Under subsection (a) of this Code section, if the person asserting the preclusion fails to exercise ordinary care in paying or taking the instrument and that failure substantially contributes to loss, the loss is allocated between the person precluded and the person asserting the preclusion according to the extent to which the failure of each to exercise ordinary care contributed to the loss.

(c) Under subsection (a) of this Code section, the burden of proving failure to exercise ordinary care is on the person asserting the preclusion. Under subsection (b) of this Code section, the burden of proving failure to exercise ordinary care is on the person precluded. (Code 1981, § 11-3-406, enacted by Ga. L. 1996, p. 1306, § 3.)

## JUDICIAL DECISIONS

## ANALYSIS

GENERAL CONSIDERATION  
COMMERCIAL REASONABLENESS

## General Consideration

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Code Section 11-3-406 are included in the annotations for this section.

**Modification of doctrine of estoppel by negligence.** — Legislature modified doctrine of estoppel by negligence in commercial paper context by enacting this section. *Trust Co. of Ga. Bank v. Port Term. & Warehousing Co.*, 153 Ga. App. 735, 266 S.E.2d 254 (1980) (decided under former Code Section 11-3-406).

**Former §§ 11-3-404(1) and 11-3-406 must be read together.** *Trust Co. of Ga. Bank v. Port Term. & Warehousing Co.*, 153 Ga. App. 735, 266 S.E.2d 254 (1980) (decided under former Code Section 11-3-406).

**Applicable to estop signer from asserting forgery.** — When a payor seeks to estop or preclude another from asserting that the payor's signature on an instrument is forged under O.C.G.A. § 11-3-404(1) and the basis for asserting this estoppel or preclusion is the neglect of one whose "signature" appears, this section controls. *Trust Co. of Ga. Bank v. Port Term. & Warehousing Co.*, 153 Ga. App. 735, 266 S.E.2d 254 (1980) (decided under former Code Section 11-3-406).

**Complaining party's negligence will not bar otherwise available recovery** against a party, including drawee, who is also negligent. *Perini Corp. v. First Nat'l Bank*, 553 F.2d 398 (5th Cir. 1977) (decided under former Code Section 11-3-406).

**Failure to prevent further forgeries after notice.** — This section extends to cases where party has notice that forgeries of the party's signature has occurred and is negligent in failing to prevent further forgeries by same person. *Trust Co. of Ga. Bank v. Port Term. & Warehousing Co.*, 153 Ga. App. 735, 266 S.E.2d 254 (1980) (decided under former Code Section 11-3-406).

**Ratification of attorney's signature.** — If a bank customer, by the customer's own conduct, ratified attorney's unauthorized signature on a check, the customer was precluded

from recovering on a claim for conversion against the bank which accepted for deposit to the attorney's escrow account a check payable to the customer bearing an allegedly forged endorsement. *Hendrix v. First Bank*, 195 Ga. App. 510, 394 S.E.2d 134 (1990) (decided under former Code Section 11-3-406).

**Cited in** *Southtrust Bank v. Parker*, 226 Ga. App. 292, 486 S.E.2d 402 (1997).

## Commercial Reasonableness

**Requirements for payor asserting estoppel.** — When one who has paid an instrument asserts that another is estopped by negligence from denying that unauthorized signature on it operates as one's own, payor personally must have paid in good faith and in accordance with reasonable commercial standards of one's business. *Trust Co. of Ga. Bank v. Port Term. & Warehousing Co.*, 153 Ga. App. 735, 266 S.E.2d 254 (1980) (decided under former Code Section 11-3-406).

**Questions of fact.** — Reasonable commercial standards and whether they were met under circumstances are initially questions of fact. *Trust Co. of Ga. Bank v. Port Term. & Warehousing Co.*, 153 Ga. App. 735, 266 S.E.2d 254 (1980) (decided under former Code Section 11-3-406).

**The appropriate inquiry** is whether a reasonable man in accordance with reasonable commercial standards would be put on notice of some impropriety appearing either from form of the instrument and its endorsements or from knowledge of facts outside the instrument itself. *Trust Co. of Ga. Bank v. Port Term. & Warehousing Co.*, 153 Ga. App. 735, 266 S.E.2d 254 (1980) (decided under former Code Section 11-3-406).

**Failure to inquire into validity of endorsements** does not preclude bank from asserting defense of commercial reasonableness as a matter of law. *Trust Co. of Ga. Bank v. Port Term. & Warehousing Co.*, 153 Ga. App. 735, 266 S.E.2d 254 (1980) (decided under former Code Section 11-3-406).

**Bank accepting check with "a patently irregular endorsement"** does not comply

**Commercial Reasonableness (Cont'd)**

with reasonable commercial standards, and fact that depositor of check is a customer of the bank does not absolve bank of its duty to inquire. *National Bank v. Refrigerated Transp. Co.*, 147 Ga. App. 240, 248 S.E.2d 496 (1978) (decided under former Code Section 11-3-406).

**Bank's conduct in opening accounts which**

**had not been authorized** by its customer and then accepting checks written on the accounts on the single signature of the customer's employee, thereby facilitating the employee's embezzlement scheme, was not in accordance with reasonable commercial standards. *Apcoa, Inc. v. Fidelity Nat'l Bank*, 906 F.2d 610 (11th Cir. 1990) (decided under former Code Section 11-3-406).

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 4 Am. Jur. 2d, Alteration of Instruments, § 63. 10 Am. Jur. 2d, Banks, § 747. 11 Am. Jur. 2d, Bills and Notes, §§ 120, 121. 11 Am. Jur. 2d, Banks and Financial Institutions, §§ 913, 918. 12 Am. Jur., 2d, Bills and Notes, §§ 553, 604, 605.

**C.J.S.** — 3A C.J.S., Alteration of Instruments, § 17. 10 C.J.S., Bills and Notes, §§ 190, 191.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 3-406.

**ALR.** — Liability of party to commercial paper so drawn as to be easily alterable as to amount, 22 ALR 1139; 36 ALR 327; 39 ALR 1380.

Misnomer or abbreviation of name of intended payee as affecting liability where check is paid or purchased upon forged indorsement, 29 ALR 368.

Alteration of note before delivery to payee as affecting parties who do not personally consent, 44 ALR 1244.

Alteration of instrument by agent as binding on principal, 51 ALR 1229.

Construction of savings bank by-law expressly assented to by depositor, relieving bank from liability for payment to unauthorized person, 52 ALR 760.

Who must bear loss as between drawer induced by fraud of employee or agent to issue check payable to nonexistent person or a person having no interest in the proceeds thereof, and one who cashes or pays it on the forged indorsement by such employee or agent of the name of such ostensible payee, 99 ALR 439.

Deception as to character of paper signed as defense as against bona fide holder of negotiable paper, 160 ALR 1295.

When depositor-drawer of check is "precluded," under Negotiable Instruments Law, § 23, from setting up forgery of indorsement or want of authority against drawee bank, 39 ALR2d 641.

Rights and liabilities of drawee bank, as to persons other than drawer, with respect to uncertified paid check which was altered, 75 ALR2d 611.

Commercial paper: what amounts to "negligence contributing to alteration or unauthorized signature" under UCC § 3-406, 67 ALR3d 144.

Liability of bank for diversion to benefit of presenter or third party of proceeds of check drawn to bank's order by drawer not indebted to bank, 69 ALR4th 778.

**11-3-407. Alteration.**

(a) "Alteration" means (i) an unauthorized change in an instrument that purports to modify in any respect the obligation of a party; or (ii) an unauthorized addition of words or numbers or other change to an incomplete instrument relating to the obligation of a party.

(b) Except as provided in subsection (c) of this Code section, an alteration fraudulently made discharges a party whose obligation is affected by the alteration unless that party assents or is precluded from asserting the alteration. No other alteration discharges a party, and the instrument may be enforced according to its original terms.



(c) A payor bank or drawee paying a fraudulently altered instrument or a person taking it for value, in good faith and without notice of the alteration, may enforce rights with respect to the instrument (i) according to its original terms; or (ii) in the case of an incomplete instrument altered by unauthorized completion, according to its terms as completed. (Code 1981, § 11-3-407, enacted by Ga. L. 1996, p. 1306, § 3.)

**Cross references.** — Alteration of written contracts generally, § 13-4-1 et seq.

**Law reviews.** — For article discussing

parol evidence in the law of commercial paper, see 13 Ga. L. Rev. 53 (1978).

## JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Code 1933, § 14-907 and former Code Section 11-3-407 are included in the annotations for this section.

**To discharge parties, alteration must change obligation.** — Absent alteration or change in obligation of promissory note, alteration does not operate to discharge parties from their obligations. *Franco v. Bank of Forest Park*, 118 Ga. App. 700, 165 S.E.2d 593 (1968) (decided under former Code Section 11-3-407).

**Material alteration.** — That is material which might become material, and any alteration which may in any event alter rights, duties, or obligations of person sought to be charged, is material in the legal sense. *Cook v. Parks*, 46 Ga. App. 749, 169 S.E. 208 (1933) (decided under former Code 1933, § 14-907).

If legal import and effect of instrument is in fact changed, it does not matter how trivial the change may be, or whether it may be beneficial or detrimental to party sought to be charged on contract, as where it changes evidence or mode of proof. *Cook v. Parks*, 46 Ga. App. 749, 169 S.E. 208 (1933) (decided under former Code 1933, § 14-907).

That alteration was fraudulently made for purpose of causing actual injury, or that it did bring about injury, is not the test of materiality. It is equally unimportant whether alteration was beneficial or injurious to party whom it is sought to charge on the instrument. The sole question is whether rights of promisor have been materially affected; whether effect of instrument is the same as when signed. *Cook v. Parks*, 46 Ga. App. 749, 169 S.E. 208 (1933) (decided under former Code 1933, § 14-907).

**The only material change which discharges any party** is one which is also fraudulent. *Sewell v. Akins*, 147 Ga. App. 454, 249 S.E.2d 274 (1978) (decided under former Code Section 11-3-407).

**Addition of attesting witness which extends liability or affects proof of execution.** — Where addition of attesting witness to instrument has effect of extending liability under statute of limitations, or of facilitating or interfering in any manner with proof of execution of instrument, procuring of a witness to sign as an attesting witness after execution of instrument, without consent of maker, is material and constitutes an alteration. *Cook v. Parks*, 46 Ga. App. 749, 169 S.E. 208 (1933) (decided under former Code 1933, § 14-907).

**Addition of names of a comaker and witness.** — Both addition of name of a comaker and name of an official witness to a negotiable instrument containing a bill of sale to secure a debt, would be material alterations as to defendant maker, if made without defendant's consent. *Williams v. F.S. Royster Guano Co.*, 67 Ga. App. 711, 21 S.E.2d 349 (1942) (decided under former Code 1933, § 14-907).

**Confidential relationship irrelevant.** — Under theory that contract's completion was unauthorized and fraudulent, confidential relationship of parties is irrelevant. *First Am. Bank v. Bishop*, 244 Ga. 317, 260 S.E.2d 49 (1979) (decided under former Code Section 11-3-407).

**If a writing is signed with blanks left to be filled in** by the other party, the person signing is bound by it. *Massey-Ferguson Credit Corp. v. Wiley*, 655 F. Supp. 655 (M.D. Ga. 1987) (decided under former Code Section 11-3-407).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 4 Am. Jur. 2d, Alteration of Instruments, §§ 3, 10, 26, 29, 42, 71. 11 Am. Jur. 2d, Bills and Notes, §§ 120, 121. 12 Am. Jur. 2d, Bills and Notes, § 563.

**C.J.S.** — 3A C.J.S., Alteration of Instruments, § 4 et seq. 10 C.J.S., Bills and Notes, §§ 33, 197.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 3-407.

**ALR.** — Rights and liabilities of bank with respect to certified check or draft fraudulently altered, 22 ALR 1157.

Necessity of endorsement by all payees before maturity to make a transferee a bona fide holder, 25 ALR 163.

Burden of proof as to alteration not apparent on face of instrument, 31 ALR 1455.

Detachment of paper used to conceal the nature or terms of a bill or note which one signed or endorsed, as an alteration, 34 ALR 532.

Memoranda or notations on paper as affecting one's character as a holder in due course, 34 ALR 1377.

Liability of party to commercial paper so drawn as to be easily alterable as to amount, 39 ALR 1380.

Alteration of note before delivery to payee as affecting parties who do not personally consent, 44 ALR 1244.

Erasing endorsement of payment as an alteration of instrument, 44 ALR 1540.

Notation or memorandum on bill or note as notice, 56 ALR 1373.

Memorandum on negotiable instrument as an alteration, 96 ALR 1102.

Addition of maker or other obligor to commercial paper as material alteration discharging nonconsenting party, 119 ALR 898.

Material alteration which avoids note, as affecting debt for which note was given, or security therefor, 127 ALR 343.

Rule regarding material alteration of instrument as affected by attempt at restoration of instrument to its original condition or effect, 155 ALR 1217.

Deception as to character of paper signed as defense as against bona fide holder of negotiable paper, 160 ALR 1295.

Alteration in check or other instrument of name of branch of bank as material, 174 ALR 299.

Invalid instrument as subject of forgery, 174 ALR 1300.

Rights and liabilities of drawee bank, as to persons other than drawer, with respect to uncertified paid check which was altered, 75 ALR2d 611.

Rights of one who acquires lost or stolen traveler's checks, 42 ALR3d 846.

What constitutes "fraudulent and material" alteration of negotiable instrument under UCC § 3-407(2)(a), 88 ALR3d 905.

### 11-3-408. Drawee not liable on unaccepted draft.

A check or other draft does not of itself operate as an assignment of funds in the hands of the drawee available for its payment, and the drawee is not liable on the instrument until the drawee accepts it. (Code 1981, § 11-3-408, enacted by Ga. L. 1996, p. 1306, § 3.)

### JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, decisions under Ga. L. 1924, pp. 152, 153, subsequently codified as former Code 1933, §§ 14-1002, 14-1707, and former Code Section 11-3-409 are included in the annotations for this section.

**Check not assignment of funds with drawee.** — A check itself does not operate as an assignment of any part of the funds to

credit of drawer with drawee bank, and the latter is not liable to holder unless and until it accepts or certifies the check. *Salzburger Bank v. Standard Oil Co.*, 173 Ga. 722, 161 S.E. 584 (1931) (decided under former Ga. L. 1924, pp. 152, 163, subsequently codified as former Code 1933, § 14-1707).

A check does not in and of itself operate as an assignment of any part of drawer's funds



deposited with drawee bank, but is merely an order upon such bank to pay from drawer's account. *Lambeth v. Lewis*, 114 Ga. App. 191, 150 S.E.2d 462 (1966); *Harris v. Harbin Lumber Co. (In re Ellison)*, 31 Bankr. 545 (Bankr. M.D. Ga. 1983) (decided under former Code Section 11-3-409).

**Bill not assignment of funds with drawee.** — A bill in and of itself does not operate as an assignment of funds in hands of drawee available for payment thereof, and drawee is not liable on bill unless and until the drawee accepts same. *Salzburger Bank v. Standard Oil Co.*, 173 Ga. 722, 161 S.E. 584 (1931) (decided under former Ga. L. 1924, pp. 152, 163, subsequently codified as former Code 1933, § 14-1002).

**This rule does not do away with doctrine of equitable assignment.** — Rule that checks by themselves do not operate as assignments of funds in drawee's hands and do not operate as assignment of any part of funds to credit of drawer with bank, does not do away with doctrine of equitable assignment of funds to credit of drawers of such instruments in banks upon which they are drawn. *Salzburger Bank v. Standard Oil Co.*, 173 Ga. 722, 161 S.E. 584 (1931) (decided under former Ga. L. 1924, pp. 152, 163, subsequently codified as former Code 1933, § 14-1707).

**Certification of check not assignment until delivery.** — While under former Code 1933, § 14-1707, the certification of a check, even if procured by drawer, amounts to assignment of the fund in the sense that it operates to withdraw it from deposit account of drawer, the mere fact of such certification by the drawer does not, before delivery of the check, operate as an assignment of the fund to payee. *McIntire v. Raskin*, 42 Ga. App. 303, 155 S.E. 799 (1930), rev'd on other grounds, 173 Ga. 746, 161 S.E. 363 (1931) (decided under former Code 1933, § 14-1707).

**Drawer who procures certification may surrender check to bank for cancellation prior to delivery.** *McIntire v. Raskin*, 42 Ga. App. 303, 155 S.E. 799 (1930), rev'd on other grounds, 173 Ga. 746, 161 S.E. 363 (1931) (decided under former Code 1933, § 14-1707).

**Acceptance required for right of action.**

— Under this section, holder or payee of check which has not been accepted or certified has no right of action against drawee bank based upon its failure or refusal to honor the check, even though at time check was presented for payment, bank had sufficient funds of drawer on deposit to pay it. *Georgia Bank & Trust Co. v. Hadarits*, 111 Ga. App. 195, 141 S.E.2d 172, rev'd on other grounds, 221 Ga. 125, 143 S.E.2d 627 (1965) (decided under former Code Section 11-3-409).

**Presumption is that a check is only intended as conditional payment,** and if dishonored, and the holder is not guilty of laches causing loss to drawer, the latter is liable upon original cause or debt for which check was given. *Hiatt v. Edwards*, 52 Ga. App. 152, 182 S.E. 634 (1935) (decided under former Code 1933, § 14-1707).

**Remedy upon dishonor.** — Upon presentation of check as to which payment was refused, the check was dishonored, and plaintiff's remedy, as a holder, was "against the drawers and endorser," not the defendant bank and its agent, neither of whom owed plaintiff a duty. *Stewart v. Citizens & S. Nat'l Bank*, 138 Ga. App. 209, 225 S.E.2d 761 (1976); *Green Property Corp. v. O'Callaghan, Saunders & Stumm*, 177 Ga. App. 686, 340 S.E.2d 652 (1986) (decided under former Code Section 11-3-409).

**Garnishment.** — After delivery of check, and before dishonor, drawer cannot be garnished as debtor of payee in respect to debt for which check is given. *Hiatt v. Edwards*, 52 Ga. App. 152, 182 S.E. 634 (1935) (decided under former Code 1933, § 14-1707).

**Revocation of check, voluntary and by operation of law.** — Check may be revoked at any time by drawer before it has been certified, accepted, or paid by the bank, and is revoked by operation of law ten days after death of drawer, although drawee bank is not liable where it has in good faith honored such instrument without knowledge of depositor's death. *Lambeth v. Lewis*, 114 Ga. App. 191, 150 S.E.2d 462 (1966) (decided under former Code Section 11-3-409).



## RESEARCH REFERENCES

**Am. Jur. 2d.** — 6 Am. Jur. 2d, Attachment and Garnishment, § 507. 11 Am. Jur. 2d, Banks and Financial Institutions, § 888. 11 Am. Jur. 2d, Bills and Notes, §§ 140, 382. 12 Am. Jur. 2d, Bills and Notes, §§ 487, 488. 38 Am. Jur. 2d, Gifts, § 59.

**C.J.S.** — 6A C.J.S., Assignments, § 60. 10 C.J.S., Bills and Notes, §§ 19, 21.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 3-408.

**ALR.** — Right of transferee of postdated check, 21 ALR 234.

**11-3-409. Acceptance of draft; certified check.**

(a) “Acceptance” means the drawee’s signed agreement to pay a draft as presented. It must be written on the draft and may consist of the drawee’s signature alone. Acceptance may be made at any time and becomes effective when notification pursuant to instructions is given or the accepted draft is delivered for the purpose of giving rights on the acceptance to any person.

(b) A draft may be accepted although it has not been signed by the drawer, is otherwise incomplete, is overdue, or has been dishonored.

(c) If a draft is payable at a fixed period after sight and the acceptor fails to date the acceptance, the holder may complete the acceptance by supplying a date in good faith.

(d) “Certified check” means a check accepted by the bank on which it is drawn. Acceptance may be made as stated in subsection (a) of this Code section or by a writing on the check which indicates that the check is certified. The drawee of a check has no obligation to certify the check, and refusal to certify is not dishonor of the check. (Code 1981, § 11-3-409, enacted by Ga. L. 1996, p. 1306, § 3.)

**Cross references.** — Criminal penalties for certification of check, draft, etc., where drawer does not have sufficient funds on deposit to cover amount of check, draft, etc.,

or for failure to set aside amount from drawer’s account to cover check, draft, etc., after certification, § 7-1-843.

## JUDICIAL DECISIONS

## ANALYSIS

GENERAL CONSIDERATION.

CERTIFIED CLERKS

CERTIFICATION WITHOUT ENDORSEMENT

**General Consideration.**

**Editor’s notes.** — In light of the similarity of the provisions, decisions under former Code 1933, §§ 14-1101, 14-1705, 14-1706 and former Code Sections 11-3-410 and 11-3-411 are included in the annotations for this section.

**Consideration given official comments.** —

This section was adopted verbatim from § 3-410 of the Uniform Commercial Code, and the legislature had benefit of drafter’s interpretation when it enacted this statute; therefore, due consideration should be given official comments as the court cannot say that legislature intended something else.

*Roswell Bank v. Atlanta Util. Works, Inc.*, 149 Ga. App. 660, 255 S.E.2d 124 (1979) (decided under former Code Section 11-3-410).

**Acceptance of check by means of telephone conversation** cannot be effective because law requires that acceptance be in writing. *Georgia Bank & Trust Co. v. Hadarits*, 111 Ga. App. 195, 141 S.E.2d 172 (decided under former Code 1933, § 14-1101), rev'd on other grounds 221 Ga. 125, 143 S.E.2d 627 (1965).

**Place and form of drawee's signature of acceptance.** — Official comments to § 3-410 of the Uniform Commercial Code (this section) include statement that "[c]ustomarily the signature is written vertically across the face of the instrument; but since the drawee has no reason to sign for any other purpose his signature in any other place, even on the back of the instrument, is sufficient." *Roswell Bank v. Atlanta Util. Works, Inc.*, 149 Ga. App. 660, 255 S.E.2d 124 (1979) (decided under former Code Section 11-3-410).

**A petition must allege written acceptance of draft** to set forth a cause of action based upon acceptance. *Bank of Augusta v. Westinghouse Elec. Corp.*, 110 Ga. App. 231, 138 S.E.2d 191 (1964) (decided under former Code 1933, § 14-1101).

#### Certified Clerks

**Act of having check certified constitutes acceptance** of payment under terms specified on check. *Kersh v. Manis Whsle. Co.*, 135 Ga. App. 943, 219 S.E.2d 604 (1975) (decided under former Code Section 11-3-411).

**Payee bound by check's notations.** — In obtaining certification of check, payee accepts and is bound by notations already on it, such as that payee releases claims against drawer and another person. *Kersh v. Manis Whsle. Co.*, 135 Ga. App. 943, 219 S.E.2d 604 (1975) (decided under former Code Section 11-3-411).

**Bank draft does not operate as assignment of funds, as does certified check**, or cashier's check, or bank money order, which are considered to be notes carrying unconditional promises to pay. *Fulton Nat'l Bank v. Delco Corp.*, 128 Ga. App. 16, 195 S.E.2d 455 (1973).

**Release of drawer upon certification.** — Where a check, at instance of payee, is certified by bank upon which it is drawn, the

bank becomes solely responsible, and the drawer is discharged from liability. *McIntire v. Raskin*, 42 Ga. App. 303, 155 S.E. 799 (1930), rev'd on other grounds, 173 Ga. 746, 161 S.E. 363 (1931) (decided under former Code 1933, § 14-1706).

If check is certified at instance of payee, bank then becomes absolute debtor of holder, drawers are released, and check is regarded as paid as between the drawers and holder. Since such certification operates as immediate payment from funds of drawer, it deprives payee of right to order payment stopped. *Kersh v. Manis Whsle. Co.*, 135 Ga. App. 943, 219 S.E.2d 604 (1975) (decided under former Code Section 11-3-411).

**Drawer procuring certification prior to delivery.** — Where the drawer, before delivery of the check, personally procures the certification of the check by the bank upon which it is drawn; prior to its delivery, the relations, duties, and obligations between the drawer and the payee remain the same, but after its delivery, the bank becomes primarily liable, while the liability of the drawer becomes secondary. *McIntire v. Raskin*, 42 Ga. App. 303, 155 S.E. 799 (1930), rev'd on other grounds, 173 Ga. 746, 161 S.E. 363 (1931) (decided under former Code 1933, § 14-1706).

**Certification of check for lump-sum alimony payment.** — Certification of check for lump-sum alimony payment by bank at instance of wife amounted to payment of check as to all parties except her and the bank and resulted in settlement of judgment for alimony, and having accepted amount awarded, she was estopped, while retaining it, from further prosecuting her petition to set aside decree of divorce as contained in same judgment. *Thompson v. Thompson*, 203 Ga. 128, 45 S.E.2d 632 (1947) (decided under former Code 1933, §§ 14-1705 and 14-1706).

Where there was judgment pursuant to alimony agreement which sum husband paid to wife's attorney, and attorney then delivered to her his own check in settlement and that check at her instance was certified by a bank, certification amounted to payment of check as to all parties except her and the bank, and resulted in settlement of judgment for alimony. *Kersh v. Manis Whsle. Co.*, 135 Ga. App. 943, 219 S.E.2d 604 (1975) (decided under former Code Section 11-3-411).

### Certification Without Endorsement

**Drawer released by certification without endorsement.** — Where payee certifies check and receives payment, drawer is released even though release on check pro-

vided for both “acceptance and endorsement” and payee failed to sign or endorse check. *Kersh v. Manis Whsle. Co.*, 135 Ga. App. 943, 219 S.E.2d 604 (1975) (decided under former Code Section 11-3-411).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 10 Am. Jur. 2d, Banks and Financial Institutions, §§ 577, 588, 590, 591, 600, 602, 643. 11 Am. Jur. 2d, Bills and Notes, §§ 212, 381 et seq. 12 Am. Jur. 2d, Bills and Notes, §§ 456, 457, 671. 50 Am. Jur. 2d, Letters of Credit, and Credit Cards, § 3. 60 Am. Jur. 2d, Payment, § 64. 72 Am. Jur. 2d, Statute of Frauds, § 154.

**C.J.S.** — 3A C.J.S., Alteration of Instruments, § 62 et seq. 10 C.J.S., Bills and Notes, §§ 37, 160, 231, 242.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 3-409.

**ALR.** — Effect of certification of check upon presentment by one other than the owner or drawer, 12 ALR 992.

Acceptance of renewal note made or endorsed by personal representative of obligor in original paper as payment or novation of that paper, 12 ALR 1546.

Rights and liabilities of bank with respect to certified check or draft fraudulently altered, 22 ALR 1157.

What amounts to acceptance extrinsic to check, 26 ALR 312.

Effect of notice to drawee bank of claim of lien on check payable to another, 42 ALR 625.

Delay in presenting certified or accepted check for payment as affecting liability of drawee bank, 42 ALR 1138.

Drawee's mere writing of his name on bill as an acceptance thereof, 48 ALR 760.

Check on bank as payment of debts held by bank for collection, 65 ALR 1151.

Bank deposit for purpose of meeting certain checks or classes of checks, 86 ALR 375.

Meaning of term “accepted” as used in that provision of the Uniform Negotiable Instruments Act (§ 115, subd. 3) which dispenses with notice of dishonor to indorser where instrument was made or accepted for his accommodation, 90 ALR 218; 129 ALR 426.

Lost or stolen travelers' checks, 110 ALR 976.

Drawee bank's certification of check as an admission of genuineness of drawer's signature, 110 ALR 1109.

Avoidance of bank's check certification secured by fraud, 100 ALR2d 1197.

Provision in draft or note directing payment “on acceptance” as affecting negotiability, 19 ALR4th 1268.

### 11-3-410. Acceptance varying draft.

(a) If the terms of a drawee's acceptance vary from the terms of the draft as presented, the holder may refuse the acceptance and treat the draft as dishonored. In that case, the drawee may cancel the acceptance.

(b) The terms of a draft are not varied by an acceptance to pay at a particular bank or place in the United States, unless the acceptance states that the draft is to be paid only at that bank or place.

(c) If the holder assents to an acceptance varying the terms of a draft, the obligation of each drawer and indorser that does not expressly assent to the acceptance is discharged. (Code 1981, § 11-3-410, enacted by Ga. L. 1996, p. 1306, § 3.)



**RESEARCH REFERENCES**

**U.L.A.** — Uniform Commercial Code  
(U.L.A.) § 3-410.

**11-3-411. Refusal to pay cashier's checks, teller's checks, and certified checks.**

(a) In this Code section, "obligated bank" means the acceptor of a certified check or the issuer of a cashier's check or teller's check bought from the issuer.

(b) If the obligated bank wrongfully (i) refuses to pay a cashier's check or certified check; (ii) stops payment of a teller's check; or (iii) refuses to pay a dishonored teller's check, the person asserting the right to enforce the check is entitled to compensation for expenses and loss of interest resulting from the nonpayment and may recover consequential damages if the obligated bank refuses to pay after receiving notice of particular circumstances giving rise to the damages.

(c) Expenses or consequential damages under subsection (b) of this Code section are not recoverable if the refusal of the obligated bank to pay occurs because (i) the bank suspends payments; (ii) the obligated bank asserts a claim or defense of the bank that it has reasonable grounds to believe is available against the person entitled to enforce the instrument; (iii) the obligated bank has a reasonable doubt whether the person demanding payment is the person entitled to enforce the instrument; or (iv) payment is prohibited by law. (Code 1981, § 11-3-411, enacted by Ga. L. 1996, p. 1306, § 3.)

**RESEARCH REFERENCES**

**U.L.A.** — Uniform Commercial Code  
(U.L.A.) § 3-411.

**11-3-412. Obligation of issuer of note or cashier's check.**

The issuer of a note or cashier's check or other draft drawn on the drawer is obliged to pay the instrument (i) according to its terms at the time it was issued or, if the instrument was not issued, at the time it first came into the possession of a holder; or (ii) if the issuer signed an incomplete instrument, according to the instrument's terms when completed, to the extent stated in Code Sections 11-3-115 and 11-3-407. The obligation is owed to a person entitled to enforce the instrument or to an indorser who paid the instrument under Code Section 11-3-415. (Code 1981, § 11-3-412, enacted by Ga. L. 1996, p. 1306, § 3.)

## RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 3-412.

**11-3-413. Obligation of acceptor.**

(a) The acceptor of a draft is obliged to pay the draft (i) according to its terms at the time it was accepted, even though the acceptance states that the draft is payable “as originally drawn” or equivalent terms; (ii) if the acceptance varies the terms of the draft, according to the terms of the draft as varied; or (iii) if the acceptance is of a draft that is an incomplete instrument, according to its terms when completed, to the extent stated in Code Sections 11-3-115 and 11-3-407. The obligation is owed to a person entitled to enforce the draft or to the drawer or an indorser who paid the draft under Code Section 11-3-414 or 11-3-415.

(b) If the certification of a check or other acceptance of a draft states the amount certified or accepted, the obligation of the acceptor is that amount. If the certification or acceptance does not state an amount, the amount of the instrument is subsequently raised, and the instrument is then negotiated to a holder in due course, the obligation of the acceptor is the amount of the instrument at the time it was taken by the holder in due course. (Code 1981, § 11-3-413, enacted by Ga. L. 1996, p. 1306, § 3.)

**Cross references.** — Allowance of setoff against original payee in action by holder or transferee of negotiable instrument received under dishonor, § 13-7-7.

**Law reviews.** — For article discussing parol evidence in the law of commercial

paper, see 13 Ga. L. Rev. 53 (1978). For article surveying Georgia cases in the area of commercial law from June 1979 through May 1980, see 32 Mercer L. Rev. 11 (1980). For annual survey of commercial law, see 38 Mercer L. Rev. 85 (1986).

## JUDICIAL DECISIONS

## ANALYSIS

GENERAL CONSIDERATION  
PAROL EVIDENCE

**General Consideration**

**Editor’s notes.** — In light of the similarity of the provisions, decisions under former Code 1933, § 14-602 and former Code Section 11-3-413 are included in the annotations for this section.

**Promissory note is unconditional contract of maker** to pay payee according to tenor of instrument. *Tatum v. Bank of Cumming*, 135 Ga. App. 675, 218 S.E.2d 677 (1975); *Curtis v. First Nat’l Bank*, 158 Ga. App. 379, 280 S.E.2d 404 (1981) (decided under former Code Section 11-3-413).

**Good faith is presumed** until questioned. *First Bank & Trust Co. v. Skelton*, 154 Ga. App. 423, 268 S.E.2d 691 (1980).

**Maker’s obligation.** — The sale of a note, although it may provide the seller with sufficient funds to cover the debt, does not discharge the maker’s obligation to pay the note according to its terms. *First State Bank & Trust Co. v. McIver*, 893 F.2d 301 (11th Cir. 1990) (decided under former Code Section 11-3-413).

**Impossibility of performance** of contract covenant personal to promissor does not

excuse nonperformance. *Phillips v. Marcin*, 162 Ga. App. 202, 290 S.E.2d 546 (1982) (decided under former Code Section 11-3-413).

Debt evidenced by note is not contingent upon continued existence of property. *Phillips v. Marcin*, 162 Ga. App. 202, 290 S.E.2d 546 (1982) (decided under former Code Section 11-3-413).

**Necessary allegations.** — In action on check against drawer, petition which fails to allege presentment and notice of dishonor, or facts excusing presentment and notice of dishonor, is subject to general demurrer. *Lanier v. Waddell*, 83 Ga. App. 423, 64 S.E.2d 79 (1951) (decided under former Code Section 11-3-413).

#### Parol Evidence

**Parol evidence generally not admissible to alter unconditional nature of note.** — In

absence of fraud, accident, or mistake, unconditional promissory note cannot be changed into conditional obligation by parol evidence. *Dolanson Co. v. Citizens & S. Nat'l Bank*, 242 Ga. 681, 251 S.E.2d 274 (1978) (decided under former Code Section 11-3-413).

**Inadmissible to impose conditions not apparent from face of note.** — A promissory note, being an unconditional promise, is a complete contract as written, and parol evidence may not be used to impose conditions not apparent from face of note. *Whiteside v. Douglas County Bank*, 145 Ga. App. 775, 245 S.E.2d 2 (1978); *Curtis v. First Nat'l Bank*, 158 Ga. App. 379, 280 S.E.2d 404 (1981); *Phillips v. Marcin*, 162 Ga. App. 202, 290 S.E.2d 546 (1982) (decided under former Code Section 11-3-413).

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 11 Am. Jur. 2d, Banks and Financial Institutions, § 956. 12 Am. Jur. 2d, Bills and Notes, §§ 438 et seq., 492, 557.

**C.J.S.** — 10 C.J.S., Bills and Notes, §§ 12 et seq., 39 et seq., 80 et seq., 263.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 3-413.

**ALR.** — Words, “credit the drawer,” on note, as affecting liability of one who signs before delivery, 56 ALR 232.

Negligence in drawing check which facilitates alteration as to payee as affecting

bank's liability in cashing check, 64 ALR 1108.

Duty of holder as regards presentation of check to drawee bank as affected by run on bank or other indications of impending closing of doors, 88 ALR 479.

Right of maker of negotiable paper which is subject to defenses as against payee-pledgor but not as against pledgee (by invoking doctrine of marshaling assets or otherwise) to require the latter to resort first to other collateral, 92 ALR 1085.

#### 11-3-414. Obligation of drawer.

(a) This Code section does not apply to cashier's checks or other drafts drawn on the drawer.

(b) If an unaccepted draft is dishonored, the drawer is obliged to pay the draft (i) according to its terms at the time it was issued or, if the instrument was not issued, at the time it first came into possession of a holder; or (ii) if the drawer signed an incomplete instrument, according to the instrument's terms when completed, to the extent stated in Code Sections 11-3-115 and 11-3-407. The obligation is owed to a person entitled to enforce the draft or to an indorser who paid the draft under Code Section 11-3-415.

(c) If a draft is accepted by a bank, the drawer is discharged, regardless of when or by whom acceptance was obtained.



(d) If a draft is accepted and the acceptor is not a bank, the obligation of the drawer to pay the draft if the draft is dishonored by the acceptor is the same as the obligation of an indorser under subsections (a) and (c) of Code Section 11-3-415.

(e) If a draft states that it is drawn “without recourse” or otherwise disclaims liability of the drawer to pay the draft, the drawer is not liable under subsection (b) of this Code section to pay the draft if the draft is not a check. A disclaimer of the liability stated in subsection (b) of this Code section is not effective if the draft is a check.

(f) If a check is not presented for payment or given to a depository bank for collection within 30 days after its date, the drawee suspends payments after expiration of the 30 day period without paying the check, and because of the suspension of payments, the drawer is deprived of funds maintained with the drawee to cover payment of the check, the drawer, to the extent deprived of funds, may discharge its obligation to pay the check by assigning to the person entitled to enforce the check the rights of the drawer against the drawee with respect to the funds. (Code 1981, § 11-3-414, enacted by Ga. L. 1996, p. 1306, § 3.)

#### RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 3-414.

#### **11-3-415. Obligation of indorser.**

(a) Subject to subsections (b), (c), (d), and (e) of this Code section and to subsection (d) of Code Section 11-3-419, if an instrument is dishonored, an indorser is obliged to pay the amount due on the instrument (i) according to the terms of the instrument at the time it was indorsed; or (ii) if the indorser indorsed an incomplete instrument, according to the instrument’s terms when completed to the extent stated in Code Sections 11-3-115 and 11-3-407. The obligation of the indorser is owed to a person entitled to enforce the instrument or to a subsequent indorser who paid the instrument under this Code section.

(b) If an indorsement states that it is made “without recourse” or otherwise disclaims liability of the indorser, the indorser is not liable under subsection (a) of this Code section to pay the instrument.

(c) If notice of dishonor of an instrument is required by Code Section 11-3-503 and notice of dishonor complying with that Code section is not given to an indorser, the liability of the indorser under subsection (a) of this Code section is discharged.

(d) If a draft is accepted by a bank after an indorsement is made, the liability of the indorser under subsection (a) of this Code section is discharged.

(e) If an indorser of a check is liable under subsection (a) of this Code section and the check is not presented for payment, or given to a depository bank for collection within 30 days after the day the indorsement was made, the liability of the indorser under subsection (a) of this Code section is discharged. (Code 1981, § 11-3-415, enacted by Ga. L. 1996, p. 1306, § 3; Ga. L. 1997, p. 143, § 11.)

**Cross references.** — Endorser's right to control judgment and execution against principal and prior endorsers, § 10-7-54. Allowance of setoff against original payee in action by holder or transferee of negotiable instrument received under dishonor, § 13-7-7.

**Law reviews.** — For article discussing parol evidence in the law of commercial paper, see 13 Ga. L. Rev. 53 (1978).

For note, "The Law of Evidence in the Uniform Commercial Code," see 1 Ga. L. Rev. 44 (1966).

### JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Code 1933, §§ 14-604, 14-605, 14-607, and former Code Section 11-3-414, are included in the annotations for this section.

**To establish prima facie that one is not an endorser** one must clearly indicate by appropriate words an intention to be bound in some other capacity than that of endorser. *Hopkins Auto. Equip. Co. v. Lyon*, 59 Ga. App. 468, 1 S.E.2d 460 (1939) (decided under former Code 1933, § 14-605).

**Obligation of endorser** is that the endorser will pay if certain preliminary proceedings are taken. It must follow conversely that otherwise one is discharged from liability. This liability is the same as that of a technical or general endorser. *McCarroll v. First Inv. Co.*, 109 Ga. App. 748, 137 S.E.2d 319 (1964) (decided under former Code 1933, § 14-604).

**Words "every endorser,"** include every person classed as endorser, unless the person's endorsement is properly qualified. *Massell v. Prudential Ins. Co. of Am.*, 57 Ga. App. 460, 196 S.E. 115 (1938) (decided under former Code 1933, § 14-607).

**Endorser entitled to have note presented**

**for payment and to notice of nonpayment.**

— According to rules of common law, endorser of promissory note is entitled to have same duly presented for payment and to be notified of failure or refusal to pay; and failure of holder to present note for payment or to give notice of nonpayment discharges endorser from liability. *Massell v. Prudential Ins. Co. of Am.*, 57 Ga. App. 460, 196 S.E. 115 (1938) (decided under former Code 1933, § 14-607).

**When endorser's liability becomes absolute or is discharged.** — Liability of every endorser is contingent until note matures; when conditions of endorser's warranty have been met, liability becomes absolute; when requirements as to presentment and notice of dishonor have not been complied with, endorser is discharged. *Massell v. Prudential Ins. Co. of Am.*, 57 Ga. App. 460, 196 S.E. 115 (1938) (decided under former Code 1933, § 14-607).

**Principal and surety on note are jointly and severally liable,** and one need not sue them jointly. *Hurt v. Citizens Trust Co.*, 128 Ga. App. 224, 196 S.E.2d 349 (1973) (decided under former Code Section 11-3-414).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 11 Am. Jur. 2d, Bills and Notes, §§ 207, 218 et seq., 233, 459 et seq., 470 et seq. 12 Am. Jur. 2d, Bills and Notes, §§ 515, 647, 648, 671 et seq.

**C.J.S.** — 10 C.J.S., Bills and Notes, § 160 et seq.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 3-415.

**ALR.** — Undertaking of one who endorses a note without recourse, 2 ALR 216; 91 ALR 399.

Necessity of protest and notice as between coendorsers of negotiable paper, 32 ALR 190.

Endorsement of bill or note in form of guaranty of payment, 33 ALR 97; 46 ALR 1516.

Seller's rights in respect of the property, or its proceeds, upon dishonor of draft or check for purchase price, on a cash sale, 54 ALR 526.

Words, "credit the drawer," on note, as affecting liability of one who signs before delivery, 56 ALR 232.

Necessity of express agreement between endorsers to be jointly and not successively liable in order to give a right of contribution as between themselves, 90 ALR 305.

Rights, liabilities, and remedies of endorsers and endorsees in respect of stipulation in paper for attorneys' fees or costs of collection, 117 ALR 1236.

Necessity of notice of nonpayment of note or bill upon which corporation is primary obligor, in order to hold officer, director, or stockholder as indorser, 123 ALR 1367.

Necessity, in order to overcome presumption of consideration where one signed note as additional maker or as endorser after its delivery by maker to payee, of evidence negating promise of by maker to payee at or before delivery that it would be so signed or endorsed by the former, 124 ALR 717.

Liability of intermediate endorser where negotiable instrument is reacquired and renegotiated by prior party, 169 ALR 1410.

### **11-3-416. Transfer warranties.**

(a) A person who transfers an instrument for consideration warrants to the transferee and, if the transfer is by indorsement, to any subsequent transferee that:

- (1) The warrantor is a person entitled to enforce the instrument;
- (2) All signatures on the instrument are authentic and authorized;
- (3) The instrument has not been altered;
- (4) The instrument is not subject to a defense or claim in recoupment of any party which can be asserted against the warrantor; and
- (5) The warrantor has no knowledge of any insolvency proceeding commenced with respect to the maker or acceptor or, in the case of an unaccepted draft, the drawer.

(b) A person to whom the warranties under subsection (a) of this Code section are made and who took the instrument in good faith may recover from the warrantor as damages for breach of warranty an amount equal to the loss suffered as a result of the breach, but not more than the amount of the instrument plus expenses and loss of interest incurred as a result of the breach.

(c) The warranties stated in subsection (a) of this Code section cannot be disclaimed with respect to checks. Unless notice of a claim for breach of warranty is given to the warrantor within 30 days after the claimant has reason to know of the breach and the identity of the warrantor, the liability of the warrantor under subsection (b) of this Code section is discharged to the extent of any loss caused by the delay in giving notice of the claim.



(d) A cause of action for breach of warranty under this Code section accrues when the claimant has reason to know of the breach. (Code 1981, § 11-3-416, enacted by Ga. L. 1996, p. 1306, § 3; Ga. L. 1997, p. 143, § 11.)

#### RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 3-416.

#### 11-3-417. Presentment warranties.

(a) If an unaccepted draft is presented to the drawee for payment or acceptance and the drawee pays or accepts the draft, the person obtaining payment or acceptance, at the time of presentment, and a previous transferor of the draft, at the time of transfer, warrant to the drawee making payment or accepting the draft in good faith that:

(1) The warrantor is, or was, at the time the warrantor transferred the draft, a person entitled to enforce the draft or authorized to obtain payment or acceptance of the draft on behalf of a person entitled to enforce the draft;

(2) The draft has not been altered; and

(3) The warrantor has no knowledge that the signature of the drawer of the draft is unauthorized.

(b) A drawee making payment may recover from any warrantor damages for breach of warranty equal to the amount paid by the drawee less the amount the drawee received or is entitled to receive from the drawer because of the payment. In addition, the drawee is entitled to compensation for expenses and loss of interest resulting from the breach. The right of the drawee to recover damages under this subsection is not affected by any failure of the drawee to exercise ordinary care in making payment. If the drawee accepts the draft, breach of warranty is a defense to the obligation of the acceptor. If the acceptor makes payment with respect to the draft, the acceptor is entitled to recover from any warrantor for breach of warranty the amounts stated in this subsection.

(c) If a drawee asserts a claim for breach of warranty under subsection (a) of this Code section based on an unauthorized indorsement of the draft or an alteration of the draft, the warrantor may defend by proving that the indorsement is effective under Code Section 11-3-404 or 11-3-405 or the drawer is precluded under Code Section 11-3-406 or 11-4-406 from asserting against the drawee the unauthorized indorsement or alteration.

(d) If a dishonored draft is presented for payment to the drawer or an indorser or any other instrument is presented for payment to a party

obliged to pay the instrument and payment is received, the following rules apply:

(1) The person obtaining payment and a prior transferor of the instrument warrant to the person making payment in good faith that the warrantor is, or was at the time the warrantor transferred the instrument, a person entitled to enforce the instrument or authorized to obtain payment on behalf of a person entitled to enforce the instrument; and

(2) The person making payment may recover from any warrantor for breach of warranty an amount equal to the amount paid plus expenses and loss of interest resulting from the breach.

(e) The warranties stated in subsections (a) and (d) of this Code section cannot be disclaimed with respect to checks. Unless notice of a claim for breach of warranty is given to the warrantor within 30 days after the claimant has reason to know of the breach and the identity of the warrantor, the liability of the warrantor under subsection (b) or (d) of this Code section is discharged to the extent of any loss caused by the delay in giving notice of the claim.

(f) A cause of action for breach of warranty under this Code section accrues when the claimant has reason to know of the breach. (Code 1981, § 11-3-417, enacted by Ga. L. 1996, p. 1306, § 3; Ga. L. 1997, p. 143, § 11.)

**Law reviews.** — For comment on *Perini Corp. v. First Nat'l Bank*, 553 F.2d 398 (5th Cir. 1977), see 27 *Emory L.J.* 393 (1978).

## JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Code 1933, §§ 14-606, 14-607 and former Code Section 11-3-417 are included in the annotations for this section.

**When endorser liability becomes absolute and when it is discharged.** — Liability of every endorser is contingent until note matures; when conditions of endorser's warranty have been met, liability becomes absolute; when requirements as to presentment and notice of dishonor have not been complied with, endorser is discharged. *Massell v. Prudential Ins. Co. of Am.*, 57 Ga. App. 460, 196 S.E. 115 (1938) (decided under former Code 1933, §§ 14-606 and 14-607).

**Forged endorsement** is ineffective to pass title. *Perini Corp. v. First Nat'l Bank*, 553 F.2d 398 (5th Cir. 1977) (decided under former Code Section 11-3-417).

**Bank's duty to inquire into validity of irregular endorsements.** — Where endorse-

ments are irregular enough on their face to raise question as to their validity; and when checks are offered for deposit into account of one not payee, bank has duty to inquire to ascertain authority of depositor to endorse and deposit payee's checks and cannot escape its duty of inquiry by relying on word of its customer, the depositor, nor does fact that bank could proceed against its customer under warranty provisions of this section and O.C.G.A. § 11-4-207 absolve it of obligation of inquiry. Failure to inquire into the validity of such endorsements precludes bank from asserting defense of commercial reasonableness of former Code section § 11-3-419(3) as a matter of law. *Thornton & Co. v. Gwinnett Bank & Trust Co.*, 151 Ga. App. 641, 260 S.E.2d 765 (1979) (decided under former Code Section 11-3-417).

**Defense in conversion suit prohibited.** — Bank may not defend conversion suit under this section by claiming that named payee on

negotiable instrument has no enforceable right to receive or retain proceeds evidenced thereby against drawer. *Thornton & Co. v.*

*Gwinnett Bank & Trust Co.*, 151 Ga. App. 641, 260 S.E.2d 765 (1979) (decided under former Code Section 11-3-417).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 4 Am. Jur. 2d, Alteration of Instruments, § 26. 10 Am. Jur. 2d, Banks and Financial Institutions, § 747. 11 Am. Jur. 2d, Bills and Notes, §§ 389, 390, 412 et seq. 12 Am. Jur. 2d, Banks and Financial Institutions, §§ 912, 980, 981. 12 Am. Jur. 2d, Bills and Notes, §§ 464 et seq., 512 et seq., 647 et seq., 671. 37 Am. Jur. 2d, Fraud and Deceit, § 158.

**C.J.S.** — 10 C.J.S., Bills and Notes, §§ 39 et seq., 154 et seq., 239.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 3-417.

**ALR.** — Liability on note given to bank to aid in evading law, 64 ALR 595.

Right of maker or endorser of note to set up fraud in transfer by intermediate holder to plaintiff, 66 ALR 800.

Rights and remedies of purchaser of draft, payable to third person, against drawer where draft is not paid, 71 ALR 1454.

Title to commercial paper deposited by customer of bank to his account, 99 ALR 486.

Liability of bank for diversion to benefit of presenter or third party of proceeds of check drawn to bank's order by drawer not indebted to bank, 69 ALR4th 778.

### 11-3-418. Payment or acceptance by mistake.

(a) Except as provided in subsection (c) of this Code section, if the drawee of a draft pays or accepts the draft and the drawee acted on the mistaken belief that (i) payment of the draft had not been stopped pursuant to Code Section 11-4-403; or (ii) the signature of the drawer of the draft was authorized, the drawee may recover the amount of the draft from the person to whom or for whose benefit payment was made or, in the case of acceptance, may revoke the acceptance. Rights of the drawee under this subsection are not affected by failure of the drawee to exercise ordinary care in paying or accepting the draft.

(b) Except as provided in subsection (c) of this Code section, if an instrument has been paid or accepted by mistake and the case is not covered by subsection (a) of this Code section, the person paying or accepting may, to the extent permitted by the law governing mistake and restitution, (i) recover the payment from the person to whom or for whose benefit payment was made; or (ii) in the case of acceptance, may revoke the acceptance.

(c) The remedies provided by subsection (a) or (b) of this Code section may not be asserted against a person who took the instrument in good faith and for value or who in good faith changed position in reliance on the payment or acceptance. This subsection does not limit remedies provided by Code Section 11-3-417 or 11-4-407.

(d) Notwithstanding Code Section 11-4-215, if an instrument is paid or accepted by mistake and the payor or acceptor recovers payment or revokes acceptance under subsection (a) or (b) of this Code section, the instrument



is deemed not to have been paid or accepted and is treated as dishonored, and the person from whom payment is recovered has rights as a person entitled to enforce the dishonored instrument. (Code 1981, § 11-3-418, enacted by Ga. L. 1996, p. 1306, § 3.)

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**Money order issued in wrong amount.** — When a company received and negotiated in good faith a money order that was issued by a postal clerk in the wrong amount, but that was regular on its face, by accepting the instrument as payment for a customer's outstanding debt, the company took the instrument for value. Thus, O.C.G.A. § 11-3-418(c) governs the situation, and neither the postal service nor the clerk has a remedy against the company for having negotiated the instrument. *Kline v. Atlanta Gas Light Co.*, 246 Ga. App. 172, 538 S.E.2d 93 (2000).

### RESEARCH REFERENCES

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 3-418.

#### **11-3-419. Instruments signed for accommodation.**

(a) If an instrument is issued for value given for the benefit of a party to the instrument known as the “accommodated party,” and another party to the instrument known as the “accommodation party” signs the instrument for the purpose of incurring liability on the instrument without being a direct beneficiary of the value given for the instrument, the instrument is signed by the accommodation party “for accommodation.”

(b) An accommodation party may sign the instrument as maker, drawer, acceptor, or indorser and, subject to subsection (d) of this Code section, is obliged to pay the instrument in the capacity in which the accommodation party signs. The obligation of an accommodation party may be enforced notwithstanding any statute of frauds and whether or not the accommodation party receives consideration for the accommodation.

(c) A person signing an instrument is presumed to be an accommodation party and there is notice that the instrument is signed for accommodation if the signature is an anomalous indorsement or is accompanied by words indicating that the signer is acting as surety or guarantor with respect to the obligation of another party to the instrument. Except as provided in Code Section 11-3-605, the obligation of an accommodation party to pay the instrument is not affected by the fact that the person enforcing the obligation had notice when the instrument was taken by that person that the accommodation party signed the instrument for accommodation.

(d) If the signature of a party to an instrument is accompanied by words indicating unambiguously that the party is guaranteeing collection rather than payment of the obligation of another party to the instrument, the signer is obliged to pay the amount due on the instrument to a person

entitled to enforce the instrument only if (i) execution of judgment against the other party has been returned unsatisfied; (ii) the other party is insolvent or in an insolvency proceeding; (iii) the other party cannot be served with process; or (iv) it is otherwise apparent that payment cannot be obtained from the other party.

(e) An accommodation party who pays the instrument is entitled to reimbursement from the accommodated party and is entitled to enforce the instrument against the accommodated party. An accommodated party who pays the instrument has no right of recourse against, and is not entitled to contribution from, an accommodation party. (Code 1981, § 11-3-419, enacted by Ga. L. 1996, p. 1306, § 3.)

**Cross references.** — Proof of suretyship by parol, § 10-7-45.

parol evidence in the law of commercial paper, see 13 Ga. L. Rev. 53 (1978).

**Law reviews.** — For article discussing

## JUDICIAL DECISIONS

### ANALYSIS

#### GENERAL CONSIDERATION

#### PAROL EVIDENCE

#### General Consideration

**Editor's notes.** — In light of the similarity of the issues dealt with under the provisions, certain decisions under former Code 1933, §§ 14-306, 14-604, 14-605, 14-607, 14-609 and former Code Section 11-3-415 are included in the annotations for this section.

**Surety.** — An accommodation party is always a surety. *Griswold v. Whetsell*, 157 Ga. App. 800, 278 S.E.2d 753 (1981) (decided under former Code Section 11-3-415).

**Factors in determining status.** — In resolving question of whether one is an accommodation party and in resolving issue as to identity of party accommodated, intention of parties is the determinative element. *Barylak v. Jordan*, 156 Ga. App. 508, 274 S.E.2d 846 (1980) (decided under former Code Section 11-3-415).

Two primary factors are usually found to indicate accommodation party status: (1) the accommodation party received no benefits from the proceeds of the instrument, and (2) the signature was needed by the maker to acquire the loan. Other factors which have been required to be shown in order to determine whether a party can claim this status include the purpose in signing the instrument, and the intent of the

parties to the instrument. *Bank S. v. Jones*, 185 Ga. App. 125, 364 S.E.2d 281 (1987), cert. denied, 185 Ga. App. 909, 364 S.E.2d 281 (1988) (decided under former Code Section 11-3-415).

**Accommodated party need not be actual party to note.** — The concept of an "accommodation party" as it is recognized in Georgia is a broad one, and there is no requirement that the accommodated party personally be an actual party to the note. *Scott v. Citizens Bank*, 188 Ga. App. 618, 373 S.E.2d 633 (1988) (decided under former Code Section 11-3-415).

The fact that a note may have been signed by defendant in the capacity of the maker thereof and that a bank's president personally did not sign the note in any capacity whatsoever would not preclude a finding that, under the existing circumstances, defendant, in signing the note, was in actuality signing it as an accommodation party for the bank's president. *Scott v. Citizens Bank*, 188 Ga. App. 618, 373 S.E.2d 633 (1988) (decided under former Code Section 11-3-415).

**Compensation irrelevant to status.** — One person who lends name to another party to negotiable instrument in any capacity is an accommodation party regardless of whether that person received any compensation for

**General Consideration** (Cont'd)

so acting or did so gratuitously. *Lewis v. Citizens & S. Nat'l Bank*, 139 Ga. App. 855, 229 S.E.2d 765 (1976) (decided under former Code Section 11-3-415).

One signing name to instrument for purpose of lending credit to that of maker becomes an accommodation party, regardless of whether that person receives any compensation for so acting or does so gratuitously. *Griswold v. Whetsell*, 157 Ga. App. 800, 278 S.E.2d 753 (1981) (decided under former Code Section 11-3-415).

One who lends name to another party to a negotiable instrument in any capacity is an accommodation party regardless of whether that person received any compensation for so acting or did so gratuitously, and one cannot legally assert lack of consideration for accommodation since value received by principal debtor is consideration for which accommodation party bargained. *Motz v. Landmark First Nat'l Bank*, 154 Ga. App. 858, 270 S.E.2d 81 (1980); *Callicott v. Reeves & Wagner Constr. Co.*, 199 Ga. App. 486, 405 S.E.2d 116 (1991) (decided under former Code Section 11-3-415).

Accommodation party cannot assert lack of consideration for accommodation as value received by principal debtor is consideration for which accommodation party bargained. *Lewis v. Citizens & S. Nat'l Bank*, 139 Ga. App. 855, 229 S.E.2d 765 (1976) (decided under former Code Section 11-3-415).

**One signing back of note, without more.** — One placing name on back of promissory note, without more, for purpose of lending credit to the instrument for accommodation of maker, is nevertheless an endorser, in the legal sense of the word, and is not a surety unless as between original parties that person is shown to be a surety by agreement. *Massell v. Prudential Ins. Co. of Am.*, 57 Ga. App. 460, 196 S.E. 115 (1938) (decided under former Code 1933, §§ 14-604, 14-605, and 14-607).

**Endorsement by maker under payee's endorsement.** — Where check was endorsed by payee, and maker then endorsed it under name of payee, in addition to liability on the check as maker, the latter was an accommodation endorser and therefore liable to all parties subsequent to payee on said check. *Stewart v. Western Union Tel. Co.*, 83 Ga.

App. 532, 64 S.E.2d 327 (1951) (decided under former Code 1933, §§ 14-604 and 14-609).

**Accommodation maker is bound** on instrument without any resort to principal. *Murphy v. Bank of Dahlonga*, 151 Ga. App. 264, 259 S.E.2d 670 (1979) (decided under former Code Section 11-3-415).

**Where all three defendants signed note as makers**, and amount of loan in form of certified check shows all three as named payees therein, all are liable on the note even though two claim only to be accommodators. *Kerr v. DeKalb County Bank*, 135 Ga. App. 154, 217 S.E.2d 434 (1975) (decided under former Code Section 11-3-415).

**Accommodation maker not relieved by payee's knowledge of accommodation.** — Knowledge of payee that one is signing promissory note as accommodation maker will not relieve such signatory from liability thereon. *Kerr v. DeKalb County Bank*, 135 Ga. App. 154, 217 S.E.2d 434 (1975) (decided under former Code Section 11-3-415).

Payee's knowledge of accommodation does not relieve accommodation party of liability in the capacity in which that party has signed the instrument. *Brice v. Northwest Ga. Bank*, 186 Ga. App. 871, 368 S.E.2d 816 (1988) (decided under former Code Section 11-3-415).

**Liability to party accommodated.** — Party for whose benefit accommodation paper has been made acquires no rights against accommodation party, who may set up want of consideration as a defense to action by accommodated party, since as between them there is no consideration, a fact which is always a defense to a suit on negotiable paper between immediate parties. One is not liable to party accommodated, although also signed for accommodation of another party, or although a comaker received value from party accommodated, or although the person signed for accommodation of two other parties and a valuable consideration passed between parties accommodated. *McLendon v. Lane*, 51 Ga. App. 409, 180 S.E. 746 (1935) (decided under former Code 1933, § 14-306).

If acceptance is for accommodation of payee, acceptor will not be liable to payee. *McLendon v. Lane*, 51 Ga. App. 409, 180 S.E. 746 (1935) (decided under former Code 1933, § 14-306).



Where one not otherwise party to an instrument places thereon a signature in blank before delivery, for accommodation of payee, that person is liable to all parties subsequent to payee, but not to payee. *Parker v. Vrooman*, 87 Ga. App. 287, 73 S.E.2d 777 (1952) (decided under former Code 1933, § 14-306).

**Repossession of collateral** does not void contract as to surety and result is not changed when maker is a minor. *Murphy v. Bank of Dahlonga*, 151 Ga. App. 264, 259 S.E.2d 670 (1979) (decided under former Code Section 11-3-415).

**Cited in** *Peavy v. Bank South, N.A.*, 222 Ga. App. 501, 474 S.E.2d 690 (1996).

### Parol Evidence

**Admissibility generally.** — Parol evidence is generally inadmissible to alter unconditional nature of promissory note, absent fraud, accident, or mistake. *Brice v. Northwest Ga. Bank*, 186 Ga. App. 871, 368 S.E.2d 816 (1988) (decided under former Code Section 11-3-415).

**Capacity of signer.** — Where there has been no negotiation of instrument, accommodation party may show by parol what understanding or agreement was as to the accommodating party's capacity in signing. *Deems v. Wilson*, 114 Ga. App. 341, 151 S.E.2d 230 (1966) (decided under former Code Section 11-3-415).

**Proof of accommodation admissible against one taking overdue instrument knowing no payments had been made.** — Because plaintiffs took instrument after it was due with knowledge that no payments had been made on it prior to that time, they were not holders in due course and oral proof concerning accommodation character of defendant's execution of note could be shown.

*Swida v. Adams*, 138 Ga. App. 347, 226 S.E.2d 139 (1976) (decided under former Code Section 11-3-415).

**Comaker of promissory note could offer parol proof that comaker was accommodation party** and thereby establish rights as a surety. *Bank of Terrell v. Webb*, 177 Ga. App. 715, 341 S.E.2d 258 (1986) (decided under former Code Section 11-3-415).

**Payment of note from proceeds of life insurance policy assigned by cosigner to creditor.** — The statutes and cases barring a cosigner from introducing parol evidence that the cosigner signed the note as a surety are applicable only when the defense of suretyship is asserted by one who is primarily obligated on the note in an action brought by the payee or payee's assign to collect on the note. That prohibition does not apply where the note was paid from the proceeds of a life insurance policy the cosigner had assigned to the creditor; the creditor assigned the note and security deed to the estate, the maker then sued the creditor and the cosigner's executor to cancel the security deed. *Aultman v. United Bank*, 259 Ga. 237, 378 S.E.2d 302 (1989) (decided under former Code Section 11-3-415).

**Signature eliminating defense regarding breach of oral agreement.** — An accommodation party argued that the party should not be held liable on certain notes, because commercial loan officers of the bank breached an oral agreement not to make loans to the accommodated parties without that party's prior knowledge and consent. The accommodation party's signature on the notes sued on, the authenticity of which was not contested, eliminated this defense. *Richards v. First Union Nat'l Bank*, 199 Ga. App. 636, 405 S.E.2d 705, cert. denied, 199 Ga. App. 907, 405 S.E.2d 705 (1991) (decided under former Code Section 11-3-415).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 11 Am. Jur. 2d, Bills and Notes, §§ 84 et seq., 159 et seq., 234, 301, 418 et seq. 12 Am. Jur. 2d, Bills and Notes, §§ 474 et seq., 667, 671.

**C.J.S.** — 10 C.J.S., Bills and Notes, §§ 24 et seq., 190, 191.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 3-419.

**ALR.** — Right of accommodation party to bill or note to revoke his signature, 22 ALR 1348.

Rights and remedies of accommodation party to paper as against accommodated party after payment, 36 ALR 553; 77 ALR 668.

Rights of transferee after maturity of ac-

accommodation paper, 48 ALR 1280.

Discharge of accommodation maker or surety by extension of time or release of collateral, under Negotiable Instruments Law, 65 ALR 1425; 108 ALR 1088; 2 ALR2d 260.

Amount paid for paper by holder as limiting recovery against accommodation party, 69 ALR 1313.

Admissibility of parol evidence that one

signed negotiable paper for purpose other than assuming an obligation thereon, 75 ALR 1519.

Discharge of accommodation maker or surety by release of mortgage or other security given for note, 2 ALR2d 260.

Who is accommodation party under Uniform Commercial Code § 3-415, 90 ALR3d 342.

### 11-3-420. Conversion of instrument.

(a) The law applicable to conversion of personal property applies to instruments. An instrument is also converted if it is taken by transfer, other than a negotiation, from a person not entitled to enforce the instrument or a bank makes or obtains payment with respect to the instrument for a person not entitled to enforce the instrument or receive payment. An action for conversion of an instrument may not be brought by (i) the issuer or acceptor of the instrument; or (ii) a payee or indorsee who did not receive delivery of the instrument either directly or through delivery to an agent or a co-payee.

(b) In an action under subsection (a) of this Code section, the measure of liability is presumed to be the amount payable on the instrument, but recovery may not exceed the amount of the plaintiff's interest in the instrument.

(c) A representative, other than a depository bank, who has in good faith dealt with an instrument or its proceeds on behalf of one who was not the person entitled to enforce the instrument is not liable in conversion to that person beyond the amount of any proceeds that it has not paid out. (Code 1981, § 11-3-420, enacted by Ga. L. 1996, p. 1306, § 3.)

**Law reviews.** — For article surveying recent judicial developments in commercial law, see 31 Mercer L. Rev. 13 (1979). For article surveying Georgia cases in the area of commercial law from June 1979 through May 1980, see 32 Mercer L. Rev. 11 (1980).

For note, "The Law of Evidence in the Uniform Commercial Code," see 1 Ga. L. Rev. 44 (1966).

For comment on *Perini Corp. v. First Nat'l Bank*, 553 F.2d 398 (5th Cir. 1977), see 27 Emory L.J. 393 (1978). For comment on *Trust Co. of Columbus v. Refrigeration Supplies, Inc.*, 241 Ga. 406, 246 S.E.2d 282 (1978), discussing liability of collecting and payor banks for payment of check over missing endorsement of copayee, see 13 Ga. L. Rev. 677 (1979).

## JUDICIAL DECISIONS

### ANALYSIS

GENERAL CONSIDERATION

MEASURE OF DAMAGES

COMMERCIAL REASONABLENESS

### General Consideration

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Code 1933, § 14-223 and former Code Section 11-3-419 are included in the annotations for this section.

**Noncompliance with O.C.G.A. § 11-4-302 does not constitute an action for conversion.** — It is O.C.G.A. § 11-4-302(b), not O.C.G.A. § 11-3-108, which governs as to the “time allowed” the bank for responding to the original presentment of the documentary drafts to it for payment. Accordingly, an otherwise untimely failure on the part of the bank to accept, pay or return the documentary drafts pursuant to their original specification merely as “sight drafts” may be actionable as a failure to comply with O.C.G.A. § 11-4-302(b), but could not constitute an intentional “refusal” to comply with a demand for payment or return so as to be actionable as a conversion under this section. *Bank S. v. Roswell Jeep Eagle, Inc.*, 204 Ga. App. 432, 419 S.E.2d 522 (1992) (decided under former Code Section 11-3-419).

**Direct relief for “true owner.”** — This section provides check's “true owner,” payee or endorsee from whom it was stolen and whose name was falsely endorsed, direct relief from drawee. *Perini Corp. v. First Nat'l Bank*, 553 F.2d 398 (5th Cir. 1977) (decided under former Code Section 11-3-419).

**When action for conversion available.** — Action for conversion available only to one with title, possession, or right to possession of property. *First Bank & Trust Co. v. Insurance Serv. Ass'n*, 154 Ga. App. 697, 269 S.E.2d 527 (1980) (decided under former Code Section 11-3-419).

Action for conversion available only to one who has title, possession, or right to possession of the property; inclusion of party as payee on check gives one right to possession of the check. *Thornton & Co. v. Gwinnett Bank & Trust Co.*, 151 Ga. App. 641, 260 S.E.2d 765 (1979) (decided under former Code Section 11-3-419).

**Bank's acceptance as conversion.** — By accepting the checks payable to a motel for deposit into the motel manager's personal account, bank converted the motel owner's funds. *Trust Co. Bank v. Henderson*, 185 Ga. App. 367, 364 S.E.2d 289 (1987), *aff'd*, 258 Ga. 703, 373 S.E.2d 738 (1988) (decided under former Code Section 11-3-419).

**Forged endorsement.** — Where evidence in suit to recover amount of check paid over alleged forged endorsement conclusively shows that endorsement of payee's name was a forgery, as such it was wholly ineffective to pass any title to or to confer any interest in the check; consequently, the maker can recover amount of check from drawee bank. *Citizens & S. Nat'l Bank v. New York Cas. Co.*, 84 Ga. App. 47, 65 S.E.2d 461 (1951) (decided under former Code Section 11-3-419).

Where name of endorsee is forged, bank which collects check bearing such forgery and credits proceeds to account of forger commits conversion and it is liable to person who was lawful holder prior to forged endorsement. *First Bank & Trust Co. v. Insurance Serv. Ass'n*, 154 Ga. App. 697, 269 S.E.2d 527 (1980) (decided under former Code Section 11-3-419).

Where an attorney lacked authority to endorse checks on behalf of a client, a bank which accepted for deposit to the attorney's trust account a check payable to the client and the attorney containing the attorney's forged endorsement of the client's name was liable for conversion; overruling *John Bean Mfg. Co. v. Citizens Bank of Gainesville*, 60 Ga. App. 616, 4 S.E.2d 924 (1939). *Titus v. Commercial Bank*, 214 Ga. App. 657, 448 S.E.2d 753 (1994); *Tifton Bank & Trust Co. v. Knight's Furn. Co.*, 215 Ga. App. 471, 452 S.E.2d 219 (1994) (decided under former Code Section 11-3-419).

**Payment of check without joint payee's endorsement.** — Payment of check payable to order of two or more payees without endorsement of joint payee is an exercise of dominion and control over the check inconsistent with nonsigning payee's rights amounting to conversion, analogous to payment of check on forged endorsement, which former Code section § 11-3-420(c) acknowledges to be a conversion. *Trust Co. v. Refrigeration Supplies, Inc.*, 241 Ga. 406, 246 S.E.2d 282 (1978).

**Trustee's withdrawal and improper use of trust funds.** — Fact that trustee withdrew and used trust funds for an improper purpose did not make trustee's endorsements for the withdrawals forged or unauthorized so as to make the bank liable for the withdrawals. *Bank S. v. Grand Lodge of Free & Accepted Masons*, 174 Ga. App. 777, 331



**General Consideration (Cont'd)**

S.E.2d 629 (1985) (decided under former Code Section 11-3-419).

**Slight variance between payee and endorsement.** — A bank did not act in a commercially unreasonable manner when it accepted checks made payable to “Coulter Electronics, Inc.” upon endorsements reading simply “Coulter Electronics”. Coulter Elecs., Inc. v. Commercial Bank, 727 F.2d 1078 (11th Cir. 1984) (decided under former Code Section 11-3-419).

**Ratification of attorney’s signature.** — If a bank customer, by the customer’s own conduct, ratified attorney’s unauthorized signature on a check, the customer’s was precluded from recovering on a claim for conversion against the bank which accepted for deposit to the attorney’s escrow account a check payable to the customer bearing an allegedly forged endorsement. Hendrix v. First Bank, 195 Ga. App. 510, 394 S.E.2d 134 (1990) (decided under former Code Section 11-3-419).

**Measure of Damages**

**Liquidation of damages.** — Under subsection (2) of this section measure of liability is presumed to be face amount of instrument. Thus, plaintiff does not have election as to recovery, and amount of damages is liquidated. National Bank v. Refrigerated Transp. Co., 14 Ga. App. 240, 248 S.E.2d 496 (1978) (decided under former Code Section 11-3-419).

**Payment of check without joint payee’s endorsement.** — Assuming paragraph (c) of subsection (1) does apply to missing endorsements, subsection (2) is not construed as providing a rule of absolute liability against the drawee bank for the face amount of a check where a payee who suffered no actual damage would be unjustly enriched; the measure of damages with respect to missing endorsements is one of actual damages. White County Bank v. Noland Co., 214 Ga. App. 780, 449 S.E.2d 325 (1994) (decided under former Code Section 11-3-419).

**Credit for prior payment.** — A bank which was liable for conversion to the client of an attorney who deposited a forged check to the attorney’s trust account was entitled to a credit against the face amount of the instrument for a prior payment made to the client

from the trust account. Tifton Bank & Trust Co. v. Knight’s Furn. Co., 215 Ga. App. 471, 452 S.E.2d 219 (1994) (decided under former Code Section 11-3-419).

**Commercial Reasonableness**

**Exception set out in subsection (3) of this section is an affirmative defense,** burden of proving it being on the bank. National Bank v. Refrigerated Transp. Co., 147 Ga. App. 240, 248 S.E.2d 496 (1978) (decided under former Code Section 11-3-419).

**Bank’s duty to inquire into validity of irregular endorsements.** — Where endorsements are irregular enough on their face to raise question as to their validity; and when checks are offered for deposit into account of one not payee, bank has duty to inquire to ascertain authority of depositor to endorse and deposit payee’s checks, and cannot escape its duty of inquiry by relying on word of its customer, the depositor, nor does fact that bank could proceed against its customer under warranty provisions of O.C.G.A. §§ 11-3-417 and 11-4-207 absolve it of obligation of inquiry. Failure to inquire into validity of such endorsements precludes a bank from asserting defense of commercial reasonableness of subsection (3) of this section as a matter of law. Thornton & Co. v. Gwinnett Bank & Trust Co., 151 Ga. App. 641, 260 S.E.2d 765 (1979) (decided under former Code Section 11-3-419).

Where checks endorsed by and deposited into the account of an aluminum siding contractor were clearly made out to both a manufacturer and the contractor, the endorsements of both were required, and the bank’s failure to examine the checks precluded their reliance on commercial reasonableness as a defense, as a matter of law; therefore, the trial court erred in allowing the jury to consider the issue of commercial reasonableness as to checks which bore no endorsement by the manufacturer. Stolle Corp. v. McMahon, 195 Ga. App. 270, 393 S.E.2d 52 (1990) (decided under former Code Section 11-3-419).

**Bank accepting check with “patently irregular endorsement”** does not comply with reasonable commercial standards, and fact that depositor of check is customer of the bank does not absolve bank of its duty to inquire. National Bank v. Refrigerated Transp. Co., 147 Ga. App. 240, 248 S.E.2d

496 (1978) (decided under former Code Section 11-3-419).

**Deposit to attorney's trust account.** — A bank did not act in a commercially reasonable manner when it accepted for deposit to an attorney's trust account a check payable to a client and the attorney without inquiring whether the attorney was authorized to endorse the check and where there was evidence that the bank had encountered numerous other problems with the attorney; overruling *John Bean Mfg. Co. v. Citizens Bank of Gainesville*, 60 Ga. App. 616, 4 S.E.2d 924 (1939). *Titus v. Commercial Bank*, 214 Ga. App. 657, 448 S.E.2d 753 (1994); *Tifton Bank & Trust Co. v. Knight's Furn. Co.*, 215 Ga. App. 471, 452 S.E.2d 219 (1994) (decided under former Code Section 11-3-419).

**Typewritten endorsement.** — Defense that bank acted in good faith and in accordance with reasonable commercial standards applicable to business of banking may not even be raised where endorsement is typewritten and therefore suspect on its face, and such acceptance by a bank cannot be shown to be commercially reasonable. *National Bank v. Refrigerated Transp. Co.*, 147 Ga. App. 240, 248 S.E.2d 496 (1978) (decided under former Code Section 11-3-419).

**Checks payable to corporation, endorsed in blank, presented by third party.** — Since checks payable to a corporation are not normally endorsed in blank by corporate officers and delivered to third parties, a collecting bank should inquire as to reason and authority for deposit in third party's account. *National Bank v. Refrigerated Transp. Co.*, 147 Ga. App. 240, 248 S.E.2d 496 (1978) (decided under former Code Section 11-3-419).

**Bank's allowing customer's employee to withdraw customer's funds** was not commercially reasonable conduct, where bank which was not authorized to pay a check drawn against any funds deposited to the customer's credit unless the check contained two authorized signatures, paid funds out of unauthorized customer accounts on the employee's single signature. *APCOA, Inc. v. Fidelity Nat'l Bank*, 703 F. Supp. 1553 (N.D. Ga. 1988), *aff'd*, 906 F.2d 610 (11th Cir. 1990) (decided under former Code Section 11-3-419).

**Bank's conduct in opening accounts which had not been authorized** by its customer and then accepting checks written on the accounts on the single signature of the customer's employee, thereby facilitating the employee's embezzlement scheme, was not in accordance with reasonable commercial standards. *Apcoa, Inc. v. Fidelity Nat'l Bank*, 906 F.2d 610 (11th Cir. 1990) (decided under former Code Section 11-3-419).

**Rubber stamp endorsement.** — Bank's cashing of checks payable to a corporate payee, endorsed only by rubber stamp, was in accordance with reasonable commercial standards. *First Rome Bank v. Reese Oil Co.*, 206 Ga. App. 667, 426 S.E.2d 384 (1992) (decided under former Code Section 11-3-419).

**Question for jury.** — Whether bank's acceptance of checks made payable to a motel for deposit into the motel manager's personal account was consistent with reasonable commercial standards was a question for the jury, where the motel's customary rubberstamped restrictive indorsement was missing. *Trust Co. Bank v. Henderson*, 185 Ga. App. 367, 364 S.E.2d 289 (1987), *aff'd*, 258 Ga. 703, 373 S.E.2d 738 (1988) (decided under former Code Section 11-3-419).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 11 Am. Jur. 2d, Banks and Financial Institutions, § 918. 11 Am. Jur. 2d, Bills and Notes, §§ 138, 384, 386, 416. 18 Am. Jur. 2d, Conversion, § 47.

**C.J.S.** — 9 C.J.S., Banks and Banking, § 382 et seq. 10 C.J.S., Bills and Notes, §§ 12 et seq., 80 et seq., 239. 89 C.J.S., Trover and Conversion, § 13 et seq.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 3-420.

**ALR.** — Who must bear loss from mistake

in name, preventing payment of check before failure of drawee, 21 ALR 1556.

Rights as between one who deposits commercial paper for collection without any indication on the paper of that purpose, and one who takes it in good faith from the depository, 49 ALR 1373; 58 ALR 259.

Duty of depositor to turn over to bank forged checks, or checks with forged endorsements, which have been paid by bank, 60 ALR 527.

Liability as between bank which issues and pays certificate of deposit and another bank which endorsed and collected it on faith of a forged endorsement of the payee's name, 62 ALR 803.

Payment of check upon forged or unauthorized indorsement as affecting the right of the true owner against the bank, 69 ALR 1076; 137 ALR 874.

Who must bear loss as between drawer induced by fraud of employee or agent to issue check payable to nonexistent person or a person having no interest in the proceeds thereof, and one who cashes or pays it on the forged indorsement by such employee or agent of the name of such ostensible payee, 99 ALR 439.

Right of drawee of forged check or draft to recover amount paid thereon, 121 ALR 1056.

Right of drawee who paid check or draft bearing forged indorsement to recover against indorser prior to the one to whom payment was made, 127 ALR 122.

Right and remedy of drawer of check against collecting bank which receives it on forged indorsement and collects it from drawee bank, 99 ALR2d 637.

Procuring signature by fraud as forgery, 11 ALR3d 1074.

Bank's liability to nonsigning payee for payment of check drawn to joint payees without obtaining indorsement by both, 47 ALR3d 537.

Payee's right of recovery, in conversion under UCC § 3-419(1)(c), for money paid on unauthorized indorsement, 23 ALR4th 855.

Bank's "reasonable commercial standards" defense under UCC § 3-419(3), 49 ALR4th 888.

Payee's and drawer's right of recovery, in conversion under pre-1990 UCC § 3-419, or post-1990 UCC § 3-420, for money paid on unauthorized endorsement, 91 ALR5th 89.

## PART 5

### DISHONOR

**Cross references.** — Duty of banks to notify customers of changes in rules governing deposits or withdrawal of deposits,

§ 7-1-350. Penalty for criminal issuance of bad check, § 16-9-20.

#### 11-3-501. Presentment.

(a) "Presentment" means a demand made by or on behalf of a person entitled to enforce an instrument to (i) pay the instrument made to the drawee or a party obliged to pay the instrument or, in the case of a note or accepted draft payable at a bank, to the bank; or (ii) accept a draft made to the drawee.

(b) The following rules are subject to Article 4 of this title, agreement of the parties, and clearing-house rules and the like:

(1) Presentment may be made at the place of payment of the instrument and must be made at the place of payment if the instrument is payable at a bank in the United States. Presentment may be made by any commercially reasonable means, including an oral, written, or electronic communication. Presentment is effective when the demand for payment or acceptance is received by the person to whom presentment is made and is effective if made to any one of two or more makers, acceptors, drawees, or other payors.



(2) Upon demand of the person to whom presentment is made, the person making presentment must:

(i) Exhibit the instrument;

(ii) Give reasonable identification and, if presentment is made on behalf of another person, reasonable evidence of authority to do so; and

(iii) Sign a receipt on the instrument for any payment made or surrender the instrument if full payment is made.

(3) Without dishonoring the instrument, the party to whom presentment is made may:

(i) Return the instrument for lack of a necessary indorsement; or

(ii) Refuse payment or acceptance for failure of the presentment to comply with the terms of the instrument, an agreement of the parties, or other applicable law or rule.

(4) The party to whom presentment is made may treat presentment as occurring on the next business day after the day of presentment if the party to whom presentment is made has established a cut-off hour not earlier than 2:00 P.M. for the receipt and processing of instruments presented for payment or acceptance and presentment is made after the cut-off hour. (Code 1981, § 11-3-501, enacted by Ga. L. 1996, p. 1306, § 3.)

**Law reviews.** — For note, “The Law of Evidence in the Uniform Commercial Code,” see 1 Ga. L. Rev. 44 (1966).

For comment on *Studstill v. American Oil Co.*, 126 Ga. App. 722, 191 S.E.2d 538 (1972), see 24 Mercer L. Rev. 939 (1973).

### JUDICIAL DECISIONS

**Editor’s notes.** — In light of the similarity of the issues dealt with by the provisions, decisions under former Code 1882, § 2781, former Code 1933, §§ 14-701 and 14-801, and former Code Sections 11-3-503, 11-3-504 are included in the annotations for this Code section.

**Necessity of presentment for payment and notice of dishonor.** — According to rules of common law, as interpreted by the Supreme Court, the endorser of a promissory note is entitled to have the same duly presented for payment, and of a failure or refusal to pay the endorser is entitled to notice; and a failure of the holder to present for payment, or to give notice of nonpayment, discharges the endorser from liability. *McCarroll v. First Inv. Co.*, 109 Ga. App. 748, 137 S.E.2d 319

(1964) (decided under former Code 1933, §§ 14-701 and 14-801).

**Personal notification.** — It is necessary that each endorser be notified personally. *Aldine Mfg. Co. v. Warner*, 96 Ga. 370, 23 S.E. 404 (1895) (decided under former Code 1882, § 2781).

**When presentment and notice of dishonor not required.** — The law does not require that notice of presentment and dishonor of a negotiable instrument be given to an endorser in order to charge the endorser with liability, where the endorser already has knowledge of such matters. The law does not require a useless thing. *McCarroll v. First Inv. Co.*, 109 Ga. App. 748, 137 S.E.2d 319 (1964) (decided under former Code 1933, §§ 14-701 and 14-801).

**Contents of petition against endorser.** — To bind the endorser as such on notes endorsed after maturity, there had to be a presentment for payment and notice of dishonor upon nonpayment, and before endorsee could proceed against endorser on the instrument, petition must have set forth compliance with these prerequisites to liability. *DeLoach v. Adams Loan & Inv. Co.*, 62 Ga. App. 61, 7 S.E.2d 580 (1940) (decided under former Code 1933, §§ 14-701 and 14-801).

**Retention of check for unreasonable time constituting an acceptance.** — Retention of check for unreasonable time without cashing and without indicating refusal to accept it as an accord and satisfaction constitutes acceptance. *Studstill v. AMOCO*, 126 Ga. App. 722, 191 S.E.2d 538 (1972), *aff'd*, 230 Ga. 305, 196 S.E.2d 847 (1973), later appeal, 132 Ga. App. 56, 207 S.E.2d 553 (1974) (decided under former Code Section 11-3-503).

**Retention of check for unreasonable period may work accord and satisfaction.** — If one intends to accept a check as payment of demand, it should be promptly presented for payment, usually within a 30-day period. Where, in absence of circumstances suggesting a contrary state of facts, the check, although not cashed, is kept for a period greatly in excess of this time, such retention

may of itself cause the debtor to rely on theory that his offer (accord) has been accepted (satisfaction), in which case the creditor no longer has a right of action for any excess payment due. *Studstill v. AMOCO*, 126 Ga. App. 722, 191 S.E.2d 538 (1972), *aff'd*, 230 Ga. 305, 196 S.E.2d 847 (1973), later appeal, 132 Ga. App. 56, 207 S.E.2d 553 (1974) (decided under former Code Section 11-3-503).

**Retention of check with knowledge of refused acceptance.** — Mere retention of stale check, with knowledge on part of debtor that creditor refused to accept it in full satisfaction of unliquidated liability, will not operate as an accord and satisfaction. *Studstill v. AMOCO*, 126 Ga. App. 722, 191 S.E.2d 538 (1972), *aff'd*, 230 Ga. 305, 196 S.E.2d 847 (1973), later appeal, 132 Ga. App. 56, 207 S.E.2d 553 (1974) (decided under former Code Section 11-3-503).

**Pre-Code rule affirmed.** — Only holder or holder's agent may properly present check for payment. Thus, the Uniform Commercial Code reaffirms general pre-Code rule that drawee may not charge its drawer customer's accounts for payment of order instrument bearing a forged endorsement. *Perini Corp. v. First Nat'l Bank*, 553 F.2d 398 (5th Cir. 1977) (decided under former Code Section 11-3-504).

## OPINIONS OF THE ATTORNEY GENERAL

**Bank's freedom in deciding how to treat collection item.** — Neither T. 7 nor T. 11 restricts in any way a bank's freedom to decide how it will treat any particular collection item, whether it be a check or a credit union share draft. 1977 Op. Att'y Gen. No. 77-2 (rendered under former Code Section 11-3-504).

**Banks' processing of credit union share drafts.** — Law of this state does not require banks to process credit union share drafts as cash items, rather than as drafts for collection. 1977 Op. Att'y Gen. No. 77-2 (rendered under former Code Section 11-3-504).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 11 Am. Jur. 2d, Bills and Notes, §§ 105, 125, 313 et seq., 375, et seq.

**C.J.S.** — 10 C.J.S., Bills and Notes, § 202 et seq.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 3-501.

**ALR.** — To whom should notice of protest or of dishonor of commercial paper be given

in event of death of the party entitled thereto, 1 ALR 474.

Conduct of holder of check at time of presentation for payment as affecting drawer's liability, 4 ALR 1233.

Right of owner of check which the drawee bank held for him at time it closed its doors, to a preference, 17 ALR 196.

Insolvency or bankruptcy of party primarily liable on commercial paper as excusing demand and notice of dishonor, 25 ALR 962; 87 ALR 1394.

Necessity of protest and notice as between coindorsers of negotiable paper, 32 ALR 190.

Bills and notes: necessity of possession and exhibition of paper at time of demand in order to make a valid presentment, 50 ALR 1200.

Validity and effect of promise made after filing of petition in bankruptcy, but before discharge, to pay existing debt, 83 ALR 1295.

### 11-3-502. Dishonor.

(a) Dishonor of a note is governed by the following rules:

(1) If the note is payable on demand, the note is dishonored if presentment is duly made to the maker and the note is not paid on the day of presentment.

(2) If the note is not payable on demand and is payable at or through a bank or the terms of the note require presentment, the note is dishonored if presentment is duly made and the note is not paid on the day it becomes payable or the day of presentment, whichever is later.

(3) If the note is not payable on demand and paragraph (2) of this subsection does not apply, the note is dishonored if it is not paid on the day it becomes payable.

(b) Dishonor of an unaccepted draft other than a documentary draft is governed by the following rules:

(1) If a check is duly presented for payment to the payor bank otherwise than for immediate payment over the counter, the check is dishonored if the payor bank makes timely return of the check or sends timely notice of dishonor or nonpayment under Code Section 11-4-301 or 11-4-302, or becomes accountable for the amount of the check under Code Section 11-4-302.

(2) If a draft is payable on demand and paragraph (1) of this subsection does not apply, the draft is dishonored if presentment for payment is duly made to the drawee and the draft is not paid on the day of presentment.

(3) If a draft is payable on a date stated in the draft, the draft is dishonored if:

(i) Presentment for payment is duly made to the drawee and payment is not made on the day the draft becomes payable or the day of presentment, whichever is later; or

(ii) Presentment for acceptance is duly made before the day the draft becomes payable and the draft is not accepted on the day of presentment.



(4) If a draft is payable on elapse of a period of time after sight or acceptance, the draft is dishonored if presentment for acceptance is duly made and the draft is not accepted on the day of presentment.

(c) Dishonor of an unaccepted documentary draft occurs according to the rules stated in paragraphs (2), (3), and (4) of subsection (b) of this Code section, except that payment or acceptance may be delayed without dishonor until no later than the close of the third business day of the drawee following the day on which payment or acceptance is required by those paragraphs.

(d) Dishonor of an accepted draft is governed by the following rules:

(1) If the draft is payable on demand, the draft is dishonored if presentment for payment is duly made to the acceptor and the draft is not paid on the day of presentment; or

(2) If the draft is not payable on demand, the draft is dishonored if presentment for payment is duly made to the acceptor and payment is not made on the day it becomes payable or the day of presentment, whichever is later.

(e) In any case in which presentment is otherwise required for dishonor under this Code section and presentment is excused under Code Section 11-3-504, dishonor occurs without presentment if the instrument is not duly accepted or paid.

(f) If a draft is dishonored because timely acceptance of the draft was not made and the person entitled to demand acceptance consents to a late acceptance, from the time of acceptance the draft is treated as never having been dishonored. (Code 1981, § 11-3-502, enacted by Ga. L. 1996, p. 1306, § 3.)

**Cross references.** — Restriction on setoff by holder or transferee of negotiable instrument received under dishonor, § 13-7-7.

## JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Code Section 11-3-507 are included in the annotations for this section.

**Recourse only against maker or endorser.** — Payee has no cause of action against payor bank for wrongful dishonor; payee's only recourse is against maker or endorser. *Southeastern Pipeline Serv., Inc. v. Citizens & S. Bank*, 617 F.2d 67 (5th Cir. 1980) (decided under former Code Section 11-3-507).

Upon presentment of check as to which payment was refused, check was dishonored, and plaintiff's remedy, as a holder, was "against the drawers and endorsers," not defendant bank and its agent, neither of whom owed plaintiff a duty. *Stewart v. Citizens & S. Nat'l Bank*, 138 Ga. App. 209, 225 S.E.2d 761 (1976) (decided under former Code Section 11-3-507).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 11 Am. Jur. 2d, Bills and Notes, § 351 et seq. 67 Am. Jur. 2d, Sales, § 273.

**C.J.S.** — 10 C.J.S., Bills and Notes, §§ 160, 203, 204.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 3-502.

**ALR.** — Necessity of endorsement by all payees before maturity to make a transferee a bona fide holder, 25 ALR 163.

Seller's rights in respect of the property, or its proceeds, upon dishonor of draft or check for purchase price, on a cash sale, 54 ALR 526.

Presentment and notice of dishonor as condition of holding one who appears on paper as endorser but was in fact primarily liable, 62 ALR 116.

Refusal of drawee bank to certify check as equivalent to dishonor for purposes of drawer's liability, 62 ALR 377.

Liability of drawer of check as affected by failure to give or delay in giving him notice of its dishonor, 86 ALR 463.

Liability of bank to depositor for dishonoring check, 126 ALR 206.

**11-3-503. Notice of dishonor.**

(a) The obligation of an indorser stated in subsection (a) of Code Section 11-3-415 and the obligation of a drawer stated in subsection (d) of Code Section 11-3-414 may not be enforced unless (i) the indorser or drawer is given notice of dishonor of the instrument complying with this Code section; or (ii) notice of dishonor is excused under subsection (b) of Code Section 11-3-504.

(b) Notice of dishonor may be given by any person. Notice of dishonor may be given by any commercially reasonable means, including an oral, written, or electronic communication. Notice of dishonor is sufficient if it reasonably identifies the instrument and indicates that the instrument has been dishonored or has not been paid or accepted. Return of an instrument given to a bank for collection is sufficient notice of dishonor. Upon request of any party to the instrument, the drawee shall provide a statement to the requesting party giving the specific reason for dishonor, and the drawee shall have no additional liability to the drawer as a result of such statement.

(c) Subject to subsection (c) of Code Section 11-3-504, with respect to an instrument taken for collection by a collecting bank, notice of dishonor must be given (i) by the bank before midnight of the next banking day following the banking day on which the bank receives notice of dishonor of the instrument; or (ii) by any other person within 30 days following the day on which the person receives notice of dishonor. With respect to any other instrument, notice of dishonor must be given within 30 days following the day on which dishonor occurs. (Code 1981, § 11-3-503, enacted by Ga. L. 1996, p. 1306, § 3.)

**Law reviews.** — For article surveying developments in Georgia commercial law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 33 (1981).

## JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Code 1933, §§ 14-701 and 14-801 and former Code Section 11-3-508 have been included in the annotations for this Code section.

**Drawer and drawee as same legal entity.** — It is not necessary for party suing on draft to show notice of dishonor to drawer where drawer and drawee are same legal entity, and drawer countermanded payment. *Harford Mut. Ins. Co. v. Barfield*, 105 Ga. App. 266, 124 S.E.2d 294 (1962) (decided under former Code Section 11-3-508).

**Effect on provisions requiring that notice of dishonor be "sent."** — It is neither logical nor credible that legislature meant to defuse this provision, and to render meaningless other Art. 3 and 4 provisions dealing with discharge of endorser's liability within spe-

cific time limits of presentment and nonacceptance by providing that dishonor does not occur until written notice of it is "sent." *Clements v. Central Bank*, 155 Ga. App. 27, 270 S.E.2d 194 (1980) (decided under former Code Section 11-3-508).

**Persons who constitute endorsers.** — Where three individual defendants, joined in suit against the maker of promissory note, had placed their signatures on back of instrument without indicating an intention to be bound in capacity other than endorser, they are deemed to be endorsers in legal sense of the word, and are entitled to have note presented to person primarily liable, and, if it is not paid, to notice of dishonor. *Massell v. Prudential Ins. Co. of Am.*, 57 Ga. App. 460, 196 S.E. 115 (1938) (decided under former Code 1933, §§ 14-701 and 14-801).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 11 Am. Jur. 2d, Banks and Financial Institutions, §§ 987, 988, 990. 12 Am. Jur. 2d, Bills and Notes, § 361 et seq.

**C.J.S.** — 10 C.J.S., Bills and Notes, § 202 et seq.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 3-503.

**ALR.** — Insolvency or bankruptcy of party primarily liable on commercial paper, as excusing demand and notice of dishonor, 25 ALR 962; 87 ALR 1394.

Necessity of protest and notice as between coindorsers of negotiable paper, 32 ALR 190.

Right of holder to sue bank in respect of deposit made, for payment of existing obligation other than check, 50 ALR 1012.

Examining directory as sufficient diligence in locating drawer or endorser for purpose of notice of dishonor, 55 ALR 673.

Promise to pay at future time by party to whom presentment is made as excusing notice of dishonor, 62 ALR 295.

Liability of drawer of check as affected by failure to give or delay in giving him notice of its dishonor, 86 ALR 463.

Insolvency or bankruptcy of party primarily liable on commercial paper as excusing demand and notice of dishonor, 87 ALR 1394.

Liability of drawee bank in respect of forged check because of delay in returning it unpaid, 116 ALR 687.

## 11-3-504. Excused presentment and notice of dishonor.

(a) Presentment for payment or acceptance of an instrument is excused if (i) the person entitled to present the instrument cannot with reasonable diligence make presentment; (ii) the maker or acceptor has repudiated an obligation to pay the instrument, is dead, or is in insolvency proceedings; (iii) by the terms of the instrument, presentment is not necessary to enforce the obligation of indorsers or the drawer; (iv) the drawer or indorser whose obligation is being enforced has waived presentment or otherwise has no reason to expect or right to require that the instrument be paid or



accepted; or (v) the drawer instructed the drawee not to pay or accept the draft or the drawee was not obligated to the drawer to pay the draft.

(b) Notice of dishonor is excused if (i) by the terms of the instrument, notice of dishonor is not necessary to enforce the obligation of a party to pay the instrument; or (ii) the party whose obligation is being enforced waived notice of dishonor. A waiver of presentment is also a waiver of notice of dishonor.

(c) Delay in giving notice of dishonor is excused if the delay was caused by circumstances beyond the control of the person giving the notice and the person giving the notice exercised reasonable diligence after the cause of the delay ceased to operate. (Code 1981, § 11-3-504, enacted by Ga. L. 1996, p. 1306, § 3.)

### JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the issues dealt with, decisions under former Civil Code 1910, § 4314 and former Code 1933, §§ 14-711, 14-713, and 20-1004 are included in the annotations for this section.

**Effect of failure to present check within reasonable time.** — One receiving bank check for collection and application must exercise reasonable diligence in presenting it for payment, and if that person negligently holds it for an unreasonable time, without presentation, it is at that person's own risk. *McEachern v. Industrial Life & Health Ins. Co.*, 51 Ga. App. 422, 180 S.E. 625 (1935) (decided under former Code 1933, § 20-1004).

Where holder of bank check neglects to present it for payment within a reasonable time, and the bank fails, the drawer is discharged from liability to extent of injury drawer sustained by such failure. *Anchor Duck Mills v. Harp*, 40 Ga. App. 563, 150 S.E. 572 (1929) (decided under former Civil Code 1910, § 4314).

If holder of bank check neglects to

present it for payment within a reasonable time, and bank fails between time of drawing and presentation of check, drawer is discharged from liability to extent of injury drawer sustained by such failure. An endorser is discharged absolutely. *McEachern v. Industrial Life & Health Ins. Co.*, 51 Ga. App. 422, 180 S.E. 625 (1935) (decided under former Code 1933, § 20-1004).

**Endorser having knowledge of presentment and dishonor.** — The law does not require that notice of presentment and dishonor of a negotiable instrument be given to an endorser in order to charge the endorser with liability, where the endorser already has knowledge of such matters. The law does not require a useless thing. *McCarroll v. First Inv. Co.*, 109 Ga. App. 748, 137 S.E.2d 319 (1964) (decided under former Code 1933, § 14-711).

**Presentment and notice of dishonor may be dispensed with or waived under certain conditions.** *Lanier v. Waddell*, 80 Ga. App. 713, 57 S.E.2d 240 (1950), later appeal, 83 Ga. App. 423, 64 S.E.2d 79 (1951) (decided under former Code 1933, § 14-713).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 11 Am. Jur. 2d, Bills and Notes, § 322. 60 Am. Jur. 2d, Payment, §§ 46, 60.

**C.J.S.** — 10 C.J.S., Bills and Notes, §§ 203 et seq., 244 et seq.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 3-504.

**ALR.** — When statute of limitations begins to run in favor of drawer of check, 4 ALR 881.

Conduct of holder of check at time of presentation for payment as affecting drawer's liability, 4 ALR 1233.

Trust or preference in respect of money

used to purchase exchange or to be transmitted, 16 ALR 190; 57 ALR 1168; 84 ALR 1470; 93 ALR 938; 101 ALR 631.

Necessity of protest and notice as between coindorsers of negotiable paper, 32 ALR 190.

Right of maker to recover payment or overpayment made by mistake to transferee of paper in good faith, 41 ALR 588.

Renewal of bill or note as precluding defenses available against the original, 41 ALR 963.

Delay in presenting certified or accepted check for payment as affecting liability of drawee bank, 42 ALR 1138.

Bills and notes: necessity of possession and exhibition of paper at time of demand in order to make a valid presentment, 50 ALR 1200.

Right of holder of certified check to preference out of assets of insolvent bank, 51 ALR 1034.

Loss from insolvency of bank before presentment of bank draft, as falling upon purchaser of draft or upon subsequent holder, 56 ALR 494.

Right of depositor to rescind or claim a trust in respect of a deposit because of insolvency of bank when it is made, 81 ALR 1078.

Time within which check must be presented to prevent discharge of drawer in event of bank's insolvency, 91 ALR 1181.

Provisions of sales contract relating to party to bear the loss from insolvency of or breach of contract by bank through which paper representing price is routed for collection, 99 ALR 1472.

Payment of depositor's debt to insolvent bank against which deposit might otherwise have been set off as affecting depositor's equivalent rights, 139 ALR 723; 162 ALR 1175.

### 11-3-505. Evidence of dishonor.

(a) The following are admissible as evidence and create a presumption of dishonor and of any notice of dishonor stated:

(1) A document regular in form as provided in subsection (b) of this Code section which purports to be a protest;

(2) A purported stamp or writing of the drawee, payor bank, or presenting bank on or accompanying the instrument stating that acceptance or payment has been refused unless reasons for the refusal are stated and the reasons are not consistent with dishonor; and

(3) A book or record of the drawee, payor bank, or collecting bank kept in the usual course of business which shows dishonor, even if there is no evidence of who made the entry.

(b) A protest is a certificate of dishonor made by a United States consul or vice consul or by a notary public or other person authorized to administer oaths by the law of the place where dishonor occurs. It may be made upon information satisfactory to that person. The protest must identify the instrument and certify either that presentment has been made or, if not made, the reason why it was not made, and that the instrument has been dishonored by nonacceptance or nonpayment. The protest may also certify that notice of dishonor has been given to some or all parties. (Code 1981, § 11-3-505, enacted by Ga. L. 1996, p. 1306, § 3.)

**Cross references.** — Evidence of presentation, nonpayment, and protest relating to instruments issued in payment of wages or salary due, § 34-7-3.

**Law reviews.** — For article surveying cases dealing with law of evidence from June 1977 through May 1978, see 30 Mercer L. Rev. 91 (1978).

For note, “The Law of Evidence in the Uniform Commercial Code,” see 1 Ga. L. Rev. 44 (1966).

RESEARCH REFERENCES

**Am. Jur. 2d.** — 12 Am. Jur. 2d, Bills and Notes, § 669,

**C.J.S.** — 10 C.J.S., Bills and Notes, § 299.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 3-505.

**ALR.** — Examining directory as sufficient diligence in locating drawer or endorser for purpose of notice of dishonor, 55 ALR 673.

Promise to pay at future time by party to whom presentment is made as excusing notice of dishonor, 62 ALR 295.

Presumption as to payment or discharge of obligation from obligor’s possession of paper evidencing it, 70 ALR 859; 156 ALR 777.

Necessity of producing in court note or other evidence of debt sued on, as a precaution against possibility of double liability, 129 ALR 977.

PART 6

DISCHARGE AND PAYMENT

**Cross references.** — Applicability of article to provisions of T. 10 pertaining to discharge of parties to suretyship, § 10-7-27.

11-3-601. Discharge and effect of discharge.

(a) The obligation of a party to pay the instrument is discharged as stated in this article or by an act or agreement with the party which would discharge an obligation to pay money under a simple contract.

(b) Discharge of the obligation of a party is not effective against a person acquiring rights of a holder in due course of the instrument without notice of the discharge. (Code 1981, § 11-3-601, enacted by Ga. L. 1996, p. 1306, § 3.)

**Cross references.** — Discharge of surety by increase of risk, § 10-7-22.

JUDICIAL DECISIONS

ANALYSIS

- GENERAL CONSIDERATION
- DISCHARGE ON UNDERLYING CONTRACT
- DISCHARGE OF SURETY

General Consideration

**Editor’s notes.** — In light of the similarity of the issues dealt with, decisions under

former Code Section 11-3-601 are included in the annotations of this section.

**Purpose of former subsection (3).** — Former Code section § 11-3-208 and former



**General Consideration (Cont'd)**

subsection (3) of this section intended to eliminate circuitry in order of responsibility of endorsers of check. *Columbian Peanut Co. v. Frosteg*, 472 F.2d 476 (5th Cir.), cert. denied, 414 U.S. 824, 94 S. Ct. 126, 38 L. Ed. 2d 57 (1973).

**Discharge on Underlying Contract**

**Effect of failure of consideration on note liability.** — Former subsection (2) of this section codifies principle that failure of consideration on underlying contract discharges liability on note. *Hunter v. McLelland*, 143 Ga. App. 746, 240 S.E.2d 153 (1977).

**Recognition of interdependence of promises to deliver possession and pay.** — Promise of seller to deliver possession and comply with other terms of contract are interdependent with promise of buyer to pay for the property. Neither buyer nor seller is obligated to perform unless the other is ready and able to perform his or her obligations under the contract. *Hunter v. McLelland*, 143 Ga. App. 746, 240 S.E.2d 153 (1977).

**Effect of vendor's failure to deliver title according to contract.** — Inability of vendor of land to make title according to vendor's contract will give vendee a cause of action for breach of contract and justify vendee in asserting want or failure of consideration as to any notes executed therefor in hands of a holder with notice. *Hunter v. McLelland*, 143 Ga. App. 746, 240 S.E.2d 153 (1977).

**Increased rate of interest.** — The comaker of the third series of renewal notes was discharged following subsequent renewals at an increased rate of interest, where the provisions of the note did not cover subsequent modifications of the interest rate and the comaker had not signed the subsequent notes. *Bank of Terrell v. Webb*, 177 Ga. App. 715, 341 S.E.2d 258 (1986).

**Discharge of Surety**

**Section governs surety's discharge on a note.** — Surety's discharge on a note is now governed by O.C.G.A. § 11-3-601 which lists various circumstances in which a party may

be discharged from liability on an instrument. *DeKalb County Bank v. Haldi*, 146 Ga. App. 257, 246 S.E.2d 116 (1978).

Section 10-7-22 was superseded by former Code 1933, § 14-902, which was, in turn, repealed by O.C.G.A. § 11-10-103. Law governing discharge of sureties and other parties on instruments is currently governed by Uniform Commercial Code provisions cited in O.C.G.A. § 11-3-601. *Christian v. Atlanta Army Depot Fed. Credit Union*, 151 Ga. App. 403, 260 S.E.2d 533 (1979).

**Relationship to O.C.G.A. Ch. 7, T. 10 (suretyship chapter).** — There is no conflict between application of O.C.G.A. Ch. 7, T. 10 and holding that commercial paper chapter of Uniform Commercial Code controls in cases based on negotiable instruments, since O.C.G.A. § 11-3-601, which provided for discharge of parties to negotiable instruments, in former subsection (2) provided for such use of O.C.G.A. § Ch. 7, T. 10. Import of that subsection was that in situations other than those listed in former subsection (1) of this section, the law providing for discharge of surety or guarantor of simple contract for payment of money applies equally to surety or guarantor of negotiable instruments. Consequently, an agreement (novation) which would discharge surety or guarantor of simple contract for payment of money will also discharge one who is guarantor or surety on negotiable instrument. *Sewell v. Akins*, 147 Ga. App. 454, 249 S.E.2d 274 (1978).

Some decisions have applied O.C.G.A. Ch. 7, T. 10 to contracts of surety or guaranty securing obligations evidenced by instruments which were almost certainly negotiable instruments without reference to the Uniform Commercial Code. *Sewell v. Akins*, 147 Ga. App. 454, 249 S.E.2d 274 (1978).

**Effect of discharge of principal debtor.** — Whenever principal debtor is discharged, surety is also discharged. *Samples v. Kämp-N-Go Sys., Inc.*, 139 Ga. App. 324, 228 S.E.2d 360 (1976).

Where maker of note, or principal, is discharged by express terms of assignment clause to which note is subject, defendant endorser or surety is discharged. *Samples v. Kämp-N-Go Sys., Inc.*, 139 Ga. App. 324, 228 S.E.2d 360 (1976).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 11 Am. Jur. 2d, Bills and Notes, §§ 322, 391 et seq., 417 et seq. 69 Am. Jur. 2d, Secured Transactions, § 229.

**C.J.S.** — 10 C.J.S., Bills and Notes, § 231 et seq.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 3-601.

**ALR.** — Renewal of bill or note as precluding defenses available against the original, 35 ALR 1258; 72 ALR 600.

May one not a holder in due course of original note acquire that character as to a renewal note, 35 ALR 1300.

Discharge of drawer or endorser of check by holder's acceptance therefor of some-

thing other than money, 52 ALR 994; 87 ALR 442.

Renewal note as discharging original obligation or indebtedness, 52 ALR 1416.

Statement made to prospective transferee at time of execution of obligation, negating defense or offset against obligation, as affecting right to set up defense of fraud, 60 ALR 1180.

Right to countermand or stop payment on cashier's check or check or draft drawn by one bank upon another, 107 ALR 1463.

Renewal note signed by one comaker as discharge of nonsigning comakers, 43 ALR3d 246.

**11-3-602. Payment.**

(a) Subject to subsection (b) of this Code section, an instrument is paid to the extent payment is made (i) by or on behalf of a party obliged to pay the instrument; and (ii) to a person entitled to enforce the instrument. To the extent of the payment, the obligation of the party obliged to pay the instrument is discharged even though payment is made with knowledge of a claim to the instrument under Code Section 11-3-306 by another person.

(b) The obligation of a party to pay the instrument is not discharged under subsection (a) of this Code section if:

(1) A claim to the instrument under Code Section 11-3-306 is enforceable against the party receiving payment, and either:

(i) Payment is made with knowledge by the payor that payment is prohibited by injunction or similar process of a court of competent jurisdiction; or

(ii) In the case of an instrument other than a cashier's check, teller's check, or certified check, the party making payment accepted, from the person having a claim to the instrument, indemnity against loss resulting from refusal to pay the person entitled to enforce the instrument; or

(2) The person making payment knows that the instrument is a stolen instrument and pays a person the payor knows is in wrongful possession of the instrument.

(c) Notwithstanding any other provision of this article, with respect to a note which is a negotiable instrument within the meaning of this article and which is to be paid off in installment payments or in more than one payment, the maker or drawer is authorized to pay the assignor until the assignee or its authorized agent sends a registered or certified letter to the

maker or drawer at the maker's or drawer's last known address notifying the maker or drawer that the amount due or to become due has been assigned and that payment is to be made to the assignee. A notification that does not reasonably identify the rights assigned is ineffective. If requested by the drawer or maker, the assignee must furnish reasonable proof that the assignment has been made and, unless the assignee does so, the maker or drawer may pay the assignor. (Code 1981, § 11-3-602, enacted by Ga. L. 1996, p. 1306, § 3.)

### JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the issues dealt with under the provisions, decisions under former Code 1933, §§ 14-223 and 14-505 and former Code Section 11-3-603 are included in the annotations for this Code section.

**Stop payment order does not relieve drawer of liability to holder.** — While drawer of check has the right to stop payment of it at any time before certification or payment by drawee, drawer remains liable, unless drawer has a defense good against the holder. *Tidwell v. Bank of Tifton*, 115 Ga. App. 555, 155 S.E.2d 451 (1967) (decided under former Code Section 11-3-603).

**Sale of note does not relieve maker.** — The sale of a note, although it may provide the seller with sufficient funds to cover the debt, does not discharge the maker's obligation to pay the note according to its terms. *First State Bank & Trust Co. v. McIver*, 893 F.2d 301 (11th Cir. 1990) (decided under former Code Section 11-3-603).

**Payment over forged endorsement not protection against true owner.** — Payment of

promissory note to supposed transferee, holding it by virtue of forged endorsement, will not protect maker or one who has assumed the debt, against payment to true owner; and, consequently, in suit by such alleged transferee to enforce liability against such parties, assumer may utilize defense that alleged transfer by payee was not genuine. *Austell Bank v. National Bondholders Corp.*, 188 Ga. 757, 4 S.E.2d 913 (1939) (decided under former Code 1933, § 14-223).

**Inquiry into plaintiff's title.** — In a suit instituted by a person claiming to be the owner and holder of a promissory note, for the purpose of recovering thereon against the maker and another person alleged to have assumed the debt, it is permissible for the latter to inquire into the plaintiff's title to the note, if necessary either for the other's protection or to let in any valid defense which that person seeks to make. *Austell Bank v. National Bondholders Corp.*, 188 Ga. 757, 4 S.E.2d 913 (1939) (decided under former Code 1933, §§ 14-223 and 14-505).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 11 Am. Jur. 2d, Bills and Notes, §§ 656, 963, 964, 970. 69 Am. Jur. 2d, Secured Transactions, §§ 230, 529, 530.

**C.J.S.** — 10 C.J.S., Bills and Notes, § 231 et seq.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 3-602.

**ALR.** — Renewal of bill or note as precluding defenses available against the original, 35 ALR 1258; 72 ALR 600.

May one not a holder in due course of original note acquire that character as to a renewal note, 35 ALR 1300.

Construction of savings bank by-law ex-

pressly assented to by depositor, relieving bank from liability for payment to unauthorized person, 52 ALR 760.

Discharge of drawer or endorser of check by holder's acceptance therefor of something other than money, 52 ALR 994; 87 ALR 442.

Renewal note as discharging original obligation or indebtedness, 52 ALR 1416.

Right of purchaser of stolen bonds, 85 ALR 357; 102 ALR 28.

Surrender of commercial paper received as conditional payment as condition to recovery on original obligation, 85 ALR 1057.



Payment to payee, indorser, or guarantor of bill or note not in possession thereof, 103 ALR 653.

### 11-3-603. Tender of payment.

(a) If tender of payment of an obligation to pay an instrument is made to a person entitled to enforce the instrument, the effect of tender is governed by principles of law applicable to tender of payment under a simple contract.

(b) If tender of payment of an obligation to pay an instrument is made to a person entitled to enforce the instrument and the tender is refused, there is discharge, to the extent of the amount of the tender, of the obligation of an indorser or accommodation party having a right of recourse with respect to the obligation to which the tender relates.

(c) If tender of payment of an amount due on an instrument is made to a person entitled to enforce the instrument, the obligation of the obligor to pay interest after the due date on the amount tendered is discharged. If presentment is required with respect to an instrument and the obligor is able and ready to pay on the due date at every place of payment stated in the instrument, the obligor is deemed to have made tender of payment on the due date to the person entitled to enforce the instrument. (Code 1981, § 11-3-603, enacted by Ga. L. 1996, p. 1306, § 3.)

**Law reviews.** — For article surveying developments in Georgia commercial law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 33 (1981).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 11 Am. Jur. 2d, Bills and Notes, §§ 316, 324 et seq., 422. 68A Am. Jur. 2d, Secured Transactions, § 569.

**C.J.S.** — 10 C.J.S., Bills and Notes, § 234. 20 C.J.S., Costs, § 39 et seq. 47 C.J.S., Interest, §§ 61-63. 86 C.J.S., Tender, § 42 et seq.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 3-603.

**ALR.** — Is actual tender excused by inability of other party to produce paper or other

thing to be surrendered as condition of tender, 14 ALR 1120.

Renewal of bill or note as precluding defenses available against the original, 41 ALR 963.

Surrender of commercial paper received as conditional payment as condition to recovery on original obligation, 85 ALR 1057.

### 11-3-604. Discharge by cancellation or renunciation.

(a) A person entitled to enforce an instrument, with or without consideration, may discharge the obligation of a party to pay the instrument by (i) an intentional voluntary act such as surrender of the instrument to the party, destruction, mutilation, or cancellation of the instrument, cancellation or striking out of the party's signature, or the addition of words to the instrument indicating discharge; or (ii) agreeing not to sue or otherwise renouncing rights against the party by a signed writing.

(b) Cancellation or striking out of an indorsement pursuant to subsection (a) of this Code section does not affect the status and rights of a party derived from the indorsement. (Code 1981, § 11-3-604, enacted by Ga. L. 1996, p. 1306, § 3.)

### JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the issues dealt with, decisions under former Code Section 11-3-605 are included in the annotations of this section.

**Requirements for discharge of promissory note.** — Although a holder of a promissory note may accomplish a discharge on the instrument itself, there are no requirements that the holder do so, nor are there any specific words which must be written to effect the cancellation and renunciation. *Gorlin v. Reece*, 187 Ga. App. 584, 370 S.E.2d 834 (1988) (decided under former Code Section 11-3-605).

**Guaranties not ancillary to negotiable instruments.** — Since Article 3 does not cover guaranties which are not ancillary to notes or other actionable negotiable instruments, Article 3 was not applicable to determine the effectiveness of an oral renunciation of a guaranty by a bank's loan officer, after one note had been fully satisfied by the debtor and before subsequent notes were executed which would otherwise have been covered by a future advances clause in the guaranty. *Fidelity Nat'l Bank v. Reid*, 180 Ga. App. 428, 348 S.E.2d 913 (1986) (decided under former Code Section 11-3-605).

### RESEARCH REFERENCES

**C.J.S.** — 10 C.J.S., Bills and Notes, § 231 et seq.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 3-604.

**ALR.** — Right of maker to recover payment or overpayment made by mistake to transferee of paper in good faith, 41 ALR 588.

Surrender (or indemnity in lieu thereof) of original instrument as condition of recovery

upon new or renewal instrument, or surrender of new or renewal instrument as condition of recovery upon original, 129 ALR 371.

What constitutes renunciation by surrender of negotiable instrument under UCC § 3-605, 96 ALR3d 1144.

Unintentional cancellation of negotiable instrument under UCC Article 3, 59 ALR4th 617.

### 11-3-605. Discharge of indorsers and accommodation parties.

(a) In this Code section, the term "indorser" includes a drawer having the obligation described in subsection (d) of Code Section 11-3-414.

(b) Discharge, under Code Section 11-3-604, of the obligation of a party to pay an instrument does not discharge the obligation of an indorser or accommodation party having a right of recourse against the discharged party.

(c) If a person entitled to enforce an instrument agrees, with or without consideration, to an extension of the due date of the obligation of a party to pay the instrument, the extension discharges an indorser or accommodation party having a right of recourse against the party whose obligation is extended to the extent the indorser or accommodation party proves that the extension caused loss to the indorser or accommodation party with respect to the right of recourse.

(d) If a person entitled to enforce an instrument agrees, with or without consideration, to a material modification of the obligation of a party other than an extension of the due date, the modification discharges the obligation of an indorser or accommodation party having a right of recourse against the person whose obligation is modified to the extent the modification causes loss to the indorser or accommodation party with respect to the right of recourse. The loss suffered by the indorser or accommodation party as a result of the modification is equal to the amount of the right of recourse unless the person enforcing the instrument proves that no loss was caused by the modification or that the loss caused by the modification was an amount less than the amount of the right of recourse.

(e) If the obligation of a party to pay an instrument is secured by an interest in collateral and a person entitled to enforce the instrument impairs the value of the interest in collateral, the obligation of an indorser or accommodation party having a right of recourse against the obligor is discharged to the extent of the impairment. The burden of proving impairment is on the party asserting discharge. The value of an interest in collateral is impaired to the extent (i) the value of the interest is reduced to an amount less than the amount of the right of recourse of the party asserting discharge; or (ii) the reduction in value of the interest causes an increase in the amount by which the amount of the right of recourse exceeds the value of the interest.

(f) If the obligation of a party is secured by an interest in collateral not provided by an accommodation party and a person entitled to enforce the instrument impairs the value of the interest in collateral, the obligation of any party who is jointly and severally liable with respect to the secured obligation is discharged to the extent the impairment causes the party asserting discharge to pay more than that party would have been obliged to pay, taking into account rights of contribution, if impairment had not occurred. If the party asserting discharge is an accommodation party not entitled to discharge under subsection (e) of this Code section, the party is deemed to have a right to contribution based on joint and several liability rather than a right to reimbursement. The burden of proving impairment is on the party asserting discharge.

(g) Under subsection (e) or (f) of this Code section, impairing value of an interest in collateral includes (i) failure to obtain or maintain perfection or recordation of the interest in collateral; (ii) release of collateral without substitution of collateral of equal value; (iii) failure to perform a duty to preserve the value of collateral owed, under Article 9 of this title or other law, to a debtor or surety or other person secondarily liable; or (iv) failure to comply with applicable law in disposing of collateral.

(h) An accommodation party is not discharged under subsection (c), (d), or (e) of this Code section unless the person entitled to enforce the instrument knows of the accommodation or has notice under subsection



(c) of Code Section 11-3-419 that the instrument was signed for accommodation.

(i) A party is not discharged under this Code section if (i) the party asserting discharge consents to the event or conduct that is the basis of the discharge; or (ii) the instrument or a separate agreement of the party provides for waiver of discharge under this Code section either specifically or by general language indicating that parties waive defenses based on suretyship or impairment of collateral. (Code 1981, § 11-3-605, enacted by Ga. L. 1996, p. 1306, § 3.)

**Cross references.** — Discharge of surety by increase of risk, § 10-7-22.

## JUDICIAL DECISIONS

### ANALYSIS

#### GENERAL CONSIDERATION

#### IMPAIRMENT OF COLLATERAL

#### ADVANCE CONSENT TO IMPAIRMENT OF COLLATERAL

#### EFFECT OF INSURANCE

### General Consideration

**Editor's notes.** — In light of the similarities of the provisions, decisions under former Code Section 11-3-606 are included in the annotations for this Code section.

**The discharge under O.C.G.A. § 11-3-605 is only pro tanto** and releases the surety only to the extent that the surety proves the impairment. To the extent that *Melton v. J.M. Kenith Co.*, 182 Ga. App. 184, 355 S.E.2d 115 (1987), is contra, it is overruled. *Bank S. v. Jones*, 185 Ga. App. 125, 364 S.E.2d 281 (1987), cert. denied, 185 Ga. App. 909, 364 S.E.2d 281 (1988).

**Availability of suretyship defenses.** — The suretyship defenses provided in O.C.G.A. § 11-3-605 are not limited to parties who are “secondarily liable,” but are available to any party who is in the position of a surety, having a right of recourse either on the instrument or dehors it, including accommodation maker or acceptor known to the holder to be so. *Bank S. v. Jones*, 185 Ga. App. 125, 364 S.E.2d 281 (1987), cert. denied, 185 Ga. App. 909, 364 S.E.2d 281 (1988).

**Not applicable to liability of debtor to guarantor.** — This section and O.C.G.A. § 10-7-22 address liability of a guarantor to a creditor, not the liability for a debtor to his guarantor, and did not apply to the release

of a guarantor's principal from liability on a note. *Fabian v. Dykes*, 214 Ga. App. 792, 449 S.E.2d 305 (1994) (decided under former Code Section 11-3-606).

**Discharge of nonconsenting parties.** — Impairment of recourse or of collateral by holder may discharge any nonconsenting party to instrument. *Griswold v. Whetsell*, 157 Ga. App. 800, 278 S.E.2d 753 (1981).

**Provision authorizing release may operate as waiver.** — Where guarantee agreement provided that bank was authorized to release collateral or substitute collateral without any notice to guarantors without affecting liability of undersigned, such release operates as a waiver of consenting parties' right to claim their own discharge. *Wilson v. Baxley State Bank*, 155 Ga. App. 507, 271 S.E.2d 655 (1980).

**Discharge by grant of extension by creditor.** — O.C.G.A. § 11-3-605 does not expressly state that if creditor grants extension, surety is discharged, but draftsmen intended that result. A surety, then, can claim discharge under O.C.G.A. § 11-3-605 when, without consent and without an “express reservation of rights,” creditor and debtor enter into binding agreement to extend time for payment. *Kellett v. Stanley*, 153 Ga. App. 854, 267 S.E.2d 282 (1980).

**Elements of showing failure to use proper diligence to collect.** — Where contention is

that holder of promissory notes as collateral security failed to use proper diligence to collect them, it is necessary to show both that failure to collect was due to negligence of holder of collateral, and that damage accrued to other party therefrom. *Hurt v. Citizens Trust Co.*, 128 Ga. App. 224, 196 S.E.2d 349 (1973); *Mitchell v. Ringson*, 169 Ga. App. 88, 311 S.E.2d 516 (1983).

**Release of coguarantor with limited liability.** — O.C.G.A. § 11-3-605 was inapplicable to appellees, coguarantors of note, where, although note in question was jointly guaranteed, each guarantor had specifically limited liability thereon to guarantor's own interest; thus, there could be no injury to appellees by the release of a coguarantor. *Holcombe v. Eng*, 163 Ga. App. 343, 294 S.E.2d 568 (1982).

### Impairment of Collateral

**Proving impairment.** — Failure to collect on collateral, without more, not sufficient to show "impairment" thereof. *Hurt v. Citizens Trust Co.*, 128 Ga. App. 224, 196 S.E.2d 349 (1973).

**"Impairs" defined.** — In subsection (1)(b) (now (e)) "impairs" means injured or allowed to deteriorate in value. *Hurt v. Citizens Trust Co.*, 128 Ga. App. 224, 196 S.E.2d 349 (1973).

**Burden of proof.** — With the defense of impairment of collateral under paragraph (b) of subsection (1) (now (e)) of this section, the burden of proof is on the party claiming the defense, and that party must prove it by a preponderance of the evidence. *Doyal v. Thornton*, 205 Ga. App. 74, 421 S.E.2d 314 (1992).

**Test for unjustifiable impairment of collateral** not in the creditor's possession is whether the creditor exercised reasonable care considering the circumstances of the case. The burden of proof is on the party claiming the defense, and that party must prove it by a preponderance of the evidence. *Bank S. v. Jones*, 185 Ga. App. 125, 364 S.E.2d 281 (1987), cert. denied, 185 Ga. App. 909, 364 S.E.2d 281 (1988).

**Where a creditor transferred possession of some collateral to a codebtor**, and express language of a guaranty agreement prevented the surety from subrogation until the creditor received full payment of all liabilities, the surety could not be discharged on the claim

that rights to subrogation had been impaired. In re *Broomfield*, 35 Bankr. 459 (Bankr. N.D. Ga. 1983).

**Impairment of collateral defense rejected.** — Where a promissory note provided that the bank could "release any security ... without affecting [defendants'] obligation to pay the loan," it was apparent that defendants consented in advance to an impairment of collateral by the bank. Consequently, they were estopped to assert the defense of impairment of collateral. *H & H Operations, Inc. v. West Ga. Nat'l Bank*, 181 Ga. App. 766, 353 S.E.2d 633 (1987).

A commercial loan officer's testimony that accommodated party had sold some business fixtures and brought the proceeds of the sale to the bank, which applied them toward her business loans, was insufficient to show an "impairment of collateral" within the meaning of subsection (1)(b) (now (e)). *Richards v. First Union Nat'l Bank*, 199 Ga. App. 636, 405 S.E.2d 705, cert. denied, 199 Ga. App. 907, 405 S.E.2d 705 (1991).

### Advance Consent to Impairment of Collateral

**Waiver of consentor's right to claim discharge.** — Consent to impairment of collateral may be given in advance and is commonly incorporated in the instrument. It requires no consideration, and operates as a waiver of the consenting party's right to claim discharge personally. *Reeves v. Hunnicutt*, 119 Ga. App. 806, 168 S.E.2d 663 (1969).

**Consideration not required.** — Advance consent to impairment of collateral, which may be given by maker in the instrument, requires no consideration, and operates as a waiver of consenting party's right to claim discharge personally. *Liberty Nat'l Bank & Trust Co. v. Interstate Motel Developers, Inc.*, 346 F. Supp. 888 (S.D. Ga. 1972).

**Prevention of discharge under O.C.G.A. § 11-3-605.** — Where guarantors of note agreed that holder may surrender "all or part of the collateral" and maker loaned some of the equipment to another restaurant, guarantors are not discharged under O.C.G.A. § 11-3-605 because of their advance consent to impairment of the security. *Liberty Nat'l Bank & Trust Co. v. Interstate Motel Developers, Inc.*, 346 F. Supp. 888 (S.D. Ga. 1972).

### Advance Consent to Impairment of Collateral (Cont'd)

**Provision in note permitting release of collateral.** — Note providing that surrender or release of collateral will not release or otherwise affect liability of endorser, guarantor, surety, or other party, prevented maker from urging defense of unjustifiable impairment of collateral as ground for discharge. *Liberty Nat'l Bank & Trust Co. v. Interstate Motel Developers, Inc.*, 346 F. Supp. 888 (S.D. Ga. 1972).

**Contract provision allowing release or substitution of collateral without maker's consent.** — Where security agreement contains provision authorizing holder of instrument to release or substitute any collateral without borrower or maker's consent, borrower cannot complain of discharge. *McBurnett v. National City Bank*, 142 Ga. App. 505, 236 S.E.2d 179 (1977).

### Effect of Insurance

**Effect of payee's filing suit under insurance procured by maker.** — Where payee

bank filed suit under policy of insurance procured by maker of note to recover insurance proceeds from damage to goods covered by note, guarantors of note are not discharged from their liability, since bank's action will inure to their benefit after they have discharged their obligation as indemnitors and will not prejudice them to any extent. *Liberty Nat'l Bank & Trust Co. v. Interstate Motel Developers, Inc.*, 346 F. Supp. 888 (S.D. Ga. 1972).

**Replacement of destroyed collateral by insurance company without obligor's knowledge.** — Obligor not discharged from obligation on note when original collateral, which burned, was replaced by obligor's insurance company in cooperation with loan company without the obligor's knowledge or consent. *Hunter v. Community Loan & Inv. Corp.*, 127 Ga. App. 142, 193 S.E.2d 55 (1972).

**Maker's failure to resort to insurance collateral** does not release endorser. *Liberty Nat'l Bank & Trust Co. v. Interstate Motel Developers, Inc.*, 346 F. Supp. 888 (S.D. Ga. 1972).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 11 Am. Jur. 2d, Bills and Notes, § 418 et seq. 38 Am. Jur. 2d, Guaranty, § 106. 68A Am. Jur. 2d, Secured Transactions, §§ 14, 534-537.

**C.J.S.** — 10 C.J.S., Bills and Notes, § 231 et seq.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 3-605.

**ALR.** — Renewal note as discharging original obligation or indebtedness, 52 ALR 1416.

Amount due on principal obligation as limiting recovery on collateral paper of which plaintiff is holder in due course, but which is subject to defense between prior parties, 69 ALR 898.

Discharge of accommodation maker or

surety by extension of time or release of collateral security, under Negotiable Instruments Law, 108 ALR 1088.

Discharge of accommodation maker or surety by release of mortgage or other security given for note, 2 ALR2d 260.

Renewal note signed by one comaker as discharge of nonsigning comakers, 43 ALR3d 246.

Who is "party" discharged on negotiable instrument to extent of holder's unjustifiable impairment of collateral, under UCC § 3-606(1)(b), 93 ALR3d 1283.

What constitutes unjustifiable impairment of collateral, discharging parties to negotiable instrument, under UCC § 3-606(1)(b), 95 ALR3d 962.



## ARTICLE 4

## BANK DEPOSITS AND COLLECTIONS

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- Sec.
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- 11-4-102. Applicability.
- 11-4-103. Variation by agreement; measure of damages; action constituting ordinary care.
- 11-4-104. Definitions and index of definitions.
- 11-4-105. "Bank"; "depository bank"; "payor bank"; "intermediary bank"; "collecting bank"; "presenting bank."
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- 11-4-202. Responsibility for collection or return; when action timely.
- 11-4-203. Effect of instructions.
- 11-4-204. Methods of sending and presenting; sending directly to payor bank.
- 11-4-205. Depository bank holder of unindorsed item.
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- 11-4-207. Transfer warranties.
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- 11-4-210. Security interest of collecting bank in items, accompanying documents, and proceeds.
- 11-4-211. When bank gives value for purposes of holder in due course.
- 11-4-212. Presentment by notice of item not payable by, through, or at a

## Sec.

- bank; liability of drawer or indorser.
- 11-4-213. Medium and time of settlement by bank.
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- 11-4-215. Final payment of item by payor bank; when provisional debits and credits become final; when certain credits become available for withdrawal.
- 11-4-216. Insolvency and preference.

## Part 3

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- 11-4-301. Deferred posting; recovery of payment by return of items; time of dishonor; return of items by payor bank.
- 11-4-302. Payor bank's responsibility for late return of item.
- 11-4-303. When items subject to notice, stop-payment order, legal process, or setoff; order in which items may be charged or certified.

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## Relationship Between Payor Bank and Its Customer

- 11-4-401. When bank may charge customer's account.
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- 11-4-403. Customer's right to stop payment; burden of proof of loss.
- 11-4-404. Bank not obliged to pay check more than six months old.
- 11-4-405. Death or incompetence of customer.
- 11-4-406. Customer's duty to discover and report unauthorized signature or alteration.
- 11-4-407. Payor bank's right to subrogation on improper payment.

## Part 5

## Collection of Documentary Drafts

Sec.

- 11-4-501. Handling of documentary drafts; duty to send for presentment and to notify customer of dishonor.
- 11-4-502. Presentment of "on arrival" drafts.

Sec.

- 11-4-503. Responsibility of presenting bank for documents and goods; report of reasons for dishonor; referee in case of need.
- 11-4-504. Privilege of presenting bank to deal with goods; security interest for expenses.

**Cross references.** — Liability of parties on checks or money orders tendered for payment of tax or license fee, § 48-2-32.

**Law reviews.** — For article, "The Revision of U.C.C. Articles Three and Four: A Process Which Excluded Consumer Protection Re-

quires Federal Action," see 43 Mercer L. Rev. 827 (1992). For student article, "Adopting Article IV: Can Consumers Afford to Rely on the Banks' Good Faith?," see 46 Mercer L. Rev. 581 (1994).

## RESEARCH REFERENCES

**ALR.** — Fraud or other defense to check as available against paper issued by drawee bank in payment of check, 9 ALR 963.

Federal reserve banks and bank collections, 31 ALR 1269; 61 ALR 481.

Preferences under Bank Collection Code, 99 ALR 1255; 104 ALR 1095.

Parol evidence rule as applied to deposit

of funds in name of depositor and another, 33 ALR2d 569.

Construction and effect of UCC Art. 4, dealing with bank deposits and collections, 18 ALR3d 1376; 97 ALR3d 714; 22 ALR4th 10; 29 ALR4th 631; 88 ALR4th 568; 88 ALR4th 613; 88 ALR4th 644.

## PART 1

## GENERAL PROVISIONS AND DEFINITIONS

## 11-4-101. Short title.

This article may be cited as "Uniform Commercial Code — Bank Deposits and Collections." (Code 1933, § 109A-4—101, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 1996, p. 1306, § 4.)

## RESEARCH REFERENCES

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 4-101.

## 11-4-102. Applicability.

(a) To the extent that items within this article are also within Articles 3 and 8 of this title, they are subject to those articles. If there is conflict, this article governs Article 3 of this title, but Article 8 of this title governs this article.

(b) The liability of a bank for action or nonaction with respect to an item handled by it for purposes of presentment, payment, or collection is governed by the law of the place where the bank is located. In the case of action or nonaction by or at a branch or separate office of a bank, its liability is governed by the law of the place where the branch or separate office is located. (Code 1933, § 109A-4—102, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 1996, p. 1306, § 4.)

**Law reviews.** — For review of 1996 commercial code legislation, see 13 Ga. St. U.L. Rev. 41.

### JUDICIAL DECISIONS

**Cited** in *Perini Corp. v. First Nat'l Bank*, 553 F.2d 398 (5th Cir. 1977); *Clements v. Central Bank*, 155 Ga. App. 27, 270 S.E.2d 194 (1980); *Great W. Bank v. Steve James Ford, Inc.*, 915 F. Supp. 392 (S.D. Ga. 1996).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 11 Am. Jur. 2d, Banks and Financial Institutions, §§ 970, 978. 15A Am. Jur. 2d, Commercial Code, § 11.

**C.J.S.** — 9 C.J.S., Banks and Banking, § 382.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 4-102.

**ALR.** — Liability of bank for loss of liberty

bonds, 17 ALR 1217; 31 ALR 703; 40 ALR 899.

Authority of bank officer or employee to bind bank by endorsement or guaranty of paper for accommodation of third person, 37 ALR 1373.

Bankruptcy: provability of judgment for tort, 37 ALR 1442.

### 11-4-103. Variation by agreement; measure of damages; action constituting ordinary care.

(a) The effect of the provisions of this article may be varied by agreement, but the parties to the agreement cannot disclaim a bank's responsibility for its lack of good faith or failure to exercise ordinary care or limit the measure of damages for the lack or failure. However, the parties may determine by agreement the standards by which the bank's responsibility is to be measured if those standards are not manifestly unreasonable.

(b) Federal reserve regulations and operating circulars, clearing-house rules, and the like, have the effect of agreements under subsection (a) of this Code section, whether or not specifically assented to by all parties interested in items handled.

(c) Action or nonaction approved by this article or pursuant to federal reserve regulations or operating circulars is the exercise of ordinary care and, in the absence of special instructions, action or nonaction consistent with clearing-house rules and the like or with a general banking usage not disapproved by this article, is *prima facie* the exercise of ordinary care.



(d) The specification or approval of certain procedures by this article is not disapproval of other procedures that may be reasonable under the circumstances.

(e) The measure of damages for failure to exercise ordinary care in handling an item is the amount of the item reduced by an amount that could not have been realized by the exercise of ordinary care. If there is also bad faith, it includes any other damages the party suffered as a proximate consequence. (Code 1933, § 109A-4—103, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 1996, p. 1306, § 4.)

**Law reviews.** — For note, “The Law of Evidence in the Uniform Commercial Code,” see 1 Ga. L. Rev. 44 (1966).

### JUDICIAL DECISIONS

**Action in violation of reasonable commercial standards.** — Bank cannot enforce agreement permitting it to act in violation of reasonable commercial standards. *Perini Corp. v. First Nat'l Bank*, 553 F.2d 398 (5th Cir. 1977).

**Action pursuant to general banking usage as exercise of ordinary care.** — The fact that a bank did not verify signatures on forged checks following a change in its rule on verification was sufficient to raise a factual issue as to its exercise of ordinary care, and, even if it showed conclusively that it complied with local industry standards, that simply shifted the burden to the bank's customer to produce rebuttal evidence that the bank did not exercise ordinary care. *Eason Publications, Inc. v. Nationsbank*, 217 Ga. App. 726, 458 S.E.2d 899 (1995).

**Determination of bank as “collecting bank” and its liability.** — See *Alimenta (U.S.A.), Inc. v. Stauffer*, 568 F. Supp. 674 (N.D. Ga. 1983).

**Party subject to limitation on damages.** — The drawer of a check made payable to a third party was deemed to have used the instrument in contemplation of its presentment for payment upon the action of a collecting bank and, thus, was engaged in a transaction governed by the UCC subject to the damage limitation provision of O.C.G.A. § 11-4-103. *Farr v. Trust Co. Bank*, 220 Ga. App. 423, 469 S.E.2d 501 (1996).

**Cited in** *First Nat'l Bank v. Stephens*, 124 Ga. App. 530, 184 S.E.2d 484 (1971).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 11 Am. Jur. 2d, Banks and Financial Institutions, §§ 940, 970 et seq.

**C.J.S.** — 9 C.J.S., Banks and Banking, § 383 et seq.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 4-103.

**ALR.** — Clearing house transactions as payment or acceptance of checks, 12 ALR 998.

Bank deposit for purpose of meeting certain checks or classes of checks, 24 ALR 1111; 39 ALR 1138; 86 ALR 375.

Liability of bank for loss of liberty bonds

and war saving stamps, 31 ALR 703; 40 ALR 899.

Authority of bank officer or employee to bind bank by endorsement or guaranty of paper for accommodation of third person, 37 ALR 1373.

Liability to trustee in bankruptcy of bank paying checks of insolvent depositor before proceedings in bankruptcy, 41 ALR 557.

Balance due other banks on clearing house settlement as preferred claim against insolvent bank, 44 ALR 1535.

Measure of damages for breach of duty by

a bank in respect to collection of commercial paper, 67 ALR 1511.

Bank's duty to customer or depositor not to disclose information as to his financial condition, 92 ALR2d 900.

Bank's right to apply third person's funds, deposited in debtor's name, on debtor's obligation, 8 ALR3d 235.

Liability of savings bank for payment to person presenting lost or stolen passbook or savings account card, 68 ALR3d 1080.

Liability of bank in connection with night depository service, 77 ALR3d 597.

Bank's liability for payment or withdrawal on less than required number of signatures, 7 ALR4th 655.

Bank's liability, under state law, for disclosing financial information concerning depositor or customer, 81 ALR4th 377.

#### **11-4-104. Definitions and index of definitions.**

(a) In this article, unless the context otherwise requires:

(1) "Account" means any deposit or credit account with a bank, including a demand, time, savings, passbook, share draft, or like account, other than an account evidenced by a certificate of deposit;

(2) "Afternoon" means the period of a day between noon and midnight;

(3) "Banking day" means the part of a day on which a bank is open to the public for carrying on substantially all of its banking functions;

(4) "Clearing-house" means an association of banks or other payors regularly clearing items;

(5) "Customer" means a person having an account with a bank or for whom a bank has agreed to collect items, including a bank that maintains an account at another bank;

(6) "Documentary draft" means a draft to be presented for acceptance or payment if specified documents, certificated securities (Code Section 11-8-102) or instructions for uncertificated securities (Code Section 11-8-102), or other certificates, statements, or the like are to be received by the drawee or other payor before acceptance or payment of the draft;

(7) "Draft" means a draft as defined in Code Section 11-3-104 or an item, other than an instrument, that is an order;

(8) "Drawee" means a person ordered in a draft to make payment;

(9) "Item" means an instrument or a promise or order to pay money handled by a bank for collection or payment. The term does not include a payment order governed by Article 4A of this title or a credit or debit card slip;

(10) "Midnight deadline" with respect to a bank is midnight on its next banking day following the banking day on which it receives the

relevant item or notice or from which the time for taking action commences to run, whichever is later;

(11) “Settle” means to pay in cash, by clearing-house settlement, in a charge or credit, or by remittance, or otherwise as agreed. A settlement may be either provisional or final; and

(12) “Suspends payments” with respect to a bank means that it has been closed by order of the supervisory authorities, that a public officer has been appointed to take it over, or that it ceases or refuses to make payments in the ordinary course of business.

(b) Other definitions applying to this article and the Code sections in which they appear are:

“Agreement for electronic presentment.” Code Section 11-4-110.

“Bank.” Code Section 11-4-105.

“Collecting bank.” Code Section 11-4-105.

“Depository bank.” Code Section 11-4-105.

“Intermediary bank.” Code Section 11-4-105.

“Payor bank.” Code Section 11-4-105.

“Presenting bank.” Code Section 11-4-105.

“Presentment notice.” Code Section 11-4-110.

(c) The following definitions in other articles of this title apply to this article:

“Acceptance.” Code Section 11-3-409.

“Alteration.” Code Section 11-3-407.

“Cashier’s check.” Code Section 11-3-104.

“Certificate of deposit.” Code Section 11-3-104.

“Certified check.” Code Section 11-3-409.

“Check.” Code Section 11-3-104.

“Good faith.” Code Section 11-3-103.

“Holder in due course.” Code Section 11-3-302.

“Instrument.” Code Section 11-3-104.

“Notice of dishonor.” Code Section 11-3-503.

“Order.” Code Section 11-3-103.

“Ordinary care.” Code Section 11-3-103.



“Person entitled to enforce.” Code Section 11-3-301.

“Presentment.” Code Section 11-3-501.

“Promise.” Code Section 11-3-103.

“Prove.” Code Section 11-3-103.

“Teller’s check.” Code Section 11-3-104.

“Unauthorized signature.” Code Section 11-3-403.

(d) In addition Article 1 of this title contains general definitions and principles of construction and interpretation applicable throughout this article. (Code 1933, § 109A-4—104, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 1963, p. 188, § 9; Ga. L. 1974, p. 618, § 1; Ga. L. 1992, p. 2685, § 3; Ga. L. 1996, p. 1306, § 4; Ga. L. 1998, p. 1323, § 17.)

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 1996, ending quotation marks were added following “Cashier’s check.” in subsection (c).

**Law reviews.** — For note on 1992 amendment of this Code section, see 9 Ga. St. U.L. Rev. 163 (1992).

## JUDICIAL DECISIONS

### ANALYSIS

#### GENERAL CONSIDERATION

##### ACCOUNT

##### CUSTOMER

#### General Consideration

**Cited in** *Samples v. Trust Co.*, 118 Ga. App. 307, 163 S.E.2d 325 (1968); *Fulton Nat’l Bank v. Delco Corp.*, 128 Ga. App. 16, 195 S.E.2d 455 (1973); *Harris v. Hill*, 129 Ga. App. 403, 199 S.E.2d 847 (1973); *Trading Assocs. v. Trust Co. Bank*, 142 Ga. App. 229, 235 S.E.2d 661 (1977); *Clements v. Central Bank*, 155 Ga. App. 27, 270 S.E.2d 194 (1980); *Sabin Meyer Regional Sales Corp. v. Citizens Bank*, 502 F. Supp. 557 (N.D. Ga. 1980); *Alimenta (U.S.A.), Inc. v. Stauffer*, 568 F. Supp. 674 (N.D. Ga. 1983); *Georgia Cas. & Sur. Co. v. Tennille Banking Co.* (In re Smith), 51 Bankr. 904 (Bankr. M.D. Ga. 1985).

#### Account

**Scope.** — “Account” under subsection (1)(a) (now O.C.G.A. § 11-4-104(a)(1)) is not limited to accounts specifically named. *Columbian Peanut Co. v. Frosteg*, 472 F.2d

476 (5th Cir.), cert. denied, 414 U.S. 824, 94 S. Ct. 126, 38 L. Ed. 2d 57 (1973).

#### Customer

**Oral contract to pay drawer’s checks.** — Bank’s oral contract, based on agreed consideration to pay drawer’s checks as presented, places upon the bank same responsibilities and liabilities as if checks had been paid from general deposit of money by drawer in the bank. *Columbian Peanut Co. v. Frosteg*, 472 F.2d 476 (5th Cir.), cert. denied, 414 U.S. 824, 94 S. Ct. 126, 38 L. Ed. 2d 57 (1973).

**If one acts for another by power of attorney** suggesting possible incapacity or other special circumstance, a bank’s customer must be deemed inclusive of the depositor and the attorney-in-fact who acts as depositor/principal’s agent. *Wachovia Bank v. Reynolds*, 244 Ga. App. 1, 533 S.E.2d 743 (2000).

## OPINIONS OF THE ATTORNEY GENERAL

**Purchaser of a cashier's check** falls within law's broad definition of "customer." 1977 Op. Att'y Gen. No. 77-16.

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 11 Am. Jur. 2d, Banks and Financial Institutions, § 970 et seq.

**C.J.S.** — 9 C.J.S., Banks and Banking, § 1. 82 C.J.S., Statutes, § 309.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 4-104.

**ALR.** — Clearing-house transactions as

payment or acceptance of checks, 30 ALR 1028.

Balance due other banks on clearing-house settlement as preferred claim against insolvent bank, 44 ALR 1535.

Banks: what is "documentary draft" under UCC § 4-104(1)(f), 65 ALR4th 1095.

**11-4-105. "Bank"; "depository bank"; "payor bank"; "intermediary bank"; "collecting bank"; "presenting bank."**

In this article:

(1) "Bank" means a person engaged in the business of banking, including a savings bank, savings and loan association, credit union, or trust company;

(2) "Depository bank" means the first bank to take an item even though it is also the payor bank, unless the item is presented for immediate payment over the counter;

(3) "Payor bank" means a bank that is the drawee of a draft;

(4) "Intermediary bank" means a bank to which an item is transferred in course of collection except the depository or payor bank;

(5) "Collecting bank" means a bank handling an item for collection except the payor bank; and

(6) "Presenting bank" means a bank presenting an item except a payor bank. (Code 1933, § 109A-4—105, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 1996, p. 1306, § 4; Ga. L. 1997, p. 143, § 11.)

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 1996, the period at the end of section catchline was moved inside the ending quotation marks.

**Law reviews.** — For comment on Trust Co. of Columbus v. Refrigeration Supplies,

Inc., 241 Ga. 406, 246 S.E.2d 282 (1978), discussing liability of collecting and payor banks for payment of check over missing endorsement of copayee, see 13 Ga. L. Rev. 677 (1979).

## JUDICIAL DECISIONS

**Collecting bank's warranty of title runs to payor bank and "other payor."** — Collecting bank's warranty that it had good title to

checks or was authorized to obtain payment or acceptance on behalf of one who has good title runs to payor bank and "other

payor.” Insurance Co. of N. Am. v. Atlas Supply Co., 121 Ga. App. 1, 172 S.E.2d 632 (1970).

**Status of “collecting bank” not affected by transmitting checks through mail rather than federal reserve.** — Where customer of trust company presented checks to it for deposit in its accounts and trust company accepted the checks, credited customer’s accounts and then forwarded checks to payor bank with collection form attached, such company performed more than requisite acts necessary to qualify as handling checks for collection, despite company’s having forwarded checks by United States mail rather than through a federal reserve bank. First Nat’l Bank v. Trust Co., 510 F. Supp. 651 (N.D. Ga. 1981).

**Burden of assuring validity of endorsements on checks** rests directly on first bank in collection chain, since it is the first bank which has best opportunity to verify endorsements; this standard applies equally to situation of missing endorsements as well as forged endorsements. First Nat’l Bank v. Trust Co., 510 F. Supp. 651 (N.D. Ga. 1981).

**Determination of bank as “collecting bank” and its liability.** — See Alimenta (U.S.A.), Inc. v. Stauffer, 568 F. Supp. 674 (N.D. Ga. 1983).

**Cited in** Harris v. Hill, 129 Ga. App. 403, 199 S.E.2d 847 (1973); Brannon v. First Nat’l Bank, 137 Ga. App. 275, 223 S.E.2d 473 (1976).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 11 Am. Jur. 2d, Banks and Financial Institutions, §§ 970, 986. 15A Am. Jur. 2d, Commercial Code, § 68.

**C.J.S.** — 9 C.J.S., Banks and Banking, § 1 et seq. 82 C.J.S., Statutes, § 309.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 4-105.

**ALR.** — Maintenance of computer termi-

nal in retail store for purpose of effecting transfer of funds between financial institution and its depositors as conduct of banking business by store, 73 ALR3d 1282.

Construction of UCC § 4-105, which defines “payor bank,” “collecting bank,” and the like, 84 ALR3d 1073.

### 11-4-106. Payable through or payable at bank; collecting bank.

(a) If an item states that it is “payable through” a bank identified in the item, the item (i) designates the bank as a collecting bank and does not by itself authorize the bank to pay the item; and (ii) may be presented for payment only by or through the bank.

(b) If an item states that it is “payable at” a bank identified in the item, the item (i) designates the bank as a collecting bank and does not by itself authorize the bank to pay the item; and (ii) may be presented for payment only by or through the bank.

(c) If a draft names a nonbank drawee and it is unclear whether a bank named in the draft is a co-drawee or a collecting bank, the bank is a collecting bank. (Code 1981, § 11-4-106, enacted by Ga. L. 1996, p. 1306, § 5.)

**Editor’s notes.** — Ga. L. 1996, p. 1306, § 5, effective July 1, 1996, renumbered former Code Section 11-4-106 as present

Code Section 11-4-107 and added this Code section.



RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code (U.L.A.) § 4-106.

11-4-107. Separate office of a bank.

A branch or separate office of a bank, including the location of any agent of a bank receiving items for data processing purposes, is a separate bank for the purpose of computing the time within which and determining the place at or to which action may be taken or notice or orders must be given under this article and under Article 3 of this title. (Code 1933, § 109A-4—106, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 1963, p. 188, § 10; Ga. L. 1985, p. 825, § 2; Code 1981, § 11-4-107, as redesignated by Ga. L. 1996, p. 1306, § 5.)

Cross references. — Status and manner of operation of branch banks generally, § 7-1-600 et seq.

Editor's notes. — Ga. L. 1996, p. 1306, § 5, effective July 1, 1996, renumbered

former Code Section 11-4-106 as present Code Section 11-4-107 and renumbered former Code Section 11-4-107 as present Code Section 11-4-108.

RESEARCH REFERENCES

Am. Jur. 2d. — 10 Am. Jur. 2d, Banks and Financial Institutions, §§ 635, 636.

U.L.A. — Uniform Commercial Code (U.L.A.) § 4-107.

ALR. — Construction of UCC § 4-106 defining separate or branch office of bank, 5 ALR4th 938.

11-4-108. Time of receipt of items.

(a) For the purpose of allowing time to process items, prove balances, and make the necessary entries on its books to determine its position for the day, a bank may fix an afternoon hour of 2:00 P.M. or later as a cutoff hour for the handling of money and items and the making of entries on its books.

(b) An item or deposit of money received on any day after a cutoff hour so fixed or after the close of the banking day may be treated as being received at the opening of the next banking day. (Code 1933, § 109A-4—107, enacted by Ga. L. 1962, p. 156, § 1; Code 1981, § 11-4-108, as redesignated by Ga. L. 1996, p. 1306, § 5.)

Editor's notes. — Ga. L. 1996, p. 1306, § 5, effective July 1, 1996, renumbered former Code Section 11-4-107 as present

Code Section 11-4-108 and renumbered former Code Section 11-4-108 as present Code Section 11-4-109.

RESEARCH REFERENCES

Am. Jur. 2d. — 11 Am. Jur. 2d, Banks and Financial Institutions, §§ 699, 987, 988.

C.J.S. — 9 C.J.S., Banks and Banking, §§ 273, 274, 383.

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 4-108.

11-4-109. Delays.

(a) Unless otherwise instructed, a collecting bank in a good faith effort to secure payment of a specific item drawn on a payor other than a bank, and with or without the approval of any person involved, may waive, modify, or extend time limits imposed or permitted by this title for a period not exceeding two additional banking days without discharge of drawers or indorsers or liability to its transferor or a prior party.

(b) Delay by a collecting bank or payor bank beyond time limits prescribed or permitted by this title or by instructions is excused if (i) the delay is caused by interruption of communication or computer facilities, suspension of payments by another bank, war, emergency conditions, failure of equipment, or other circumstances beyond the control of the bank; and (ii) the bank exercises such diligence as the circumstances require. (Code 1933, § 109A-4—108, enacted by Ga. L. 1962, p. 156, § 1; Code 1981, § 11-4-109, as redesignated by Ga. L. 1996, p. 1306, § 5.)

Editor’s notes. — Ga. L. 1996, p. 1306, former Code Section 11-4-108 as present § 5, effective July 1, 1996, renumbered Code Section 11-4-109.

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Cited in Samples v. Trust Co., 118 Ga. 235 S.E.2d 661 (1977); Clements v. Central App. 307, 163 S.E.2d 325 (1968); Trading Bank, 155 Ga. App. 27, 270 S.E.2d 194 Assocs. v. Trust Co. Bank, 142 Ga. App. 229, (1980).

RESEARCH REFERENCES

Am. Jur. 2d. — 11 Am. Jur. 2d, Banks and Financial Institutions, §§ 980, 981. U.L.A. — Uniform Commercial Code (U.L.A.) § 4-109.

11-4-110. Electronic presentment.

(a) “Agreement for electronic presentment” means an agreement, clearing-house rule, or federal reserve regulation or operating circular, providing that presentment of an item may be made by transmission of an image of an item or information describing the item (“presentment notice”) rather than delivery of the item itself. The agreement may provide for procedures governing retention, presentment, payment, dishonor, and other matters concerning items subject to the agreement.

(b) Presentment of an item pursuant to an agreement for presentment is made when the presentment notice is received.

(c) If presentment is made by presentment notice, a reference to “item” or “check” in this article means the presentment notice unless the context

otherwise indicates. (Code 1981, § 11-4-110, enacted by Ga. L. 1996, p. 1306, § 5.)

#### RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 4-110.

#### **11-4-111. Statute of limitations.**

An action to enforce an obligation, duty, or right arising under this article must be commenced within three years after the cause of action accrues. (Code 1981, § 11-4-111, enacted by Ga. L. 1996, p. 1306, § 5.)

#### RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 4-111.

### PART 2

#### COLLECTION OF ITEMS: DEPOSITARY AND COLLECTING BANKS

#### **11-4-201. Status of collecting bank as agent and provisional status of credits; applicability of article; item indorsed “pay any bank.”**

(a) Unless a contrary intent clearly appears and before the time that a settlement given by a collecting bank for an item is or becomes final, the bank, with respect to the item, is an agent or subagent of the owner of the item and any settlement given for the item is provisional. This provision applies regardless of the form of indorsement or lack of indorsement and even though credit given for the item is subject to immediate withdrawal as of right or is in fact withdrawn; but the continuance of ownership of an item by its owner and any rights of the owner to proceeds of the item are subject to rights of a collecting bank, such as those resulting from outstanding advances on the item and rights of recoupment or setoff. If an item is handled by banks for purposes of presentment, payment, collection, or return, the relevant provisions of this article apply even though action of the parties clearly establishes that a particular bank has purchased the item and is the owner of it.

(b) After an item has been indorsed with the words “pay any bank” or the like, only a bank may acquire the rights of a holder until the item has been:

- (1) Returned to the customer initiating collection; or



(2) Specially indorsed by a bank to a person who is not a bank. (Code 1933, § 109A-4—201, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 1996, p. 1306, § 6.)

## JUDICIAL DECISIONS

### ANALYSIS

#### GENERAL CONSIDERATION

##### "PAY ANY BANK" ENDORSEMENT

#### General Consideration

**Editor's notes.** — In light of the similarity of the issues dealt with under the provisions, certain decisions under former Code 1933, § 14-502 are included in the annotations for this section.

**Primary purpose of O.C.G.A. § 11-4-201** seems to be to avoid litigation over question of status of collecting banks, i.e., as owners or agents for collection, and to make any settlements given by them to owner of instruments provisional until they have received final settlement for the instruments. By making settlement provisional, this section causes risk of loss to continue in owner of item rather than in agent bank. *Pazol v. Citizens Nat'l Bank*, 110 Ga. App. 319, 138 S.E.2d 442 (1964).

**The collecting bank is merely an agent of the drawer** of a draft. *Wallace v. Harrison*, 166 Ga. App. 461, 304 S.E.2d 487 (1983).

**Bank's right to sue drawer in own name in spite of presumption of agency.** — Fact that presumption of plaintiff-depositary bank's agency of payee-depositor for collection purposes continues even after credit given depositor has been withdrawn does not negative right of bank to bring action in its own name against defendant-drawer. *Pazol v. Citizens Nat'l Bank*, 110 Ga. App. 319, 138 S.E.2d 442 (1964).

**Depository bank as holder in due course.**

— Where plaintiff bank is unable to obtain settlement, either final or provisional, from payor bank by reason of stop payment order of defendant-drawer, it becomes holder in due course (all pertinent requirements having been met) with a security interest in the item which enables it to enforce payment against drawer, with right of charge-back against its depositor's account in event that judgment cannot be obtained against drawer. *Pazol v. Citizens Nat'l Bank*, 110 Ga. App. 319, 138 S.E.2d 442 (1964).

Where check is deposited and credited to depositor's account and depositor is allowed to draw against it, the bank is presumed to be holder in due course in spite of express conditions in deposit contract making bank a mere agent for collection, where there are other facts; namely, that draft was endorsed in blank and bank thereafter paid checks drawn by endorser against such deposit, making bank at least a pledgee, if not absolute owner of the draft, and placing it on same footing as a purchaser. *Southern Fruit Distribs., Inc. v. Citizens' Bank*, 44 Ga. App. 832, 163 S.E. 261 (1932); *Pike v. First Nat'l Bank*, 99 Ga. App. 598, 109 S.E.2d 620 (1959) (decided under former Code 1933, § 14-502).

**Effect of collection agreement.** — Collection agreement is simply a device for bank and depositor to determine respective rights between themselves, not such a contract as will conclusively and in all events determine status of paper so far as third parties are concerned. *Pike v. First Nat'l Bank*, 99 Ga. App. 598, 109 S.E.2d 620 (1959) (decided under former Code 1933, § 14-502).

While deposit to credit of depositor under collection agreement gives rise to presumption of agency relationship rather than debtor-creditor relationship, and while, between parties themselves, the bank may always charge back uncollected check against its depositor whether it has advanced funds thereon or not, nevertheless, the presumption of agency relationship, so far as third parties are concerned, holds only so long as no contrary agreement between bank and depositor is shown. Proof that bank did in fact not only credit fund to depositor but allowed the depositor to draw against that credit is, according to better rule, conclusive evidence of a contrary agreement. *Pike v. First Nat'l Bank*, 99 Ga. App. 598, 109 S.E.2d 620 (1959) (decided under former Code 1933, § 14-502).

**General Consideration (Cont'd)**

When a bank credited depositors' accounts and permitted them to withdraw funds prior to their collection, and they did in fact withdraw funds, the bank became a holder in due course as to the amounts withdrawn so as to be able to enforce payment of the amounts. *Howell v. Bank of Newman (In re Summit Fin. Servs., Inc.)*, 240 Bankr. 105 (Bankr. N.D. Ga. 1999).

**Cited in** *National Bank v. Weiner*, 180 Ga. App. 61, 348 S.E.2d 492 (1986); *Green v. State*, 182 Ga. App. 695, 356 S.E.2d 673 (1987).

**"Pay Any Bank" Endorsement**

**Endorsement no basis for drawer's recovery against bank.** — Endorsement on check reading, "Pay to Any Bank, Banker or Trust Company. All Prior Endorsements Guaranteed," runs only to a bank, banker, or trust company, and drawer cannot base its right to recover from the bank on guarantee contained in the endorsement. *Columbian Peanut Co. v. Frosteg*, 472 F.2d 476 (5th Cir.), cert. denied, 414 U.S. 824, 94 S. Ct. 126, 38 L. Ed. 2d 57 (1973).

**OPINIONS OF THE ATTORNEY GENERAL**

**O.C.G.A. § 11-4-201 not restrictive of bank's freedom.** — Neither O.C.G.A. T. 7 nor T. 11 restricts in any way a bank's freedom to decide how it will treat any particular collection item, whether it be a check or a credit union share draft. 1977 Op. Att'y Gen. No. 77-2.

**Credit union share drafts.** — Banks not required to process credit union share drafts as cash items, rather than as drafts for collection. 1977 Op. Att'y Gen. No. 77-2.

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 11 Am. Jur. 2d, Banks and Financial Institutions, §§ 972, 976. 11 Am. Jur. 2d, Bills and Notes, § 249.

**C.J.S.** — 9 C.J.S., Banks and Banking, §§ 383 et seq., 415, 425 et seq.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 4-201.

**ALR.** — Fraud or other defense to check as available against paper issued by drawee bank in payment of check, 9 ALR 963.

Measure of damages for breach of duty by bank in respect to collection of commercial paper, 19 ALR 555; 67 ALR 1511.

Trust in proceeds of collections made by charging debtor's account in collecting

bank, 24 ALR 1152; 42 ALR 754; 47 ALR 761; 77 ALR 473.

Liability of collecting bank for loss of funds through attachment thereof, 36 ALR 742.

Liability of bank taking commercial paper for collection for default of correspondent, 36 ALR 1308; 44 ALR 1430; 80 ALR 815.

Title to commercial paper deposited by the customer of a bank to his account, 42 ALR 492; 68 ALR 725; 99 ALR 486.

Bank's right to apply or set off deposit against debt of depositor not due at time of his death, 7 ALR3d 908.

**11-4-202. Responsibility for collection or return; when action timely.**

(a) A collecting bank must exercise ordinary care in:

- (1) Presenting an item or sending it for presentment;
- (2) Sending notice of dishonor or nonpayment or returning an item other than a documentary draft to the bank's transferor after learning that the item has not been paid or accepted, as the case may be;
- (3) Settling for an item when the bank receives final settlement; and

(4) Notifying its transferor of any loss or delay in transit within a reasonable time after discovery thereof.

(b) A collecting bank exercises ordinary care under subsection (a) of this Code section by taking proper action before its midnight deadline following receipt of an item, notice, or settlement. Taking proper action within a reasonably longer time may constitute the exercise of ordinary care, but the bank has the burden of establishing timeliness.

(c) Subject to paragraph (1) of subsection (a) of this Code section, a bank is not liable for the insolvency, neglect, misconduct, mistake, or default of another bank or person or for loss or destruction of an item in the possession of others or in transit. (Code 1933, § 109A-4—202, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 1996, p. 1306, § 6.)

### JUDICIAL DECISIONS

**Action that is within “reasonably longer time” than is seasonable.** — In the case of time actions, action after midnight deadline, but sufficiently in advance of maturity for proper presentation, is clear example of

“reasonably longer time” than is seasonable. *Clements v. Central Bank*, 155 Ga. App. 27, 270 S.E.2d 194 (1980).

**Cited** in *Alimenta (U.S.A.), Inc. v. Stauffer*, 568 F. Supp. 674 (N.D. Ga. 1983).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 11 Am. Jur. 2d, Banks and Financial Institutions, §§ 978, 980, 990 et seq.

**C.J.S.** — 9 C.J.S., Banks and Banking, §§ 408 et seq., 415, 425 et seq.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 4-202.

**ALR.** — Banks: effect of overcertification of check, 2 ALR 86.

Liability of bank to obligor of paper for negligence in making collection, 4 ALR 521.

Duty of collecting bank as to notices of protest or dishonor which it receives from its correspondent, 4 ALR 534.

Duty of bank taking bill or note for collection to see that it is returned if not paid, 6 ALR 618.

Liability of bank for deposit received by employees out of banking hours, 15 ALR 429.

Measure of damages for breach of duty by bank in respect to collection of commercial paper, 19 ALR 555; 67 ALR 1511.

Liability of collecting bank for loss of

funds through attachment thereof, 36 ALR 742.

Liability of bank taking commercial paper for collection for default of correspondent, 36 ALR 1308; 44 ALR 1430; 80 ALR 815.

Duty of bank to prior parties to the paper to apply deposit to credit of endorser on paper owned by bank, 37 ALR 578.

Trust in proceeds of collections made by charging debtor's account in collecting bank, 42 ALR 754; 47 ALR 761; 77 ALR 473.

Liability of forwarding bank for proceeds of collection by correspondent bank which becomes insolvent after crediting proceeds to account of forwarding bank, 99 ALR 510.

Liability of collecting bank which extends time of payment or accepts renewal, 101 ALR 593.

Duties of collecting bank with respect to presenting draft or bill of exchange for acceptance, 39 ALR2d 1296.

Bank's liability for payment or withdrawal on less than required number of signatures, 7 ALR4th 655.



**11-4-203. Effect of instructions.**

Subject to Article 3 of this title concerning conversion of instruments (Code Section 11-3-420) and restrictive indorsements (Code Section 11-3-206), only a collecting bank's transferor can give instructions that affect the bank or constitute notice to it and a collecting bank is not liable to prior parties for any action taken pursuant to the instructions or in accordance with any agreement with its transferor. (Code 1933, § 109A-4—203, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 1996, p. 1306, § 6.)

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 11 Am. Jur. 2d, Banks and Financial Institutions, § 976.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 4-203.

**C.J.S.** — 9 C.J.S., Banks and Banking, § 383 et seq.

**11-4-204. Methods of sending and presenting; sending directly to payor bank.**

(a) A collecting bank shall send items by a reasonably prompt method, taking into consideration relevant instructions, the nature of the item, the number of those items on hand, the cost of collection involved, and the method generally used by it or others to present those items.

(b) A collecting bank may send:

(1) An item directly to the payor bank;

(2) An item to a nonbank payor if authorized by its transferor; and

(3) An item other than documentary drafts to a nonbank payor, if authorized by federal reserve regulation or operating circular, clearing-house rule, or the like.

(c) Presentment may be made by a presenting bank at a place where the payor bank or other payor has requested that presentment be made. (Code 1933, § 109A-4—204, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 1963, p. 188, § 11; Ga. L. 1996, p. 1306, § 6.)

**Law reviews.** — For article on the 1963 amendment (Ga. L. 1963, p. 189) to the

Georgia Uniform Commercial Code, see 14 Mercer L. Rev. 378 (1963).

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 11 Am. Jur. 2d, Banks and Financial Institutions, §§ 970, 980, 981.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 4-204.

**C.J.S.** — 9 C.J.S., Banks and Banking, § 410.

**ALR.** — Measure of damages for breach of duty by bank in respect to collection of

commercial paper, 19 ALR 555; 67 ALR 1511.

Liability of bank taking commercial paper for collection for default of correspondent, 44 ALR 1430; 80 ALR 815.

Trust in proceeds of collections made by

charging debtor's account in collecting bank, 47 ALR 761; 77 ALR 473.

Bank's liability for payment or withdrawal on less than required number of signatures, 7 ALR4th 655.

### 11-4-205. Depositary bank holder of unindorsed item.

If a customer delivers an item to a depositary bank for collection:

(1) The depositary bank becomes a holder of the item at the time it receives the item for collection if the customer at the time of delivery was a holder of the item, whether or not the customer indorses the item, and, if the bank satisfies the other requirements of Code Section 11-3-302, it is a holder in due course; and

(2) The depositary bank warrants to collecting banks, the payor bank or other payor, and the drawer that the amount of the item was paid to the customer or deposited to the customer's account. (Code 1933, § 109A-4—205, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 1996, p. 1306, § 6.)

**Law reviews.** — For article discussing judicial activism in cases involving claims and

defenses under the Uniform Commercial Code, see 17 Ga. L. Rev. 569 (1983).

## JUDICIAL DECISIONS

**Purpose of former subsection (1).** — Former subsection (1) of this section was designed to speed up collections by eliminating necessity to return to nonbank depositor any items the depositor may have failed to endorse. *Pazol v. Citizens Nat'l Bank*, 110 Ga. App. 319, 138 S.E.2d 442 (1964).

**O.C.G.A. § 11-4-205 does not eliminate depositary and collecting banks' warranty of title** or drawee's duty to accept only properly payable items. *Perini Corp. v. First Nat'l Bank*, 553 F.2d 398 (5th Cir. 1977).

**Effect of incomplete endorsement on liability.** — Handling check bearing incomplete endorsement creates no liability so long as proceeds reach designated payee. *Perini Corp. v. First Nat'l Bank*, 553 F.2d 398 (5th Cir. 1977).

**Bank as holder of instrument issued to it.** — Even if payee does not personally endorse instrument, a bank is holder as long as instrument was issued to the bank. *Pazol v. Citizens Nat'l Bank*, 110 Ga. App. 319, 138 S.E.2d 442 (1964).

A bank never became a holder in due course where a check made payable jointly to the bank's customer and a third party was never endorsed by the third party before deposit in the bank. *Citizens & S. Nat'l Bank v. Sun Belt Elec. Constructors, Inc.*, 64 Bankr. 377 (Bankr. N.D. Ga. 1986).

**Bank cannot supply missing third party endorsement.** — Although O.C.G.A. § 11-4-205 allowed the bank to supply the missing endorsement of its own depositor under certain circumstances, the bank could not ignore a defective endorsement and supply the missing endorsement of a third party to that party's detriment. *Citizens & S. Nat'l Bank v. Sun Belt Elec. Constructors, Inc.*, 64 Bankr. 377 (Bankr. N.D. Ga. 1986).

**Cited in** *First Nat'l Bank v. Barrett*, 141 Ga. App. 161, 233 S.E.2d 24 (1977); *Callahan v. C. & S. Bank*, 150 Ga. App. 62, 256 S.E.2d 666 (1979).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 11 Am. Jur. 2d, Banks and Financial Institutions, § 978.

**C.J.S.** — 9 C.J.S., Banks and Banking, § 408 et seq.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 4-205.

**ALR.** — Right of bank officer to take his own paper in payment of another's debt to bank, 28 ALR 666.

Duty of bank to prior parties to the paper

to apply deposit to credit of endorser on paper owned by bank, 37 ALR 578.

Authority of bank officer or employee to bind bank by endorsement or guaranty of paper for accommodation of third person, 37 ALR 1373.

Construction and application of UCC § 4-205(1) allowing depository bank to supply customer's indorsement on item for collection, 29 ALR4th 631.

**11-4-206. Transfer between banks.**

Any agreed method that identifies the transferor bank is sufficient for the item's further transfer to another bank. (Code 1933, § 109A-4—206, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 1996, p. 1306, § 6.)

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 10 Am. Jur. 2d, Banks and Financial Institutions, § 721. 11 Am. Jur. 2d, Banks and Financial Institutions, § 895.

**C.J.S.** — 9 C.J.S., Banks and Banking, §§ 45, 46, 408, 409.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 4-206.

**ALR.** — Acceptance of checks by telegraph or telephone, 2 ALR 1146; 13 ALR 989.

**11-4-207. Transfer warranties.**

(a) A customer or collecting bank that transfers an item and receives a settlement or other consideration warrants to the transferee and to any subsequent collecting bank that:

- (1) The warrantor is a person entitled to enforce the item;
- (2) All signatures on the item are authentic and authorized;
- (3) The item has not been altered;

(4) The item is not subject to a defense or claim in recoupment (subsection (a) of Code Section 11-3-305) of any party that can be asserted against the warrantor; and

(5) The warrantor has no knowledge of any insolvency proceeding commenced with respect to the maker or acceptor or, in the case of an unaccepted draft, the drawer.

(b) If an item is dishonored, a customer or collecting bank transferring the item and receiving settlement or other consideration is obliged to pay the amount due on the item according to the terms of the item at the time it was transferred, or, if the transfer was of an incomplete item, according to its terms when completed as stated in Code Sections 11-3-115 and 11-3-407.



The obligation of a transferor is owed to the transferee and to any subsequent collecting bank that takes the item in good faith. A transferor cannot disclaim its obligation under this subsection by an indorsement stating that it is made “without recourse” or otherwise disclaiming liability.

(c) A person to whom the warranties under subsection (a) of this Code section are made and who took the item in good faith may recover from the warrantor as damages for breach of warranty an amount equal to the loss suffered as a result of the breach, but not more than the amount of the item plus expenses and loss of interest incurred as a result of the breach.

(d) The warranties stated in subsection (a) of this Code section cannot be disclaimed with respect to checks. Unless notice of a claim for breach of warranty is given to the warrantor within 30 days after the claimant has reason to know of the breach and the identity of the warrantor, the warrantor is discharged to the extent of any loss caused by the delay in giving notice of the claim.

(e) A cause of action for breach of warranty under this Code section accrues when the claimant has reason to know of the breach. (Code 1933, § 109A-4—207, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 1996, p. 1306, § 7.)

**Law reviews.** — For comment on *Trust Co. of Columbus v. Refrigeration Supplies, Inc.*, 241 Ga. 406, 246 S.E.2d 282 (1978), discussing liability of collecting and payor

banks for payment of check over missing endorsement of copayee, see 13 Ga. L. Rev. 677 (1979).

## JUDICIAL DECISIONS

### ANALYSIS

#### GENERAL CONSIDERATION

#### FORGERIES

#### BANK'S DUTY REGARDING ENDORSEMENTS

#### CLAIM FOR BREACH OF WARRANTY

#### General Consideration

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Code 1933, § 14-607 are included in the annotations for this section.

**Certified check.** — A certified check has a distinctive character as a species of commercial paper, and constitutes a new contract between a holder and a certifying bank. Funds of the drawer are, in legal contemplation, withdrawn from drawer's credit and appropriated to payment of the check, and the bank becomes debtor of holder as for money had and received. *Citizens & S. Bank v. Daniel*, 107 Ga. App. 398, 130 S.E.2d 231

(1963) (decided under former Code 1933, § 14-607).

Where check is certified at request of drawer, bank and drawer are both bound, the bank being primarily and drawer secondarily liable; where check is certified at request of holder, bank becomes absolute debtor of holder, and drawer is released. *Citizens & S. Bank v. Daniel*, 107 Ga. App. 398, 130 S.E.2d 231 (1963) (decided under former Code 1933, § 14-607).

**Cited** in *Trust Co. v. Refrigeration Supplies, Inc.*, 241 Ga. 406, 246 S.E.2d 282 (1978); *Trust Co. Bank v. Atlanta IBM Employees Fed. Credit Union*, 245 Ga. 262, 264 S.E.2d 202 (1980); *Trust Co. of Ga. Bank v.*

**General Consideration (Cont'd)**

Port Term. & Warehousing Co., 153 Ga. App. 735, 266 S.E.2d 254 (1980); First Bank & Trust Co. v. Insurance Serv. Ass'n, 154 Ga. App. 697, 269 S.E.2d 527 (1980); Rohner, Gehrig & Co. v. Capital City Bank, 655 F.2d 571 (5th Cir. 1981); First Ga. Bank v. Webster, 168 Ga. App. 307, 308 S.E.2d 579 (1983); Peavy v. Bank South, N.A., 222 Ga. App. 501, 474 S.E.2d 690 (1996).

**Forgeries**

**A forged endorsement is ineffective to pass title.** Perini Corp. v. First Nat'l Bank, 553 F.2d 398 (5th Cir. 1977).

**General endorsement on negotiable instrument is binding** even where prior signature is forgery. Citizens & S. Bank v. Daniel, 107 Ga. App. 398, 130 S.E.2d 231 (1963).

**Payment made on forged check with forged endorsement.** — It is arguable that warranties on presentment provided in O.C.G.A. § 11-4-207 would favor drawee over collecting bank where payment has been made on a forged check with a forged endorsement. Citizens & S. Nat'l Bank v. American Sur. Co., 347 F.2d 18 (5th Cir. 1965).

**Negligence as defense.** — While the payor bank must have paid the item in good faith in order to recoup its loss from the collecting bank, negligence on the part of the payor bank is not a defense. First Guar. Bank v. Northwest Ga. Bank, 203 Ga. App. 583, 417 S.E.2d 348 (1992).

**Bank's Duty Regarding Endorsements**

**Liability for failure to obtain copayee's endorsement.** — Cashing bank is liable in damages to copayee for failure to obtain copayee's endorsement. Insurance Co. of N. Am. v. Atlas Supply Co., 121 Ga. App. 1, 172 S.E.2d 632 (1970).

Damaged payee has cause of action against cashing bank for damages sustained where cashing bank fails to obtain endorsements of all copayees on check. Insurance Co. of N. Am. v. Atlas Supply Co., 121 Ga. App. 1, 172 S.E.2d 632 (1970).

**Bank's duty to inquire into validity of irregular endorsements.** — Where endorsements are irregular enough on their face to

raise question as to their validity, and when checks are offered for deposit into account of one not payee, bank has duty to inquire to ascertain authority of depositor to endorse and deposit payee's checks and cannot escape its duty of inquiry by relying on word of its customer, the depositor, nor does fact that bank could proceed against its customer under warranty provisions and O.C.G.A. § 11-4-207 absolve it of obligation of inquiry. Failure to inquire into the validity of such endorsements precludes bank from asserting defense of commercial reasonableness as a matter of law. Thornton & Co. v. Gwinnett Bank & Trust Co., 151 Ga. App. 641, 260 S.E.2d 765 (1979).

**Burden of assuring validity of endorsements on checks** rests directly on first bank in collection chain since it is the first bank which has best opportunity to verify endorsements; this standard applies equally to situation of missing endorsements as well as forged endorsements. First Nat'l Bank v. Trust Co., 510 F. Supp. 651 (N.D. Ga. 1981).

**Claim for Breach of Warranty**

**Accepting checks without endorsement, or with defective endorsement.** — Where bank breached warranty provisions of O.C.G.A. § 11-4-207 by accepting drawers' checks, either without endorsement by the payee or with endorsements defective on their face, and then deposited the checks into an account other than that of named payee, it was liable for all funds wrongfully deposited and was not entitled to set off from the verdict the amount of funds traced to named payee's benefit. C & S Bank v. Pilco Plantation, Inc., 173 Ga. App. 37, 325 S.E.2d 426 (1984).

Collecting bank breaches warranty of good title when check missing necessary endorsement is presented to and accepted by payor bank. First Nat'l Bank v. Trust Co., 510 F. Supp. 651 (N.D. Ga. 1981).

**Obliteration of joint-payee's name.** — Warranty against material alteration is breached by obliteration of joint-payee's name. First Nat'l Bank v. Trust Co., 510 F. Supp. 651 (N.D. Ga. 1981).

**Collecting bank's defense of "ordinary care" is irrelevant** to payor bank's right to recovery under O.C.G.A. § 11-4-207. First Nat'l Bank v. Trust Co., 510 F. Supp. 651 (N.D. Ga. 1981).

**Determination of "reasonable time"** is generally a question of fact depending upon circumstances; however, where facts are undisputed, court need only determine proper legal inference to be drawn from facts and trial of matter becomes unnecessary. *First Nat'l Bank v. Trust Co.*, 510 F. Supp. 651 (N.D. Ga. 1981).

**As to what constitutes "reasonable time" for notice of breach of warranty** of good title to checks and warranty against material alterations, see *First Nat'l Bank v. Trust Co.*, 510 F. Supp. 651 (N.D. Ga. 1981).

**Notifying bank a day after discovering missing endorsement.** — Bank customer has duty to discover and report unauthorized signature or alteration and notify bank promptly after such discovery, but customer is not required to check for missing endorse-

ments, and where record shows that customer notified bank of missing endorsement the day after it was discovered, "reasonable time" requirement of former subsection (4) of this section was satisfied. *Atlanta IBM Employees Fed. Credit Union v. Trust Co. Bank*, 150 Ga. App. 253, 257 S.E.2d 346 (1979).

**Delay in giving notice not detrimental to collecting bank.** — Where payor bank's unreasonable delay in giving notice to collecting bank of breach of warranty of good title to checks and warranty against material alterations has no effect on any loss collecting bank could claim, payor bank can recover funds it gave to collecting bank in exchange for checks which had been materially altered. *First Nat'l Bank v. Trust Co.*, 510 F. Supp. 651 (N.D. Ga. 1981).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 10 Am. Jur. 2d, Banks and Financial Institutions, § 721. 11 Am. Jur. 2d, Banks and Financial Institutions, § 895. 11 Am. Jur. 2d, Bills and Notes, § 389. 12 Am. Jur. 2d, Bills and Notes, § 522 et seq.

**C.J.S.** — 9 C.J.S., Banks and Banking, § 420 et seq.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 4-207.

**ALR.** — Banks: effect of overcertification of check, 2 ALR 86.

Measure of damages for breach of duty by bank in respect to collection of commercial paper, 19 ALR 555; 67 ALR 1511.

Trust in proceeds of collections made by charging debtor's account in collecting bank, 24 ALR 1152; 42 ALR 754; 47 ALR 761; 77 ALR 473.

Rights and remedies of purchaser of draft, payable to third person, against drawer where draft is not paid, 71 ALR 1454.

Title to commercial paper deposited by customer of bank to his account, 99 ALR 486.

Arrangement or course of dealing between forwarding bank and collecting bank as affecting relations or rights as between depositor of collection item and the collecting bank, 118 ALR 363.

Right and remedy of drawer of check against collecting bank which receives it on forged endorsement and collects it from drawee bank, 99 ALR2d 637.

Bank's liability for payment or withdrawal on less than required number of signatures, 7 ALR4th 655.

Liability of bank for diversion to benefit of presenter or third party of proceeds of check drawn to bank's order by drawer not indebted to bank, 69 ALR4th 778.

### 11-4-208. Presentment warranties.

(a) If an unaccepted draft is presented to the drawee for payment or acceptance and the drawee pays or accepts the draft, the person obtaining payment or acceptance at the time of presentment and a previous transferor of the draft at the time of transfer warrant to the drawee that pays or accepts the draft in good faith that:

(1) The warrantor is, or was, at the time the warrantor transferred the draft, a person entitled to enforce the draft or authorized to obtain



payment or acceptance of the draft on behalf of a person entitled to enforce the draft;

(2) The draft has not been altered; and

(3) The warrantor has no knowledge that the signature of the purported drawer of the draft is unauthorized.

(b) A drawee making payment may recover from a warrantor damages for breach of warranty equal to the amount paid by the drawee less the amount the drawee received or is entitled to receive from the drawer because of the payment. In addition, the drawee is entitled to compensation for expenses and loss of interest resulting from the breach. The right of the drawee to recover damages under this subsection is not affected by any failure of the drawee to exercise ordinary care in making payment. If the drawee accepts the draft, breach of warranty is a defense to the obligation of the acceptor. If the acceptor makes payment with respect to the draft, the acceptor is entitled to recover from a warrantor for breach of warranty the amounts stated in this subsection.

(c) If a drawee asserts a claim for breach of warranty under subsection (a) of this Code section based on an unauthorized indorsement of the draft or an alteration of the draft, the warrantor may defend by proving that the indorsement is effective under Code Section 11-3-404 or 11-3-405 or the drawer is precluded under Code Section 11-3-406 or 11-4-406 from asserting against the drawee the unauthorized indorsement or alteration.

(d) If a dishonored draft is presented for payment to the drawer or an indorser or any other item is presented for payment to a party obliged to pay the item and the item is paid, the person obtaining payment and a prior transferor of the item warrant to the person making payment in good faith that the warrantor is, or was, at the time the warrantor transferred the item, a person entitled to enforce the item or authorized to obtain payment on behalf of a person entitled to enforce the item. The person making payment may recover from any warrantor for breach of warranty an amount equal to the amount paid plus expenses and loss of interest resulting from the breach.

(e) The warranties stated in subsections (a) and (b) of this Code section cannot be disclaimed with respect to checks. Unless notice of a claim for breach of warranty is given to the warrantor within 30 days after the claimant has reason to know of the breach and the identity of the warrantor, the warrantor is discharged to the extent of any loss caused by the delay in giving notice of the claim.

(f) A cause of action for breach of warranty under this Code section accrues when the claimant has reason to know of the breach. (Code 1981, § 11-4-208, enacted by Ga. L. 1996, p. 1306, § 8.)

**Editor's notes.** — Ga. L. 1996, p. 1306, Code Section 11-4-210 and Ga. L. 1996, p. § 9, effective July 1, 1996, renumbered 1306, § 8 added this Code section. former Code Section 11-4-208 as present

#### RESEARCH REFERENCES

**U.L.A.** — Uniform Commercial Code  
(U.L.A.) § 4-208.

#### **11-4-209. Encoding and retention warranties.**

(a) A person who encodes information on or with respect to an item after issue warrants to any subsequent collecting bank and to the payor bank or other payor that the information is correctly encoded. If the customer of a depository bank encodes, that bank also makes the warranty.

(b) A person who undertakes to retain an item pursuant to an agreement for electronic presentment warrants to any subsequent collecting bank and to the payor bank or other payor that retention and presentment of the item comply with the agreement. If a customer of a depository bank undertakes to retain an item, that bank also makes this warranty.

(c) A person to whom warranties are made under this Code section and who took the item in good faith may recover from the warrantor as damages for breach of warranty an amount equal to the loss suffered as a result of the breach, plus expenses and loss of interest incurred as a result of the breach. (Code 1981, § 11-4-209, enacted by Ga. L. 1996, p. 1306, § 8.)

**Editor's notes.** — Ga. L. 1996, p. 1306, Code Section 11-4-211 and Ga. L. 1996, p. § 9, effective July 1, 1996, renumbered 1306, § 8 added this Code section. former Code Section 11-4-209 as present

#### RESEARCH REFERENCES

**U.L.A.** — Uniform Commercial Code  
(U.L.A.) § 4-209.

#### **11-4-210. Security interest of collecting bank in items, accompanying documents, and proceeds.**

(a) A collecting bank has a security interest in an item and any accompanying documents or the proceeds of either:

(1) In case of an item deposited in an account, to the extent to which credit given for the item has been withdrawn or applied;

(2) In case of an item for which it has given credit available for withdrawal as of right, to the extent of the credit given whether or not the credit is drawn upon or there is a right of charge-back; or

(3) If it makes an advance on or against the item.

(b) If credit given for several items received at one time or pursuant to a single agreement is withdrawn or applied in part, the security interest remains upon all the items, any accompanying documents, or the proceeds of either. For the purpose of this Code section, credits first given are first withdrawn.

(c) Receipt by a collecting bank of a final settlement for an item is a realization on its security interest in the item, accompanying documents, and proceeds. So long as the bank does not receive final settlement for the item or give up possession of the item or accompanying documents for purposes other than collection, the security interest continues to that extent and is subject to Article 9 of this title, but:

(1) No security agreement is necessary to make the security interest enforceable (subparagraph (b)(3)(A) of Code Section 11-9-203);

(2) No filing is required to perfect the security interest; and

(3) The security interest has priority over conflicting perfected security interests in the item, accompanying documents, or proceeds. (Code 1933, § 109A-4—208, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 1963, p. 188, § 12; Code 1981, § 11-4-210, as redesignated by Ga. L. 1996, p. 1306, § 9; Ga. L. 2001, p. 362, § 13.)

**The 2001 amendment**, effective July 1, 2001, substituted “(subparagraph (b)(3)(A) of Code Section 11-9-203)” for “(paragraph (a) of subsection (1) of Code Section 11-9-203)” in paragraph (c)(1).

**Editor’s notes.** — Ga. L. 1996, p. 1306, § 9, effective July 1, 1996, renumbered former Code Section 11-4-208 as present

Code Section 11-4-210 and renumbered former Code Section 11-4-210 as present Code Section 11-4-212.

**Law reviews.** — For article discussing judicial activism in cases involving claims and defenses under the Uniform Commercial Code, see 17 Ga. L. Rev. 569 (1983).

## JUDICIAL DECISIONS

**Acquiring security interest as “giving value.”** — Bank has given value for purposes of determining its status as a holder in due course when it has acquired a security interest in an item. *General Motors Acceptance Corp. v. Bank of Carroll County*, 138 Ga. App. 654, 226 S.E.2d 815 (1976).

**Withdrawal or application of credit necessary to obtain security interest in check.** — Bank does not obtain security interest in checks deposited by customer where there is no evidence that it permitted any withdrawal or application against the credit as is required by O.C.G.A. § 11-4-210 to establish a “security interest.” *General Motors Acceptance Corp. v. Bank of Carroll County*, 138 Ga. App. 654, 226 S.E.2d 815 (1976).

**Kited checks.** — Bank had a security interest in deposited items to the extent that depositors applied or made draws against provisional credit and the fact that the items were kited checks did not matter. *Howell v. Bank of Newman (In re Summit Fin. Servs., Inc.)*, 240 Bankr. 105 (Bankr. N.D. Ga. 1999).

**Cited in** *Pazol v. Citizens Nat’l Bank*, 110 Ga. App. 319, 138 S.E.2d 442 (1964); *United States v. Payne*, 602 F.2d 1215 (5th Cir. 1979); *Citizens & S. Nat’l Bank v. Sun Belt Elec. Constructors, Inc.*, 64 Bankr. 377 (Bankr. N.D. Ga. 1986); *Green v. State*, 182 Ga. App. 695, 356 S.E.2d 673 (1987).



## RESEARCH REFERENCES

**Am. Jur. 2d.** — 11 Am. Jur. 2d, Banks and Financial Institutions, §§ 854, 855. 15A Am. Jur. 2d, Commercial Code, § 8. 68A Am. Jur. 2d, Secured Transactions, §§ 15, 55, 149, 167, 168, 306.

**C.J.S.** — 9 C.J.S., Banks and Banking, § 384.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 4-210.

**ALR.** — Lien of bank upon commercial paper delivered to it by debtor for collection, 22 ALR2d 478.

### 11-4-211. When bank gives value for purposes of holder in due course.

For purposes of determining its status as a holder in due course, a bank has given value to the extent it has a security interest in an item, if the bank otherwise complies with the requirements of Code Section 11-3-302 on what constitutes a holder in due course. (Code 1933, § 109A-4—209, enacted by Ga. L. 1962, p. 156, § 1; Code 1981, § 11-4-211, as redesignated by Ga. L. 1996, p. 1306, § 9.)

**Editor's notes.** — Ga. L. 1996, p. 1306, § 10, effective July 1, 1996, renumbered former Code Section 11-4-209 as present

Code Section 11-4-211 and renumbered former Code Section 11-4-211 as present Code Section 11-4-213.

## JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the issues dealt with under the provisions, decisions under former Code 1933, § 14-502 are included in the annotations for this section.

**Where bank credits deposit and allows withdrawals, it is holder in due course.** — Where check is deposited and credited to depositor's account and depositor is allowed to draw against it, the bank is presumed to be holder in due course in spite of express conditions in deposit contract making bank a mere agent for collection, where there are other facts, namely, that draft was endorsed in blank and bank thereafter paid checks drawn by endorser against such deposit, making bank at least a pledgee, if not absolute owner of the draft, and placing it on same footing as a purchaser. *Southern Fruit Distribs., Inc. v. Citizens' Bank*, 44 Ga. App. 832, 163 S.E. 261 (1932) (decided under former Code 1933, § 14-502); *Pike v. First Nat'l Bank*, 99 Ga. App. 598, 109 S.E.2d 620 (1959) (decided under former Code 1933, § 14-502).

No matter what the deposit agreement was initially, when bank did in fact credit deposit to its customer, and thereafter permitted

customer to withdraw fund before collection, the bank became a holder for value of the check as to amount withdrawn, so as to be able to enforce payment against drawer thereof. *Pike v. First Nat'l Bank*, 99 Ga. App. 598, 109 S.E.2d 620 (1959) (decided under former Code 1933, § 14-502).

**Instrument lacking joint payee's endorsement.** — A bank never became a holder in due course where a check made payable jointly to the bank's customer and a third party was never endorsed by the third party before deposit in the bank. *Citizens & S. Nat'l Bank v. Sun Belt Elec. Constructors, Inc.*, 64 Bankr. 377 (Bankr. N.D. Ga. 1986).

**Effect of collection agreement.** — Collection agreement is simply a device for bank and depositor to determine respective rights between themselves, not such a contract as will conclusively and in all events determine status of paper so far as third parties are concerned. *Pike v. First Nat'l Bank*, 99 Ga. App. 598, 109 S.E.2d 620 (1959) (decided under former Code 1933, § 14-502).

While deposit to credit of depositor under collection agreement gives rise to presumption of agency relationship rather than debtor-creditor relationship, and while, be-

tween parties themselves, the bank may always charge back uncollected check against its depositor whether it has advanced funds thereon or not, nevertheless, the presumption of agency relationship, so far as third parties are concerned, holds only so long as no contrary agreement between bank and depositor is shown. Proof that bank did in fact not only credit fund to depositor but

allowed depositor to draw against that credit is, according to better rule, conclusive evidence of a contrary agreement. *Pike v. First Nat'l Bank*, 99 Ga. App. 598, 109 S.E.2d 620 (1959) (decided under former Code 1933, § 14-502).

**Cited in** *Pazol v. Citizens Nat'l Bank*, 110 Ga. App. 319, 138 S.E.2d 442 (1964).

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 11 Am. Jur. 2d, Bills and Notes, § 208. 15A Am. Jur. 2d, Commercial Code, § 8.

**C.J.S.** — 9 C.J.S., Banks and Banking, § 383 et seq. 10 C.J.S., Bills and Notes, §§ 185, 186.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 4-211.

**ALR.** — Character as holder in due course of bank which takes over assets and assumes liabilities of another bank, 76 ALR 1329.

#### **11-4-212. Presentment by notice of item not payable by, through, or at a bank; liability of drawer or indorser.**

(a) Unless otherwise instructed, a collecting bank may present an item not payable by, through, or at a bank by sending to the party to accept or pay a written notice that the bank holds the item for acceptance or payment. The notice must be sent in time to be received on or before the day when presentment is due and the bank must meet any requirement of the party to accept or pay under Code Section 11-3-501 by the close of the bank's next banking day after it knows of the requirement.

(b) If presentment is made by notice and payment, acceptance, or request for compliance with a requirement under Code Section 11-3-501 is not received by the close of business on the day after maturity or, in the case of demand items by the close of business on the third banking day after notice was sent, the presenting bank may treat the item as dishonored and charge any drawer or indorser by sending it notice of the facts. (Code 1933, § 109A-4—210, enacted by Ga. L. 1962, p. 156, § 1; Code 1981, § 11-4-212, as redesignated by Ga. L. 1996, p. 1306, § 9.)

**Editor's notes.** — Ga. L. 1996, p. 1306, § 11, effective July 1, 1996, renumbered former Code Section 11-4-210 as present Code Section 11-4-212 and renumbered former Code Section 11-4-212 as present Code Section 11-4-214.

#### JUDICIAL DECISIONS

**Cited in** *Peavy v. Bank South, N.A.*, 222 Ga. App. 501, 474 S.E.2d 690 (1996).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 11 Am. Jur. 2d, Banks and Financial Institutions, §§ 980, 981.

**C.J.S.** — 9 C.J.S., Banks and Banking, § 408 et seq.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 4-212.

**ALR.** — Who must bear loss of funds from failure of bank, at which bill or note is payable, during delay in presenting it, 2 ALR 1381.

**11-4-213. Medium and time of settlement by bank.**

(a) With respect to settlement by a bank, the medium and time of settlement may be prescribed by federal reserve regulations or circulars, clearing-house rules, and the like, or agreement. In the absence of such prescription:

(1) The medium of settlement is cash or credit to an account in a federal reserve bank of or specified by the person to receive settlement; and

(2) The time of settlement is:

(i) With respect to tender of settlement by cash, a cashier's check, or a teller's check, when the cash or check is sent or delivered;

(ii) With respect to tender of settlement by credit in an account in a federal reserve bank, when the credit is made;

(iii) With respect to tender of settlement by a credit or debit to an account in a bank, when the credit or debit is made or, in the case of tender of settlement by authority to charge an account, when the authority is sent or delivered; or

(iv) With respect to tender of settlement by a funds transfer, when payment is made pursuant to subsection (a) of Code Section 11-4A-406 to the person receiving settlement.

(b) If the tender of settlement is not by a medium authorized by subsection (a) of this Code section or the time of settlement is not fixed by subsection (a) of this Code section, no settlement occurs until the tender of settlement is accepted by the person receiving settlement.

(c) If settlement for an item is made by cashier's check or teller's check and the person receiving settlement, before its midnight deadline:

(1) Presents or forwards the check for collection, settlement is final when the check is finally paid; or

(2) Fails to present or forward the check for collection, settlement is final at the midnight deadline of the person receiving settlement.

(d) If settlement for an item is made by giving authority to charge the account of the bank giving settlement in the bank receiving settlement,



settlement is final when the charge is made by the bank receiving settlement if there are funds available in the account for the amount of the item. (Code 1933, § 109A-4—211, enacted by Ga. L. 1962, p. 156, § 1; Code 1981, § 11-4-213, as redesignated by Ga. L. 1996, p. 1306, § 10.)

**Editor's notes.** — Ga. L. 1996, p. 1306, § 11, effective July 1, 1996, renumbered former Code Section 11-4-211 as present Code Section 11-4-213 and renumbered former Code Section 11-4-213 as present Code Section 11-4-215.

### JUDICIAL DECISIONS

**Cited in** *Trading Assocs. v. Trust Co. Bank*, 142 Ga. App. 229, 235 S.E.2d 661 (1977).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 11 Am. Jur. 2d, Banks and Financial Institutions, § 986.

**C.J.S.** — 9 C.J.S., Banks and Banking, § 393 et seq.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 4-213.

#### **11-4-214. Right of charge-back or refund; liability of collecting bank; return of item.**

(a) If a collecting bank has made provisional settlement with its customer for an item and fails by reason of dishonor, suspension of payments by a bank, or otherwise to receive settlement for the item which is or becomes final, the bank may revoke the settlement given by it, charge back the amount of any credit given for the item to its customer's account, or obtain refund from its customer, whether or not it is able to return the item, if by its midnight deadline or within a longer reasonable time after it learns the facts it returns the item or sends notification of the facts. If the return or notice is delayed beyond the bank's midnight deadline or a longer reasonable time after it learns the facts, the bank may revoke the settlement, charge back the credit, or obtain refund from its customer, but it is liable for any loss resulting from the delay. These rights to revoke, charge back, and obtain refund terminate if and when a settlement for the item received by the bank is or becomes final.

(b) A collecting bank returns an item when it is sent or delivered to the bank's customer or transferor or pursuant to its instructions.

(c) A depository bank that is also the payor may charge back the amount of an item to its customer's account or obtain refund in accordance with the Code section governing return of an item received by a payor bank for credit on its books (Code Section 11-4-301).

(d) The right to charge back is not affected by:

(1) Previous use of a credit given for the item; or

(2) Failure by any bank to exercise ordinary care with respect to the item, but a bank so failing remains liable.

(e) A failure to charge back or claim refund does not affect other rights of the bank against the customer or any other party.

(f) If credit is given in dollars as the equivalent of the value of an item payable in foreign money, the dollar amount of any charge-back or refund must be calculated on the basis of the bank-offered spot rate for the foreign money prevailing on the day when the person entitled to the charge-back or refund learns that it will not receive payment in ordinary course. (Code 1933, § 109A-4—212, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 1969, p. 956, § 1; Code 1981, § 11-4-214, as redesignated by Ga. L. 1996, p. 1306, § 11.)

**Editor's notes.** — Ga. L. 1996, p. 1306, § 11, effective July 1, 1996, renumbered former Code Section 11-4-212 as present

Code Section 11-4-214 and renumbered former Code Section 11-4-214 as present Code Section 11-4-216.

### JUDICIAL DECISIONS

**Right to charge back credit.** — A bank has the right to revoke the credit it has extended when it is unable to collect the check upon which it has extended the provisional credit. The fact that the customer has used a portion of the credit extended does not affect the bank's right to charge back the credit, even though the bank was negligent in its representation that the deposited check was "good." However, the elements of estoppel prevent the bank from obtaining a refund of the amount credited to the account. *First Ga. Bank v. Webster*, 168 Ga. App. 307, 308 S.E.2d 579 (1983).

Where plaintiff bank is unable to obtain settlement, either final or provisional, from payor bank by reason of stop payment order of defendant-drawer, it becomes a holder in due course (all pertinent requirements having been met) with a security interest in the item which enables it to enforce payment

against drawer, with right of charge back against its depositor's account in event that judgment cannot be obtained against drawer. *Pazol v. Citizens Nat'l Bank*, 110 Ga. App. 319, 138 S.E.2d 442 (1964).

**Effect of charge back on recovery against drawer also.** — Where bank exercises charge back rights granted by debiting customer's account on notice of dishonor for exact amount of checks in issue and thereby made itself whole, it will not be permitted to also recover amount of checks from drawer. *GMAC v. Bank of Carroll County*, 138 Ga. App. 654, 226 S.E.2d 815 (1976).

**Cited in** *Brannon v. First Nat'l Bank*, 137 Ga. App. 275, 223 S.E.2d 473 (1976); *National Bank v. Weiner*, 180 Ga. App. 61, 348 S.E.2d 492 (1986); *Citizens & S. Nat'l Bank v. Sun Belt Elec. Constructors, Inc.*, 64 Bankr. 377 (Bankr. N.D. Ga. 1986).

### OPINIONS OF THE ATTORNEY GENERAL

**O.C.G.A. § 11-4-214 not restrictive of bank's freedom.** — Neither O.C.G.A. T. 7 nor T. 11 restricts in any way a bank's freedom to decide how it will treat any particular collection item, whether it be a check or a credit union share draft. 1977 Op. Att'y Gen. No. 77-2.

**Credit union share drafts.** — Banks need not process credit union share drafts as cash items, rather than as drafts for collection. 1977 Op. Att'y Gen. No. 77-2.

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 11 Am. Jur. 2d, Banks and Financial Institutions, §§ 897, 938, 988. 11 Am. Jur. 2d, Bills and Notes, § 361 et seq.

**C.J.S.** — 9 C.J.S., Banks and Banking, §§ 383 et seq., 402.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 4-214.

**ALR.** — Right of bank to charge back check drawn upon itself, which it has credited to a depositor under mistaken belief that the drawer's account is good, 15 ALR 709.

Setoff or lien as between banks as to collection items or proceeds, as affected by question of mutuality or rights of owner of paper, 90 ALR 1009.

Rights and liabilities of bank paying, or giving credit for, personal check of own officer or employee whose account is not good, 171 ALR 880.

Right of bank which includes in its remittance to correspondent bank amount of a check drawn on itself which is not good, or other uncollectible item, to recall payment by deducting the amount in next remittance to correspondent, 10 ALR2d 349.

Correspondent bank's liability to owner of collection items where credit originally extended to forwarding bank is canceled, 10 ALR2d 462.

Right of bank certifying check or note by mistake to cancel, or avoid effect of, certification, 25 ALR3d 1367.

Post-Sniadach status of banker's right to set off bank's claim against depositor's funds, 65 ALR3d 1284.

Bank's liability for payment or withdrawal on less than required number of signatures, 7 ALR4th 655.

**11-4-215. Final payment of item by payor bank; when provisional debits and credits become final; when certain credits become available for withdrawal.**

(a) An item is finally paid by a payor bank when the bank has first done any of the following:

(1) Paid the item in cash;

(2) Settled for the item without having a right to revoke the settlement under statute, clearing-house rule, or agreement; or

(3) Made a provisional settlement for the item and failed to revoke the settlement in the time and manner permitted by statute, clearing-house rule, or agreement.

(b) If provisional settlement for an item does not become final, the item is not finally paid.

(c) If provisional settlement for an item between the presenting and payor banks is made through a clearing-house or by debits or credits in an account between them, then to the extent that provisional debits or credits for the item are entered in accounts between the presenting and payor banks or between the presenting and successive prior collecting banks seriatim, they become final upon final payment of the item by the payor bank.



(d) If a collecting bank receives a settlement for an item which is or becomes final, the bank is accountable to its customer for the amount of the item and any provisional credit given for the item in an account with its customer becomes final.

(e) Subject to applicable law stating a time for availability of funds and any right of the bank to apply the credit to an obligation of the customer, credit given by a bank for an item in a customer's account becomes available for withdrawal as of right:

(1) If the bank has received a provisional settlement for the item, — when the settlement becomes final and the bank has had a reasonable time to receive return of the item and the item has not been received within that time;

(2) If the bank is both the depository bank and the payor bank, and the item is finally paid, — at the opening of the bank's second banking day following receipt of the item.

(f) Subject to applicable law stating a time for availability of funds and any right of a bank to apply a deposit to an obligation of the depositor, a deposit of money becomes available for withdrawal as of right at the opening of the bank's next banking day after receipt of the deposit. (Code 1933, § 109A-4—213, enacted by Ga. L. 1962, p. 156, § 1; Code 1981, § 11-4-215, as redesignated by Ga. L. 1996, p. 1306, § 11.)

**Editor's notes.** — Ga. L. 1996, p. 1306, § 11, effective July 1, 1996, renumbered former Code Section 11-4-213 as Code Section 11-4-215.

## JUDICIAL DECISIONS

### ANALYSIS

#### GENERAL CONSIDERATION

##### POSTING

#### General Consideration

**Final payment imposes liability upon drawee bank for amount of check.** — Final sentence of former subsection (1) of this section creates liability on part of drawee bank for amount of check when any "final payment" has been made. *Georgia R.R. Bank & Trust Co. v. First Nat'l Bank & Trust Co.*, 139 Ga. App. 683, 229 S.E.2d 482 (1976), *aff'd*, 238 Ga. 693, 235 S.E.2d 1 (1977) (decided prior to 1996 amendment).

Once item is finally paid by drawee under this paragraph, drawer loses right to revoke settlement. *Georgia R.R. Bank & Trust Co. v. First Nat'l Bank & Trust Co.*, 139 Ga. App. 683, 229 S.E.2d 482 (1976), *aff'd*, 238 Ga.

693, 235 S.E.2d 1 (1977) (decided prior to 1996 amendment).

**Cited in** *Citizens & S. Nat'l Bank v. Youngblood*, 135 Ga. App. 638, 219 S.E.2d 172 (1975); *Trading Assocs. v. Trust Co. Bank*, 142 Ga. App. 229, 235 S.E.2d 661 (1977); *Trust Co. v. Student Air Travel Agency, Inc.*, 142 Ga. App. 248, 235 S.E.2d 670 (1977); *National Bank v. Weiner*, 180 Ga. App. 61, 348 S.E.2d 492 (1986); *National Bank of Ga., Inc. v. Air Atlanta, Inc.*, 74 Bankr. 426 (Bankr. N.D. Ga.), *aff'd*, 81 Bankr. 724 (N.D. Ga. 1987).

#### Posting

**"Process of posting."** — The "process of posting" means the usual procedure fol-

**Posting (Cont'd)**

lowed by payor bank in determining to pay an item and in recording payment, including one or more of the following or other steps as determined by the bank: (a) verification of any signature; (b) ascertaining that sufficient funds are available; (c) affixing a "paid" or other stamp; (d) entering a charge or entry to a customer's account; (e) correcting or reversing an entry or erroneous action with respect to the item. *South-eastern Pipeline Serv., Inc. v. Citizens & S.*

*Bank*, 617 F.2d 67 (5th Cir. 1980).

**Completion of posting as final payment.**

— Where item has been posted to account of drawer, although in a smaller amount than true amount of the item, it is sufficient to constitute final payment within meaning of former subparagraph (1)(c) of this section, and payor bank becomes accountable for the amount of the item. *Georgia R.R. Bank & Trust Co. v. First Nat'l Bank & Trust Co.*, 139 Ga. App. 683, 229 S.E.2d 482 (1976), *aff'd*, 238 Ga. 693, 235 S.E.2d 1 (1977) (decided prior to 1996 amendment).

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 10 Am. Jur. 2d, Banks and Financial Institutions, §§ 770, 779 et seq.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 4-215.

**ALR.** — Banks: effect of overcertification of check, 2 ALR 86.

Bank's acceptance of check as affected by attempt to pay it otherwise than in cash, 38 ALR 185.

Trust in proceeds of collections made by charging debtor's account in collecting bank, 42 ALR 754; 47 ALR 761; 77 ALR 473.

Presumption of payment as applicable to bank deposit, 69 ALR3d 1311.

What constitutes final payment under UCC § 4-213, 23 ALR4th 203.

**11-4-216. Insolvency and preference.**

(a) If an item is in or comes into the possession of a payor or collecting bank that suspends payment and the item has not been finally paid, the item must be returned by the receiver, trustee, or agent in charge of the closed bank to the presenting bank or the closed bank's customer.

(b) If a payor bank finally pays an item and suspends payments without making a settlement for the item with its customer or the presenting bank which settlement is or becomes final, the owner of the item has a preferred claim against the payor bank.

(c) If a payor bank gives or a collecting bank gives or receives a provisional settlement for an item and thereafter suspends payments, the suspension does not prevent or interfere with the settlement's becoming final if the finality occurs automatically upon the lapse of certain time or the happening of certain events.

(d) If a collecting bank receives from subsequent parties settlement for an item, which settlement is or becomes final and the bank suspends payments without making a settlement for the item with its customer which settlement is or becomes final, the owner of the item has a preferred claim against the collecting bank. (Code 1933, § 109A-4—214, enacted by Ga. L. 1962, p. 156, § 1; Code 1981, § 11-4-216, as redesignated by Ga. L. 1996, p. 1306, § 11.)

**Cross references.** — Order of payment of liabilities of financial institution which is liquidated or dissolved and the assets of which are insufficient to pay in full its liabilities, § 7-1-202.

**Editor's notes.** — Ga. L. 1996, p. 1306, § 11, effective July 1, 1996, renumbered former Code Section 11-4-214 as Code Section 11-4-216.

### JUDICIAL DECISIONS

**Cited in** *Pazol v. Citizens Nat'l Bank*, 110 Ga. App. 319, 138 S.E.2d 442 (1964).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 10 Am. Jur. 2d, Banks and Financial Institutions, § 863. 11 Am. Jur. 2d, Banks and Financial Institutions, §§ 990, 1033 et seq.

**C.J.S.** — 9 C.J.S., Banks and Banking, §§ 173 et seq., 405 et seq.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 4-216.

**ALR.** — Banks: effect of overcertification of check, 2 ALR 86.

Trust in proceeds of collections made by charging debtor's account in collecting bank, 42 ALR 754; 47 ALR 761; 77 ALR 473.

Rights of owners of securities deposited in bank, upon its insolvency, 51 ALR 914; 84 ALR 1534; 126 ALR 625.

Trust or preference in assets of insolvent bank in respect of proceeds of collection as affected by notice or instructions with respect to collection, 90 ALR 6.

Liability of forwarding bank for proceeds of collection by correspondent bank which becomes insolvent after crediting proceeds to account of forwarding bank, 99 ALR 510.

Liability of collecting bank which extends time of payment or accepts renewal, 101 ALR 593.

Failure of bank in which funds have been deposited for payment of coupons as affecting liability of party issuing them, 103 ALR 1265.

## PART 3

### COLLECTION OF ITEMS: PAYOR BANKS

#### **11-4-301. Deferred posting; recovery of payment by return of items; time of dishonor; return of items by payor bank.**

(a) If a payor bank settles for a demand item other than a documentary draft presented otherwise than for immediate payment over the counter before midnight of the banking day of receipt, the payor bank may revoke the settlement and recover the settlement if, before it has made final payment and before its midnight deadline, it:

(1) Returns the item; or

(2) Sends written notice of dishonor or nonpayment if the item is unavailable for return.

(b) If a demand item is received by a payor bank for credit on its books, it may return the item or send notice of dishonor and may revoke any credit given or recover the amount thereof withdrawn by its customer, if it acts within the time limit and in the manner specified in subsection (a) of this Code section.



(c) Unless previous notice of dishonor has been sent, an item is dishonored at the time when for purposes of dishonor it is returned or notice sent in accordance with this Code section.

(d) An item is returned:

(1) As to an item presented through a clearing-house, when it is delivered to the presenting or last collecting bank or to the clearing-house or is sent or delivered in accordance with clearing-house rules; or

(2) In all other cases, when it is sent or delivered to the bank's customer or transferor or pursuant to instructions. (Code 1933, § 109A-4—301, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 1996, p. 1306, § 12.)

### JUDICIAL DECISIONS

**Cited in** *Clements v. Central Bank*, 155 Ga. App. 27, 270 S.E.2d 194 (1980); *Sabin Meyer Regional Sales Corp. v. Citizens Bank*, 502 F. Supp. 557 (N.D. Ga. 1980); *Bleichner, Bonta, Martinez & Brown, Inc. v. National*

*Bank (In re Micro Mart, Inc.)*, 72 Bankr. 63 (Bankr. N.D. Ga. 1987); *Landers v. Heritage Bank*, 188 Ga. App. 785, 374 S.E.2d 353 (1988).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 11 Am. Jur. 2d, Banks and Financial Institutions, § 970 et seq. 11 Am. Jur. 2d, Bills and Notes, § 351 et seq.

**C.J.S.** — 9 C.J.S., Banks and Banking, § 397 et seq.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 4-301.

**ALR.** — Construction and effect of UCC §§ 4-301 and 4-302 making payor bank accountable for failure to act promptly on item presented for payment, 22 ALR4th 10.

### 11-4-302. Payor bank's responsibility for late return of item.

(a) If an item is presented to and received by a payor bank, the bank is accountable for the amount of:

(1) A demand item, other than a documentary draft, whether properly payable or not, if the bank, in any case in which it is not also the depository bank, retains the item beyond midnight of the banking day of receipt without settling for it or, whether or not it is also the depository bank, does not pay or return the item or send notice of dishonor until after its midnight deadline; or

(2) Any other properly payable item unless, within the time allowed for acceptance or payment of that item, the bank either accepts or pays the item or returns it and accompanying documents.

(b) The liability of a payor bank to pay an item pursuant to subsection (a) of this Code section is subject to defenses based on breach of a

presentment warranty (Code Section 11-4-208) or proof that the person seeking enforcement of the liability presented or transferred the item for the purpose of defrauding the payor bank. (Code 1933, § 109A-4—302, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 1996, p. 1306, § 12.)

### JUDICIAL DECISIONS

**Failure to meet midnight deadline.** — Under O.C.G.A. § 11-4-302, when payor bank retains item past midnight deadline without completely settling for it, it becomes accountable for amount of the retained check. *Georgia R.R. Bank & Trust Co. v. First Nat'l Bank & Trust Co.*, 139 Ga. App. 683, 229 S.E.2d 482 (1976), *aff'd*, 238 Ga. 693, 235 S.E.2d 1 (1977).

Pursuant to O.C.G.A. § 11-4-302(a), a payor bank may be liable if it fails to pay, return or give notice of the dishonor of a demand item, other than a documentary draft, by “its midnight deadline.” *Bank S. v. Roswell Jeep Eagle, Inc.*, 204 Ga. App. 432, 419 S.E.2d 522 (1992).

Where there is no valid defense alleged, defendant payor bank is liable to plaintiff holder for amount of checks received by defendant by reason of its retention of said items beyond deadline in O.C.G.A. § 11-4-302 without having either settled for or paid them, or, in the alternative, returned them or sent notice of dishonor, prior to deadline. *National City Bank v. Motor Contract Co.*, 119 Ga. App. 208, 166 S.E.2d 742 (1969).

**Effect of affidavit stating return of items “in customary period.”** — Affidavit to effect that return of items by defendant payor bank to depositary bank was “in the customary period of time for the return of said items,” cannot be used to nullify O.C.G.A. § 11-4-302. *National City Bank v. Motor Contract Co.*, 119 Ga. App. 208, 166 S.E.2d 742 (1969).

**Documentary draft as “sight” draft.** — The mere denomination of a documentary draft as a “sight draft” would not otherwise serve to establish any definite “time allowed” for the payor bank to act pursuant to O.C.G.A. § 11-4-302(b). *Bank S. v. Roswell Jeep Eagle, Inc.*, 204 Ga. App. 432, 419 S.E.2d 522 (1992).

**“Property payable” documentary drafts.** — If the documentary drafts were “property payable,” the bank was not required to act by

“its midnight deadline” under subsection (a) (now O.C.G.A. § 11-4-302(a)(1)), but was required to act “within the time allowed” under subsection (b) (now O.C.G.A. § 11-4-302(a)(2)). *Bank S. v. Roswell Jeep Eagle, Inc.*, 204 Ga. App. 432, 419 S.E.2d 522 (1992).

**Where the demand item is also a documentary draft,** the payor bank need not comply with the midnight deadline that is established for other demand items by O.C.G.A. § 11-4-302(a). *Bank S. v. Roswell Jeep Eagle, Inc.*, 204 Ga. App. 432, 419 S.E.2d 522 (1992).

**Liability under subsection (b) (now O.C.G.A. § 11-4-302(a)(2))** is not liability on the document itself but is liability for the delay in giving notice or return of the item. *Bank S. v. Roswell Jeep Eagle, Inc.*, 204 Ga. App. 432, 419 S.E.2d 522 (1992).

**Noncompliance does not create an action for conversion.** — It is subsection (b) (now O.C.G.A. § 11-4-302(a)(2)) which governs as to the “time allowed” the bank for responding to the original presentment of the documentary drafts to it for payment. Accordingly, an otherwise untimely failure on the part of the bank to accept, pay or return the documentary drafts pursuant to their original specification merely as “sight drafts” may be actionable as a failure to comply with subsection (b) (now O.C.G.A. § 11-4-302(a)(2)), but could not constitute an intentional “refusal” to comply with a demand for payment or return so as to be actionable as a conversion. *Bank S. v. Roswell Jeep Eagle, Inc.*, 204 Ga. App. 432, 419 S.E.2d 522 (1992).

**Compliance with standard of ordinary care.** — If the bank violated subsection (b) (now O.C.G.A. § 11-4-302(a)(2)), it violated the applicable standard of ordinary care for a payor bank and would be liable. *Bank S. v. Roswell Jeep Eagle, Inc.*, 204 Ga. App. 432, 419 S.E.2d 522 (1992).

**Cited in** *Samples v. Trust Co.*, 118 Ga. App. 307, 163 S.E.2d 325 (1968); *Alimenta*

(U.S.A.), Inc. v. Stauffer, 568 F. Supp. 674 (N.D. Ga. 1983); National Bank of Ga., Inc. v. Air Atlanta, Inc., 74 Bankr. 426 (Bankr. N.D. Ga.), aff'd, 81 Bankr. 724 (N.D. Ga. 1987).

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 10 Am. Jur. 2d, Banks and Financial Institutions, §§ 770, 779 et seq. 11 Am. Jur. 2d, Banks and Financial Institutions, §§ 941, 990. 11 Am. Jur. 2d, Bills and Notes, §§ 341 et seq., 368, 373, 380.

**C.J.S.** — 9 C.J.S., Banks and Banking, §§ 328 et seq., 397 et seq.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 4-302.

**ALR.** — Duty of bank taking bill or note for collection to see that it is returned if not paid, 6 ALR 618.

Construction and effect of UCC §§ 4-301 and 4-302 making payor bank accountable for failure to act promptly on item presented for payment, 22 ALR4th 10.

### **11-4-303. When items subject to notice, stop-payment order, legal process, or setoff; order in which items may be charged or certified.**

(a) Any knowledge, notice, or stop-payment order received by, legal process served upon, or setoff exercised by a payor bank comes too late to terminate, suspend, or modify the bank's right or duty to pay an item or to charge its customer's account for the item, if the knowledge, notice, stop-payment order, or legal process is received or served and a reasonable time for the bank to act thereon expires or the setoff is exercised after the earliest of the following:

(1) The bank accepts or certifies the item;

(2) The bank pays the item in cash;

(3) The bank settles for the item without having a right to revoke the settlement under statute, clearing-house rule, or agreement;

(4) The bank becomes accountable for the amount of the item under Code Section 11-4-302 dealing with the payor bank's responsibility for late return of items; or

(5) With respect to checks, a cutoff hour no earlier than one hour after the opening of the next banking day after the banking day on which the bank received the check and no later than the close of that next banking day or, if no cutoff hour is fixed, the close of the next banking day after the banking day on which the bank received the check.

(b) Subject to subsection (a) of this Code section, items may be accepted, paid, certified, or charged to the indicated account of its customer in any order. (Code 1933, § 109A-4—303, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 1996, p. 1306, § 12.)



## JUDICIAL DECISIONS

**Bank errs in honoring stop payment order after payment of item in cash.** — It is bank's mistake to honor customer's stop payment after stop payment could no longer be made under O.C.G.A. § 11-4-303. *Citizens & S. Nat'l Bank v. Youngblood*, 135 Ga. App. 638, 219 S.E.2d 172 (1975).

**Right to stop payment.** — The law fully accords the drawer of an uncertified check the right to order the drawer's bank to stop payment, and stopping payment on a check, especially to recoup monies owed, does not constitute extreme and outrageous conduct. *UPS v. Moore*, 238 Ga. App. 376, 519 S.E.2d 15 (1999).

**Bank draft does not operate as assignment of funds,** as does certified check, cashier's check or bank money order, which are considered to be notes carrying unconditional promises to pay. *Fulton Nat'l Bank v. Delco Corp.*, 128 Ga. App. 16, 195 S.E.2d 455 (1973).

**Cited in** *Andrews v. Citizens Bank*, 139 Ga. App. 763, 229 S.E.2d 501 (1976); *United States v. Citizens & S. Nat'l Bank*, 538 F.2d 1101 (5th Cir. 1976); *First Nat'l Bank & Trust Co. v. Georgia R.R. Bank & Trust Co.*, 238 Ga. 693, 235 S.E.2d 1 (1977).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 10 Am. Jur. 2d, Banks and Financial Institutions, §§ 770, 779 et seq. 11 Am. Jur. 2d, Banks and Financial Institutions, §§ 941, 955, 987, 988. 11 Am. Jur. 2d, Bills and Notes, § 388.

**C.J.S.** — 9 C.J.S., Banks and Banking, §§ 326, 352 et seq.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 4-303.

**ALR.** — Deposit to individual account of checks or notes drawn or endorsed by agent or fiduciary, as charging bank with notice of misappropriation, 57 ALR 925; 64 ALR 1404; 106 ALR 836; 115 ALR 648.

Rights and duties where check is presented to bank which exceeds balance on deposit, 62 ALR 187.

Right and remedy as regards application of debt due from insolvent as between debts owed by creditor to insolvent, 86 ALR 993.

Setoff or lien as between banks as to collection items or proceeds, as affected by question of mutuality or rights or owner of paper, 90 ALR 1009.

Garnishment of bank deposit as affected by bank's right or waiver of right to set off depositor's indebtedness to it against deposit

or apply deposit to such indebtedness, 110 ALR 1268.

Bank's right as against receiver to apply or set off deposit to credit of insolvent corporation against its indebtedness to bank, 134 ALR 536.

What amounts to waiver, estoppel, or loss of bank's right to set off depositor's indebtedness against deposit or to apply deposit upon indebtedness, 143 ALR 453.

Deposit in name of one indebted to bank, which is not subject to withdrawal until discharge of obligation of depositor to third person, as subject of setoff by depositor-debtor against debt, or to application by bank in payment of debt, 149 ALR 735.

Construction, application, and effect of statute relating to notice to bank of adverse claim to deposit, 62 ALR2d 1116.

Post-Sniadach status of banker's right to set off bank's claim against depositor's funds, 65 ALR3d 1284.

Uniform Commercial Code: Bank's right to stop payment on its own uncertified check or money order, 97 ALR3d 714.

## PART 4

## RELATIONSHIP BETWEEN PAYOR BANK AND ITS CUSTOMER

**Cross references.** — Duty of banks to notify customers of changes in rules govern-

ing deposits or withdrawals of deposits, § 7-1-350.

RESEARCH REFERENCES

**ALR.** — Recovery by bank of money paid out to customer by mistake, 10 ALR4th 524. 1136.  
 Nondrawing cosigner's liability for joint checking account overdraft, 48 ALR4th 1136.

**11-4-401. When bank may charge customer's account.**

(a) A bank may charge against the account of a customer an item that is properly payable from that account even though the charge creates an overdraft. An item is properly payable if it is authorized by the customer and is in accordance with any agreement between the customer and bank.

(b) A customer is not liable for the amount of an overdraft if the customer neither signed the item nor benefited from the proceeds of the item.

(c) A bank may charge against the account of a customer a check that is otherwise properly payable from the account, even though payment was made before the date of the check, unless the customer has given notice to the bank of the postdating describing the check with reasonable certainty. The notice is effective for the period stated in subsection (b) of Code Section 11-4-403 for stop-payment orders, and must be received at such time and in such manner as to afford the bank a reasonable opportunity to act on it before the bank takes any action with respect to the check described in Code Section 11-4-303. If a bank charges against the account of a customer a check before the date stated in the notice of postdating, the bank is liable for damages for the loss resulting from its act. The loss may include damages for dishonor of subsequent items under Code Section 11-4-402.

(d) A bank that in good faith makes payment to a holder may charge the indicated account of its customer according to:

(1) The original terms of the altered item; or

(2) The terms of the completed item, even though the bank knows the item has been completed unless the bank has notice that the completion was improper. (Code 1933, § 109A-4—401, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 1996, p. 1306, § 13.)

**Law reviews.** — For article surveying Georgia cases in the area of commercial law from June 1979 through May 1980, see 32 Mercer L. Rev. 11 (1980).  
 For comment on *Perini Corp. v. First Nat'l Bank*, 553 F.2d 398 (5th Cir. 1977), see 27 Emory L.J. 393 (1978).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION  
 PAYMENT OF OVERDRAFTS

### General Consideration

**Editor's notes.** — In light of the similarity of the issues dealt with under the provisions, decisions under former Code 1933, § 13-2044 are included in the annotations for this section.

**Check is "properly payable"** when it was made payable to a named payee and delivered to that payee. Delivery to either of the partners of a partnership constitutes delivery to the partnership. *Mustin v. Citizens & S. Nat'l Bank*, 168 Ga. App. 549, 309 S.E.2d 822 (1983).

**A check bearing a forged endorsement** is not "properly payable." *Trans-American Steel Corp. v. Federal Ins. Co.*, 535 F. Supp. 1185 (N.D. Ga. 1982).

**Liability of bank for wrongful honor of forged endorsement.** — The liability of a depository bank for wrongly honoring a forged endorsement will be reduced by any amount the forger has already paid in restitution to the drawer. *Trans-American Steel Corp. v. Federal Ins. Co.*, 535 F. Supp. 1185 (N.D. Ga. 1982).

**Drawee bank** is generally liable to drawer customer for payment of check not "properly payable." *Perini Corp. v. First Nat'l Bank*, 553 F.2d 398 (5th Cir. 1977).

**Bank's duty to obtain endorsements of all joint payees.** — A joint payee endorsing check alone does not have requisite authority, and a bank paying over sole endorsement of one joint payee is liable for its wrongful payment. *Trust Co. Bank v. Atlanta IBM Employees Fed. Credit Union*, 245 Ga. 262, 264 S.E.2d 202 (1980).

**Effect of failure of collecting bank to supply missing payee's endorsement.** — Absence of payee's endorsement and failure of collecting bank to supply missing endorsement as it was authorized to do did not affect payor bank's right to pay check and to debit plaintiffs' account. *First Nat'l Bank v. Barrett*, 141 Ga. App. 161, 233 S.E.2d 24 (1977).

**Customer's failure to discover payment of improperly endorsed check.** — Failure of customer to promptly discover bank's mistake in accepting improperly endorsed check bars customer from otherwise valid claim against bank for charging customer's account for that check. *Trust Co. Bank v. Atlanta IBM Employees Fed. Credit Union*, 245 Ga. 262, 264 S.E.2d 202 (1980).

**Effect of general deposit.** — Deposit of money in bank on general deposit creates relation of creditor and debtor between bank and depositor and debtor bank can discharge its liability to general depositor only by paying money to depositor, or as directed by depositor and cannot discharge its liability by accepting and paying forged checks drawn in name of the depositor against the bank. *White v. Georgia R.R. Bank & Trust Co.*, 71 Ga. App. 78, 30 S.E.2d 118 (1944) (decided under former Code 1933, § 13-2044).

**Charging depositor's account for payments on forged checks.** — A bank is bound to know signatures of its customers, and it cannot legally charge amount paid on forged check to account of depositor whose name was forged, but must be considered as having made payment out of its own funds. *White v. Georgia R.R. Bank & Trust Co.*, 71 Ga. App. 78, 30 S.E.2d 118 (1944) (decided under former Code 1933, § 13-2044).

**Signature of alleged incompetent, made by another guiding his hand.** — Allegations that, while depositor was on death bed and not physically or mentally in condition to transact business, depositor's name was written on a check by one of the defendants who held depositor's hand and guided it and that signature was not written by depositor and was not depositor's act and deed, were sufficient to charge that check in question was a forgery (see also § 11-4-405). *White v. Georgia R.R. Bank & Trust Co.*, 71 Ga. App. 78, 30 S.E.2d 118 (1944) (decided under former Code 1933, § 13-2044).

**Cited in** *Andrews v. Citizens Bank*, 139 Ga. App. 763, 229 S.E.2d 501 (1976); *Thornton & Co. v. Gwinnett Bank & Trust Co.*, 151 Ga. App. 641, 260 S.E.2d 765 (1979); *Georgia Cas. & Sur. Co. v. Tennille Banking Co.* (In re Smith), 51 Bankr. 904 (Bankr. M.D. Ga. 1985); *National Bank v. Weiner*, 180 Ga. App. 61, 348 S.E.2d 492 (1986); *Eason Publications, Inc. v. Nationsbank*, 217 Ga. App. 726, 458 S.E.2d 899 (1995); *Summit Transp. Servs., Inc. v. NationsBank*, 232 Ga. App. 8, 500 S.E.2d 911 (1998).

### Payment of Overdrafts

**Payment of overdraft by drawee gives it remedy against drawer.** — Where drawee bank turns money over to collecting bank who is a holder in due course on an instru-



**Payment of Overdrafts (Cont'd)**

ment which would overdraw drawee bank's customer's account, it has turned over its own money on the instrument, and has both a remedy against its customer under

O.C.G.A. § 11-4-401, and also a remedy on the instrument against drawer provided drawee does not give up possession of the instrument. *FDIC v. West*, 244 Ga. 396, 260 S.E.2d 89 (1979).

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 10 Am. Jur. 2d, Banks and Financial Institutions, §§ 770, 779 et seq.

**C.J.S.** — 9 C.J.S., Banks and Banking, § 341 et seq.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 4-401.

**ALR.** — Banks: effect of overcertification of check, 2 ALR 86.

Effect of verbal order with respect to payment of check or transfer of bank deposit, 2 ALR 175.

Acceptance of checks by telegraph or telephone, 2 ALR 1146; 13 ALR 989.

Right of drawee bank to charge back a credit given on a forged check, 5 ALR 1566.

Right of bank to recover amount of overdraft from depositor, 12 ALR 360.

Right of bank to charge back check drawn

upon itself, which it has credited to a depositor under mistaken belief that the drawer's account is good, 15 ALR 709.

Burden of proof as to alteration not apparent on face of instrument, 31 ALR 1455.

Duty of bank to prior parties to the paper to apply deposit to credit of endorser on paper owned by bank, 37 ALR 578.

Bank's right to recover back money paid on stopped check, 39 ALR 1239.

Rights and duties where check is presented to bank which exceeds balance on deposit, 62 ALR 187.

Bank depositor's act in seeking restitution from third person to whom, or for benefit of whom, the bank has paid out the deposit, as election of remedy precluding action against bank, 144 ALR 1440.

## **11-4-402. Bank's liability to customer for wrongful dishonor; time of determining insufficiency of account.**

(a) Except as otherwise provided in this article, a payor bank wrongfully dishonors an item if it dishonors an item that is properly payable, but a bank may dishonor an item that would create an overdraft unless it has agreed to pay the overdraft.

(b) A payor bank is liable to its customer for damages proximately caused by the wrongful dishonor of an item. Liability is limited to actual damages proved and may include damages for an arrest or prosecution of the customer or other consequential damages. Whether any consequential damages are proximately caused by the wrongful dishonor is a question of fact to be determined in each case.

(c) A payor bank's determination of the customer's account balance on which a decision to dishonor for insufficiency of available funds is based may be made at any time between the time the item is received by the payor bank and the time that the payor bank returns the item or gives notice in lieu of return, and no more than one determination need be made. If, at the election of the payor bank, a subsequent balance determination is made for the purpose of reevaluating the bank's decision to dishonor the item, the account balance at that time is determinative of whether a dishonor for

insufficiency of available funds is wrongful. (Code 1933, § 109A-4—402, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 1996, p. 1306, § 13.)

**Law reviews.** — For annual survey on law of torts, see 43 Mercer L. Rev. 395 (1991).

### JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Code 1933, § 13-2044 are included in the annotations for this section.

**Depositor's duty to minimize damages.** — A bank is liable for damages proximately caused by its wrongful handling of an item, but depositor has obligation to exercise reasonable care to rectify situation and minimize the damage done. If depositor fails in own obligations once depositor has notice, depositor is precluded from recovery against the bank. *Donmoyer v. Columbus Bank & Trust Co.*, 151 Ga. App. 38, 258 S.E.2d 725 (1979).

**President of corporate depositor held not "customer" of bank.** — Corporation president, who was one of four shareholders who guaranteed the corporation's debt to a bank, which viewed the corporation as its depositor, was not a "customer" of the bank and could not maintain an action against the bank for wrongful dishonor. *Thrash v. Georgia State Bank*, 189 Ga. App. 21, 375 S.E.2d 112 (1988).

**Effect of general deposit.** — Deposit of money in bank on general deposit creates relationship of creditor and debtor between bank and depositor and debtor bank can discharge its liability only by paying money to depositor, or as directed by depositor, and cannot discharge its liability by accepting and paying forged checks drawn in name of depositor against the bank. *White v. Georgia R.R. Bank & Trust Co.*, 71 Ga. App. 78, 30 S.E.2d 118 (1944) (decided under former Code 1933, § 13-2044).

**Drawer's knowledge of insufficient funds.** — In an action by the drawer of a check against a bank for damages arising from

drawer's arrest and prosecution for issuing a bad check based on the bank's negligent failure to stop payment and wrongful dishonor of the check, evidence that the drawer knew the check would not be honored was sufficient probable cause for the arrest and prosecution and, thus, the bank could not be held accountable for such damages. *Karrer v. Georgia State Bank*, 215 Ga. App. 654, 452 S.E.2d 120 (1994).

**Drawee bank bears loss for payment of forged check.** — A bank is bound to know signatures of its customers, and it cannot legally charge an amount paid on forged check to account of depositor whose name was forged, but must be considered as having made payment from its own funds. *White v. Georgia R.R. Bank & Trust Co.*, 71 Ga. App. 78, 30 S.E.2d 118 (1944) (decided under former Code 1933, § 13-2044).

**Burden of proof.** — On motion for summary judgment, where a bank customer introduced proof by affidavit that the payee of a wrongfully dishonored check would not have accepted any untimely tender of the amount owed after the check was dishonored, the bank had the burden of establishing as a matter of law that the damages the customer suffered were not the result of the bank's wrongful dishonor of the check. *Malak v. First Nat'l Bank*, 195 Ga. App. 105, 393 S.E.2d 267 (1990).

**Punitive damages.** — Wrongful dishonor may be considered a tort, for which punitive damages may be imposed. *Fidelity Nat'l Bank v. Kneller*, 194 Ga. App. 55, 390 S.E.2d 55 (1989).

**Cited in** *Andrews v. Citizens Bank*, 139 Ga. App. 763, 229 S.E.2d 501 (1976).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 11 Am. Jur. 2d, Banks and Financial Institutions, §§ 940, 949 et seq.

**C.J.S.** — 9 C.J.S., Banks and Banking, §§ 341, 380.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 4-402.

**ALR.** — Duty of bank to prior parties to the paper to apply deposit to credit of endorser on paper owned by bank, 37 ALR 578.

Bank's right to recover back money paid on stopped check, 39 ALR 1239.

Rights and duties where check is presented to bank which exceeds balance on deposit, 62 ALR 187.

Excessiveness or inadequacy of damages for wrongful failure of bank to pay check, 65 ALR 1311.

Liability for negligently causing arrest or prosecution of another, 99 ALR3d 1113.

What constitutes wrongful dishonor of check rendering payor bank liable to drawer under UCC § 4-402, 88 ALR4th 568.

Who may recover for wrongful dishonor of check under UCC § 4-402, 88 ALR4th 613.

Damages recoverable for wrongful dishonor of check under UCC § 4-402, 88 ALR4th 644.

### 11-4-403. Customer's right to stop payment; burden of proof of loss.

(a) A customer or any person authorized to draw on the account if there is more than one person may stop payment of any item drawn on the customer's account or close the account by an order to the bank describing the item or account with reasonable certainty received at a time and in a manner that affords the bank a reasonable opportunity to act on it before any action by the bank with respect to the item described in Code Section 11-4-303. If the signature of more than one person is required to draw on an account, any of these persons may stop payment or close the account.

(b) A stop-payment order is effective for six months, but it lapses after 14 calendar days if the original order was oral and was not confirmed in writing within that period. A stop-payment order may be renewed for additional six-month periods by a writing given to the bank within a period during which the stop-payment order is effective.

(c) The burden of establishing the fact and amount of loss resulting from the payment of an item contrary to a stop-payment order or order to close an account is on the customer. The loss from payment of an item contrary to a stop-payment order may include damages for dishonor of subsequent items under Code Section 11-4-402. (Code 1933, § 109A-4—403, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 1996, p. 1306, § 13.)

**Law reviews.** — For article surveying Georgia cases in the area of commercial law from June 1979 through May 1980, see 32 Mercer L. Rev. 11 (1980).

## JUDICIAL DECISIONS

### ANALYSIS

#### GENERAL CONSIDERATION EFFECT OF UNDERLYING OBLIGATION

##### General Consideration

**Editor's notes.** — In light of the similarity of the issues dealt with under the provisions,

decisions under former Code 1933, §§ 14-507 and 14-1707 are included in the annotations for this section.

**Right to stop payment.** — The law fully



accords the drawer of an uncertified check the right to order the bank to stop payment, and stopping payment on a check, especially to recoup monies owed, does not constitute extreme and outrageous conduct. *UPS v. Moore*, 238 Ga. App. 376, 519 S.E.2d 15 (1999).

**Customer may stop payment on checks prior to action by drawee.** — Under O.C.G.A. § 11-4-403 any customer may by order to the bank stop payment on a check prior to action by drawee. *Fulton Nat'l Bank v. Delco Corp.*, 128 Ga. App. 16, 195 S.E.2d 455 (1973).

**Rights of bank carrying account with other bank.** — Bank carrying account with another bank has right to stop payment on its check, which would, however, still leave it liable for value of the item unless some legal and valid defense is available to it. *Fulton Nat'l Bank v. Delco Corp.*, 128 Ga. App. 16, 195 S.E.2d 455 (1973).

**Effect of O.C.G.A. § 11-4-406(f).** — Section 11-4-406(4) (now O.C.G.A. § 11-4-406(f)) has no specific application to O.C.G.A. § 11-4-403 and does not preclude recovery for payment of an item made contrary to binding stop payment order. *Georgia Motor Club, Inc. v. First Nat'l Bank & Trust Co.*, 137 Ga. App. 521, 224 S.E.2d 498 (1976).

**Rights of holders in due course.** — Since bank is agent of maker, the latter is entitled as a matter of right to stop payment of any check drawn by maker on such bank any time before it is presented to bank for payment. This right cannot be exercised by maker in way and manner that would prejudice rights of holders in due course of check in question without becoming liable on instrument to such holders, however when this right is exercised by giving notice to drawee bank by means of telegraph service, telegraph company becomes liable for any damages sustained by inexcusable failure on its

part to make proper delivery of the telegram. *Stewart v. Western Union Tel. Co.*, 83 Ga. App. 532, 64 S.E.2d 327 (1951) (decided under former Code 1933, § 14-507).

**When check subject to revocation by drawer.** — A check is a mere order upon a bank to pay from drawer's account and is subject to revocation by drawer at any time before it has been certified, accepted or paid by the bank. *Aiken Bag Corp. v. McLeod*, 89 Ga. App. 737, 81 S.E.2d 215 (1954) (decided under former Code 1933, § 14-1707).

**Cited in** *First Nat'l Bank & Trust Co. v. Georgia R.R. Bank & Trust Co.*, 238 Ga. 693, 235 S.E.2d 1 (1977); *Georgetown Village Apts. v. Fontana*, 92 Bankr. 559 (Bankr. M.D. Ga. 1988).

### Effect of Underlying Obligation

**Stop order does not affect enforceability of underlying obligation.** — Enforceability of debt obligation underlying instrument upon which payment has been stopped is unaffected by stop order, and payee of such instrument can still assert any and all claims payee has against drawer for amount of the original obligation. *Whitmire v. Woodbury*, 154 Ga. App. 159, 267 S.E.2d 783, rev'd on other grounds, 246 Ga. 349, 271 S.E.2d 491 (1980).

**Payee cannot impair stop payment right.** — Right of bank customer under O.C.G.A. § 11-4-403 to order bank to stop payment on any instrument payable from customer's account cannot be construed as depending on validity of underlying obligation between customer and payee of instrument, as the right exists between bank customer and drawee bank, and cannot be destroyed or impaired by payee of an instrument for which bank has received an otherwise valid stop payment order. *Whitmire v. Woodbury*, 154 Ga. App. 159, 267 S.E.2d 783, rev'd on other grounds, 246 Ga. 349, 271 S.E.2d 491 (1980).

### OPINIONS OF THE ATTORNEY GENERAL

**Cashier's checks** are essentially unconditional promises to pay with respect to which the issuing bank may stop payment only on the grounds of mistake and want of consideration and only where the instrument is in the hands of the original payee. In the case of a bank draft, however, the drawer bank

may stop payment on the bank draft at any time prior to action by the drawee and raise any valid claim it may have in defense of its action. 1989 Op. Att'y Gen. No. 89-15. *Georgetown Village Apts. v. Fontana*, 92 Bankr. 559 (Bankr. M.D. Ga. 1988).

A bank does not render a bank draft a

cashier's check by imprinting the words "cashier check" on the draft, and by labeling its bank draft as a cashier's check, the issuing bank also does not waive its right to stop payment under O.C.G.A. § 11-4-403. 1989 Op. Att'y Gen. No. 89-15.

**Bank not obligated to honor customer's stop-payment order on cashier's check issued on customer's behalf.** 1977 Op. Att'y Gen. No. 77-16.

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 11 Am. Jur. 2d, Banks and Financial Institutions, §§ 955, 957. 12 Am. Jur. 2d, Bills and Notes, §§ 456, 457.

**C.J.S.** — 9 C.J.S., Banks and Banking, §§ 326, 352 et seq.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 4-403.

**ALR.** — Liability of drawer who stops payment of check, 14 ALR 562.

Right of bank to repudiate payment to foreign correspondent, 23 ALR 1232.

Liability of bank which pays checks after filing of petition in bankruptcy against drawer, 31 ALR 256; 54 ALR 751.

Right of drawer to stop payment of certified check, 35 ALR 942.

Bank's right to recover back money paid on stopped check, 39 ALR 1239.

Right to countermand, or stop payment on, cashier's check, 56 ALR 532; 107 ALR 1463.

Sufficiency, as regards mode of communi-

cation and content, of order to bank to stop payment of check, 88 ALR 741.

Stipulation relieving bank from, or limiting its liability for disregard of, stop-payment order, 1 ALR2d 1155.

What conduct by drawee of check before receipt of stop-payment order, renders order ineffectual, 10 ALR2d 428.

Bank's liability for its payment of check drawn by one depositor after stop-payment order by a joint depositor, 55 ALR2d 975.

Uniform Commercial Code: Bank's right to stop payment on its own uncertified check or money order, 97 ALR3d 714.

Banks and banking: construction and effect of UCC § 4-403(2) regulating oral or written nature of stop-payment order, 29 ALR4th 228.

Sufficiency of description of check in stop-payment order under UCC § 4-403, 35 ALR4th 985.

### 11-4-404. Bank not obliged to pay check more than six months old.

A bank is under no obligation to a customer having a checking account to pay a check, other than a certified check, which is presented more than six months after its date, but it may charge its customer's account for a payment made thereafter in good faith. (Code 1933, § 109A-4—404, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 1996, p. 1306, § 13.)

### JUDICIAL DECISIONS

**Cited in** Studstill v. AMOCO, 126 Ga. App. 722, 191 S.E.2d 538 (1972).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 11 Am. Jur. 2d, Banks and Financial Institutions, § 899.

**C.J.S.** — 9 C.J.S., Banks and Banking, § 328 et seq.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 4-404.

**ALR.** — Discharge of endorser by delay in presenting check, 11 ALR 1028.

**11-4-405. Death or incompetence of customer.**

(a) A payor or collecting bank's authority to accept, pay, or collect an item or to account for proceeds of its collection, if otherwise effective, is not rendered ineffective by incompetence of a customer of either bank existing at the time the item is issued or its collection is undertaken if the bank does not know of an adjudication of incompetence. Neither death nor incompetence of a customer revokes the authority to accept, pay, collect, or account until the bank knows of the fact of death or of an adjudication of incompetence and has reasonable opportunity to act on it.

(b) Even with knowledge, a bank may for ten days after the date of death pay or certify checks drawn on or before that date unless ordered to stop payment by a person claiming an interest in the account. (Code 1933, § 109A-4—405, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 1996, p. 1306, § 13.)

**Cross references.** — Disposition by bank of deposit of deceased depositor, § 7-1-239.

**JUDICIAL DECISIONS**

**Bank honoring instrument without knowledge of drawer's death.** — A check does not of itself operate as assignment of any part of drawer's funds deposited with bank upon which it is drawn, but is merely an order upon bank to pay from drawer's account. It may be revoked at any time by drawer before it has been certified, accepted or paid by bank, and is revoked by operation of law ten

days after death of drawer although drawee bank is not liable where it has in good faith honored such instrument without knowledge of depositor's death. *Lambeth v. Lewis*, 114 Ga. App. 191, 150 S.E.2d 462 (1966).

**Cited in** *Holsomback v. Akins*, 134 Ga. App. 543, 215 S.E.2d 306 (1975); *Stewart v. Citizens & S. Nat'l Bank*, 138 Ga. App. 209, 225 S.E.2d 761 (1976).

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 11 Am. Jur. 2d, Banks and Financial Institutions, § 894.

**C.J.S.** — 9 C.J.S., Banks and Banking, §§ 326, 352 et seq., 383.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 4-405.

**ALR.** — Liability to trustee in bankruptcy of bank paying checks of insolvent depositor before proceedings in bankruptcy, 41 ALR 557.

Liability of bank which pays checks after filing of petition in bankruptcy against drawer, 54 ALR 751.

Insanity of maker, drawer, or endorser as defense against holder in due course, 24 ALR2d 1380.

Effect of incompetency of joint depositor upon status and ownership of bank account, 62 ALR2d 1091.

**11-4-406. Customer's duty to discover and report unauthorized signature or alteration.**

(a) A bank that sends or makes available to a customer a statement of account showing payment of items for the account shall either return or make available to the customer the items paid or provide information in the



statement of account sufficient to allow the customer reasonably to identify the items paid. The statement of account provides sufficient information if the item is described by item number, amount, and date of payment.

(b) If the items are not returned to the customer, the person retaining the items shall either retain the items or, if the items are destroyed, maintain the capacity to furnish legible copies of the items until the expiration of seven years after receipt of the items. A customer may request an item from the bank that paid the item, and that bank must provide in a reasonable time either the item or, if the item has been destroyed or is not otherwise obtainable, a legible copy of the item.

(c) If a bank sends or makes available a statement of account or items pursuant to subsection (a) of this Code section, the customer must exercise reasonable promptness in examining the statement or the items to determine whether any payment was not authorized because of an alteration of an item or because a purported signature by or on behalf of the customer was not authorized. If, based on the statement or items provided, the customer should reasonably have discovered the unauthorized payment, the customer must promptly notify the bank of the relevant facts.

(d) If the bank proves that the customer failed, with respect to an item, to comply with the duties imposed on the customer by subsection (c) of this Code section, the customer is precluded from asserting against the bank:

(1) The customer's unauthorized signature or any alteration on the item, if the bank also proves that it suffered a loss by reason of the failure; and

(2) The customer's unauthorized signature or alteration by the same wrongdoer on any other item paid in good faith by the bank if the payment was made before the bank received notice from the customer of the unauthorized signature or alteration and after the customer had been afforded a reasonable period of time, not exceeding 30 days, in which to examine the item or statement of account and notify the bank.

(e) If subsection (d) of this Code section applies and the customer proves that the bank failed to exercise ordinary care in paying the item and that the failure substantially contributed to loss, the loss is allocated between the customer precluded and the bank asserting the preclusion according to the extent to which the failure of the customer to comply with subsection (c) of this Code section and the failure of the bank to exercise ordinary care contributed to the loss. If the customer proves that the bank did not pay the item in good faith, the preclusion under subsection (d) of this Code section does not apply.

(f) Without regard to care or lack of care of either the customer or the bank, a customer who does not within 60 days after the statement or items are made available to the customer (subsection (a) of this Code section)

discover and report the customer's unauthorized signature on or any alteration on the face of the item or who does not within one year from that time discover and report any unauthorized indorsement or alteration on the back of the item is precluded from asserting against the bank the unauthorized signature, indorsement, or alteration.

If there is a preclusion under this subsection, the payor bank may not recover for breach of warranty under Code Section 11-4-208 with respect to the unauthorized signature or alteration to which the preclusion applies. (Code 1933, § 109A-4—406, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 1963, p. 188, § 13; Ga. L. 1996, p. 1306, § 13.)

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 1996, a comma was inserted following “indorsement” near the end of subsection (f).

**Cross references.** — Duty of state officials and employees to notify depositories of unauthorized signatures or alterations appearing on paid items, § 50-17-65.

**Law reviews.** — For article on the 1963 amendment (Ga. L. 1963, p. 188) to the Georgia Uniform Commercial Code, see 14 Mercer L. Rev. 378 (1963). For annual sur-

vey article on commercial law, see 50 Mercer L. Rev. 193 (1998).

For note, “Drawers: Check for Missing Endorsements on Joint Payee Checks,” in light of *Trust Co. Bank v. Atlanta IBM Employees Fed. Credit Union*, 245 Ga. 262, 264 S.E.2d 202 (1980), see 32 Mercer L. Rev. 407 (1980).

For comment on *Perini Corp. v. First Nat'l Bank*, 553 F.2d 398 (5th Cir. 1977), see 27 Emory L.J. 393 (1978).

## JUDICIAL DECISIONS

### ANALYSIS

#### GENERAL CONSIDERATION

##### SIXTY-DAY AND ONE-YEAR NOTICE REQUIREMENTS

#### General Consideration

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Code 1933, § 13-2044 are included in the annotations for this section.

**Public policy evidenced by this section.** — O.C.G.A. § 11-4-406 evidences public policy in favor of imposing upon customers the duty of prompt examination of their bank statements and notification to banks of forgeries and alterations and in favor of reasonable time limitations on responsibility of banks for payment of forged or altered items. *Trust Co. Bank v. Atlanta IBM Employees Fed. Credit Union*, 245 Ga. 262, 264 S.E.2d 202 (1980).

**Bank's liability prior to section's enactment.** — Before former Code 1933, § 13-2044, liability of bank was absolute, but with enactment of § 13-2044 a duty was placed on all depositors to notify bank within given period of time of forged checks

being charged against depositors' accounts. *G. Franklyn Fischer & Assocs. v. First Nat'l Bank*, 102 Ga. App. 567, 116 S.E.2d 902 (1960).

**Section is punitive in nature and must be strictly construed.** — Former Code 1933, § 13-2044, is punitive in nature, penalizing depositor by depriving depositor of right, which depositor would otherwise have against the bank, to repudiate a forged check, and must be strictly construed. *White v. Georgia R.R. Bank & Trust Co.*, 71 Ga. App. 78, 30 S.E.2d 118 (1944).

**Endorsement required of all employees.** — It is duty of one who accepts and pays to comply with direction of maker to “pay to the order of” named payees, and to fulfill that requirement all payees must endorse. *Atlanta IBM Employees Fed. Credit Union v. Trust Co. Bank*, 150 Ga. App. 253, 257 S.E.2d 346 (1979), rev'd on other grounds, 245 Ga. 264, 264 S.E.2d 202 (1980).

**General Consideration (Cont'd)**

**A missing endorsement is equivalent to an unauthorized endorsement** under O.C.G.A. § 11-4-406. *Trust Co. Bank v. Atlanta IBM Employees Fed. Credit Union*, 245 Ga. 262, 264 S.E.2d 202 (1980).

**Time limits where bank fails to act in good faith.** — In absence of good faith by the bank, which ordinarily is an issue for jury consideration, depositor does not forfeit right of recovery by failing to give notice within prescribed time. *Bank of Thomas County v. Dekle*, 119 Ga. App. 753, 168 S.E.2d 834 (1969), overruled on other grounds, *Decatur Fed. Sav. & Loan Ass'n v. Litsky*, 207 Ga. App. 752, 429 S.E.2d 300 (1993).

**Absence of good faith is not necessarily synonymous with negligence**, and subsection (4) (now O.C.G.A. § 11-4-406(f)) expressly eliminates negligence as an issue on items not within time covered by customer's notice. *Bank of Thomas County v. Dekle*, 119 Ga. App. 753, 168 S.E.2d 834 (1969), overruled on other grounds, *Decatur Fed. Sav. & Loan Ass'n v. Litsky*, 207 Ga. App. 752, 429 S.E.2d 300 (1993).

**Duty of depositor to minimize damages.** — A bank is liable for damages proximately caused by its wrongful handling of an item, but depositor has obligation to exercise reasonable care to rectify situation and minimize the damage done. If depositor fails in personal obligations once depositor has notice, the depositor is precluded from recovery against the bank. *Donmoyer v. Columbus Bank & Trust Co.*, 151 Ga. App. 38, 258 S.E.2d 725 (1979).

Where the bank sent account statements to its customer, the customer could not recover for checks the bank improperly paid more than 60 days before the date it was notified of the improprieties, and no jury question existed regarding the "good faith" requirement of O.C.G.A. § 11-4-406. *Vickers v. Brixton State Bank*, 230 Ga. App. 170, 495 S.E.2d 645 (1998).

**Bank actions in failing to inform customers** of a rule change on signature verification, allowing an employee of customer to place funds in a checking account from the customer's line of credit, and arranging personal loans for the employee were not evidence of a lack of good faith on the part of

the bank in paying forged checks. *Eason Publications, Inc. v. Nationsbank*, 217 Ga. App. 726, 458 S.E.2d 899 (1995) (decided under former § 11-4-606).

**Customer's failure to notify regarding improperly honored checks.** — A surety on a guardianship bond having joint control of a checking account under an agreement with the guardian was a customer of the bank by virtue of the agreement, and the surety's untimely failure to request statements or notify the bank of improperly honored checks barred its claims against the bank. *Travelers Indemnity Co. v. Trust Co. Bank*, 228 Ga. App. 893, 495 S.E.2d 296 (1998).

**Cited in** *Indemnity Ins. Co. of N. Am. v. Fulton Nat'l Bank*, 108 Ga. App. 356, 133 S.E.2d 43 (1963); *Columbian Peanut Co. v. Frosteg*, 472 F.2d 476 (5th Cir. 1973); *Perini Corp. v. First Nat'l Bank*, 553 F.2d 398 (5th Cir. 1977); *National Bank v. Weiner*, 180 Ga. App. 61, 348 S.E.2d 492 (1986).

### **Sixty-Day and One-Year Notice Requirements**

**Comparison with previous Code.** — There is no substantial difference in intent and purpose between Code 1933, § 13-2044 and O.C.G.A. § 11-4-406 in imposing upon depositor the duty of notifying bank of unauthorized signatures or alterations within specified time limits, and decisions under former law are applicable to provide guides as to what may constitute a jury question of whether depositor is to be excused from this duty. *Bank of Thomas County v. Dekle*, 119 Ga. App. 753, 168 S.E.2d 834 (1969), overruled on other grounds, *Decatur Fed. Sav. & Loan Ass'n v. Litsky*, 207 Ga. App. 752, 429 S.E.2d 300 (1993).

**Applicability of subsection (f).** — Subsection (4) (now O.C.G.A. § 11-4-406(f)) is limited to two types of claims by a customer: (1) unauthorized signature and (2) any alteration. *Georgia Motor Club, Inc. v. First Nat'l Bank & Trust Co.*, 137 Ga. App. 521, 224 S.E.2d 498, overruled on other grounds, *Marietta Yamaha, Inc. v. Thomas*, 237 Ga. 840, 229 S.E.2d 753 (1976).

Under the pre-July 1, 1996 version of this section, where the bank sent monthly statements including canceled checks or imaged copies of checks and made all items available to the customer, the customer's unauthorized payment claim was limited to those



forged checks which it discovered and reported within the 60-day limit of paragraph (4) (now O.C.G.A. § 11-4-406(f)). *Summit Transp. Servs., Inc. v. NationsBank*, 232 Ga. App. 8, 500 S.E.2d 911 (1998).

**Customer's duties as to reporting discrepancies.** — As to items paid in good faith by a bank, the depositor must discover and report discrepancies to the bank within times prescribed by O.C.G.A. § 11-4-406 after bank furnishes or in a reasonable manner affords depositor an opportunity to examine items supporting debits to the account, or else show, at least by proof sufficient to create a jury issue, why depositor failed to notify the bank. *Bank of Thomas County v. Dekle*, 119 Ga. App. 753, 168 S.E.2d 834 (1969), overruled on other grounds, *Decatur Fed. Sav. & Loan Ass'n v. Litsky*, 207 Ga. App. 752, 429 S.E.2d 300 (1993).

**Effect of customer negligence.** — Under the pre-July 1, 1996 version of O.C.G.A. § 11-4-406, the trial court erred in holding that the customer's alleged negligence was relevant under former paragraph (2), because a bank could not insulate itself from liability if the customer established lack of ordinary care on the part of the bank in paying items. *Summit Transp. Servs., Inc. v. NationsBank*, 232 Ga. App. 8, 500 S.E.2d 911 (1998).

**Absence of timely notice is absolute protection to bank.** — Even if bank is negligent in paying in good faith an item not covered by customer's notice of unauthorized signatures or alterations, and even if depositor is negligent in not preventing or in failing to discover the payment, absence of timely notice is absolute in protecting bank and excluding any right of recovery by depositor. *Bank of Thomas County v. Dekle*, 119 Ga. App. 753, 168 S.E.2d 834 (1969), overruled on other grounds, *Decatur Fed. Sav. & Loan Ass'n v. Litsky*, 207 Ga. App. 752, 429 S.E.2d 300 (1993).

**Duty of bank to show it furnished depositor statement.** — With respect to 60-day provision of subsection (4) (now O.C.G.A. § 11-4-406(f)), and assuming payment in good faith, essential controlling fact which bank must show to eliminate liability, as movant for summary judgment, is that it furnished to depositor the items paid, or notified depositor that statements and items paid were available for examination, more

than 60 days before the depositor notified it of unauthorized payment. *Bank of Thomas County v. Dekle*, 119 Ga. App. 753, 168 S.E.2d 834 (1969), overruled on other grounds, *Decatur Fed. Sav. & Loan Ass'n v. Litsky*, 207 Ga. App. 752, 429 S.E.2d 300 (1993).

**Application of subsection (4) (now O.C.G.A. § 11-4-406(f)) where forgeries on front and back.** — The rationale for allowing the drawer more time to report an unauthorized indorsement than an unauthorized signature is that there is little excuse for a customer not detecting an alteration of the customer's own check or a forgery of the customer's own signature. However, the customer does not know the signatures of indorsers and may be delayed in learning that indorsements are forged. Where both are present, the customer should discover and report the unauthorized payment within the shorter time period. *Decatur Fed. Sav. & Loan Ass'n v. Litsky*, 207 Ga. App. 752, 429 S.E.2d 300 (1993).

**Good faith by bank as prerequisite to notice.** — There are circumstances wherein notice referred to in former Code 1933, § 13-2044, need not be given, and it is only when a bank has in good faith paid a forged check that it is entitled to such notice. *G. Franklyn Fischer & Assocs. v. First Nat'l Bank*, 102 Ga. App. 567, 116 S.E.2d 902 (1960).

Before bank is entitled to notice prescribed by former Code 1933, § 13-2044, it must appear that bank in good faith paid and charged to depositor's account money on a forged or raised check. *White v. Georgia R.R. Bank & Trust Co.*, 71 Ga. App. 78, 30 S.E.2d 118 (1944).

**Two circumstances where notice requirement of section inapplicable.** — There are two circumstances where notice requirement of former Code 1933, § 13-2044, is not a prerequisite to recovery: (1) where bank has not paid forged or raised check out of depositor's account in good faith, and (2) where depositor for other sufficient reason is relieved from giving such notice. *G. Franklyn Fischer & Assocs. v. First Nat'l Bank*, 102 Ga. App. 567, 116 S.E.2d 902 (1960).

**Bank's payment to one it believes depositor authorized to obtain funds.** — To require of depositor the notice referred to in former

### Sixty-Day and One-Year Notice Requirements (Cont'd)

Code 1933, § 13-2044, check paid must be a forgery as contemplated by criminal statutes, but where bank paid money from depositor's account because it believed person obtaining funds was authorized by depositor to do so, § 13-2044 is not applicable, and no notice is required to hold the bank liable. *G. Franklyn Fischer & Assocs. v. First Nat'l Bank*, 102 Ga. App. 567, 116 S.E.2d 902 (1960).

**Forgeries committed and concealed by depositor's agent.** — Fact that forgeries were committed and concealed by one whom depositor entrusted to examine depositor statements and vouchers was not sufficient to excuse depositor from giving notice to the bank. *G. Franklyn Fischer & Assocs. v. First Nat'l Bank*, 102 Ga. App. 567, 116 S.E.2d 902 (1960).

**Form of notification.** — Subsection (4) (now O.C.G.A. § 11-4-406(f)) contains no language either prescribing or proscribing the form in which the notification called for from a customer is to be made; the term "report" is a verb, not a noun, and does not require a written report. *Trammell v. F & M Bank*, 170 Ga. App. 347, 317 S.E.2d 323 (1984).

**Effect of timeliness of suit.** — Bank's claim that plaintiff was estopped from assert-

ing that bank had improperly collected and deposited check with a missing endorsement was not meritorious in that suit had been filed against the bank within one year from the time of the making of the checks involved. *Horne v. C & S Bank*, 167 Ga. App. 187, 305 S.E.2d 897 (1983).

**Whether facts excuse depositor's failure to give notice is jury issue.** — It is jury issue to determine whether or not facts pleaded are such as to absolve depositor from penalty prescribed by former Code 1933, § 13-2044 (loss of funds paid by bank on forged check) for failure to give 60-day notice provided for therein. *White v. Georgia R.R. Bank & Trust Co.*, 71 Ga. App. 78, 30 S.E.2d 118 (1944).

**Jury question whether notice excused and whether bank paid in good faith.** — Under petition alleging that all of the defendants including the bank acted jointly in withdrawing money, that signature on check was mere scrawl and was not signature of depositor, that it was the only check drawn against the account in nearly 11 years, and that there was notation on the check which it was alleged showed that suspicions of bank were aroused, it was question for jury to determine whether or not plaintiff was or should have been excused from giving notice under former Code 1933, § 13-2044, and whether bank acted in good faith in cashing forged check. *White v. Georgia R.R. Bank & Trust Co.*, 71 Ga. App. 78, 30 S.E.2d 118 (1944).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 10 Am. Jur. 2d, Banks and Financial Institutions, §§ 515-519, 631, 649. 12 Am. Jur. 2d, Bills and Notes, § 586.

**C.J.S.** — 9 C.J.S., Banks and Banking, §§ 417, 418, 424, 434 et seq.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 4-406.

**ALR.** — Right of drawee bank to charge back a credit given on a forged check, 5 ALR 1566.

Right of drawee of forged check or draft to recover money paid thereon, 12 ALR 1089; 121 ALR 1056.

Payment of check upon forged or unauthorized indorsement as affecting the right of true owner against the bank, 14 ALR 764; 69 ALR 1076; 137 ALR 874.

Examination of account, pass book, or

canceled checks by bank depositor, 15 ALR 159; 67 ALR 1121; 103 ALR 1147.

Altering receipt, canceled check, or other voucher as forgery, 26 ALR 1058.

False pretense or confidence game through means of worthless check or draft, 35 ALR 344; 174 ALR 173.

Duty of bank to prior parties to the paper to apply deposit to credit of endorser on paper owned by bank, 37 ALR 578.

Estoppel by delay after knowledge in disclosing forgery of commercial paper, 50 ALR 1374.

Duty of depositor to turn over to bank forged checks, or checks with forged endorsements, which have been paid by bank, 60 ALR 527.

Who must bear loss as between drawer induced by fraud of employee or agent to

issue check payable to nonexistent person or a person having no interest in the proceeds thereof, and one who cashes or pays it on the forged indorsement by such employee or agent of the name of such ostensible payee, 99 ALR 439.

Examination of accounts, pass books, or canceled checks by bank depositors, 103 ALR 1147.

Necessity of pleading that maker or drawer of check was given notice of its dishonor by bank, 6 ALR2d 985.

Negligence in drawing check which facilitates alteration as to amount as affecting drawee bank's liability, 42 ALR2d 1070.

Construction and effect of statute relieving bank from liability to depositor for payment of forged or raised checks unless within specified time after return of voucher representing payment he notifies banks as to forgery or raising, 50 ALR2d 1115.

Rights and liabilities of drawee bank, as to

persons other than drawer, with respect to uncertified paid check which was altered, 75 ALR2d 611.

Payee's prior negligence facilitating forging of endorsement as precluding recovery from bank paying check, 87 ALR2d 638.

Right and remedy of drawer of check against collecting bank which receives it on forged endorsement and collects it from drawee bank, 99 ALR2d 637.

Avoidance of bank's check certification secured by fraud, 100 ALR2d 1197.

Bank's liability for payment or withdrawal on less than required number of signatures, 7 ALR4th 655.

Construction and application of UCC § 4-406, requiring customer to discover and report unauthorized signature, in cases involving bank's payment of check or withdrawal on less than required number of signatures, 7 ALR4th 1111.

#### **11-4-407. Payor bank's right to subrogation on improper payment.**

If a payor bank has paid an item over the order of the drawer or maker to stop payment, or after an account has been closed, or otherwise under circumstances giving a basis for objection by the drawer or maker, to prevent unjust enrichment and only to the extent necessary to prevent loss to the bank by reason of its payment of the item, the payor bank is subrogated to the rights:

(1) Of any holder in due course on the item against the drawer or maker;

(2) Of the payee or any other holder of the item against the drawer or maker either on the item or under the transaction out of which the item arose; and

(3) Of the drawer or maker against the payee or any other holder of the item with respect to the transaction out of which the item arose. (Code 1933, § 109A-4—407, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 1996, p. 1306, § 13.)

**Law reviews.** — For article surveying recent judicial developments in commercial law, see 31 Mercer L. Rev. 13 (1979).

For comment on *Trust Co. of Columbus v. Refrigeration Supplies, Inc.*, 241 Ga. 406,

246 S.E.2d 282 (1978), discussing liability of collecting and payor banks for payment of check over missing endorsement of copayee, see 13 Ga. L. Rev. 677 (1979).



## JUDICIAL DECISIONS

**Former subsection (c) gives bank defenses of drawer against payee or holder.** — Intent of O.C.G.A. § 11-4-407 is to allow payor bank to be subrogated to rights of drawer in suit by payor bank against payee or other holder of an item with respect to transaction out of which the item arose. *Trust Co. v. Refrigeration Supplies, Inc.*, 241 Ga. 406, 246 S.E.2d 282 (1978).

**Purpose of section.** — Scales of justice seek a balance where one unjustly gains pecuniary advantage over another to which gainer is not entitled and refuses to make restitution to loser by granting action for unjust enrichment. *Woodard v. First Nat'l Bank*, 159 Ga. App. 769, 285 S.E.2d 229 (1981).

Party compelled by operation of law to pay debt which in equity and good faith another party should have kept that party from paying may recover from the other party an amount paid in action at law. *Woodard v. First Nat'l Bank*, 159 Ga. App. 769, 285 S.E.2d 229 (1981).

**Bank's rights after untimely action on stop payment order.** — Where, as result of failure to act timely upon stop payment order, bank reimburses drawer for the amount charged to drawer's account for the check, it thereby becomes subrogated to any claim the drawer has against the payee. *Middle Ga. Bank v. Continental Real Estate & Assocs.*, 168 Ga. App. 611, 309 S.E.2d 893 (1983).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 11 Am. Jur. 2d, Banks and Financial Institutions, § 937.

**C.J.S.** — 83 C.J.S., Subrogation, § 22.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 4-407.

**ALR.** — Duty of bank to prior parties to the paper to apply deposit to credit of endorser on paper owned by bank, 37 ALR 578.

Right of third person to be subrogated to depositor's claim against bank on account of the latter's payment of forged or raised check, 77 ALR 1057.

Payment of check upon forged or unauthorized indorsement as affecting the right of the true owner against the drawee bank, 137 ALR 874.

Stipulation relieving bank from, or limiting its liability for disregard of, stop-payment order, 1 ALR2d 1155.

Rights and liabilities of drawee bank, as to persons other than drawer, with respect to uncertified paid check which was altered, 75 ALR2d 611.

Right of check owner to recover against one cashing it on forged or unauthorized indorsement and procuring payment by drawee, 100 ALR2d 670.

Extent of bank's liability for paying post-dated check, 31 ALR4th 329.

## PART 5

## COLLECTION OF DOCUMENTARY DRAFTS

### 11-4-501. Handling of documentary drafts; duty to send for presentment and to notify customer of dishonor.

A bank that takes a documentary draft for collection shall present or send the draft and accompanying documents for presentment and, upon learning that the draft has not been paid or accepted in due course, shall seasonably notify its customer of the fact even though it may have discounted or bought the draft or extended credit available for withdrawal as of right. (Code 1933, § 109A-4—501, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 1996, p. 1306, § 14.)

## JUDICIAL DECISIONS

**Cited** in *Banco Surinvest, S.A. v. Suntrust Bank*, 78 F. Supp. 2d 1366 (N.D. Ga. 1999).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 11 Am. Jur. 2d, Banks and Financial Institutions, § 993. 67 Am. Jur. 2d, Sales, § 38.      **U.L.A.** — Uniform Commercial Code (U.L.A.) § 4-501.

**C.J.S.** — 9 C.J.S., Banks and Banking, § 414.

**11-4-502. Presentment of “on arrival” drafts.**

If a draft or the relevant instructions require presentment “on arrival,” “when goods arrive,” or the like, the collecting bank need not present until in its judgment a reasonable time for arrival of the goods has expired. Refusal to pay or accept because the goods have not arrived is not dishonor; the bank must notify its transferor of the refusal but need not present the draft again until it is instructed to do so or learns of the arrival of the goods. (Code 1933, § 109A-4—502, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 1996, p. 1306, § 14.)

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 11 Am. Jur. 2d, Banks and Financial Institutions, § 993.      **U.L.A.** — Uniform Commercial Code (U.L.A.) § 4-502.

**C.J.S.** — 9 C.J.S., Banks and Banking, §§ 328 et seq., 351 et seq., 405 et seq., 414 et seq.

**11-4-503. Responsibility of presenting bank for documents and goods; report of reasons for dishonor; referee in case of need.**

Unless otherwise instructed and except as provided in Article 5 of this title, a bank presenting a documentary draft:

(1) Must deliver the documents to the drawee on acceptance of the draft if it is payable more than three days after presentment; otherwise, only on payment; and

(2) Upon dishonor, either in the case of presentment for acceptance or presentment for payment, may seek and follow instructions from any referee in case of need designated in the draft or, if the presenting bank does not choose to utilize the referee’s services, it must use diligence and good faith to ascertain the reason for dishonor, must notify its transferor of the dishonor and of the results of its effort to ascertain the reasons therefor, and must request instructions.

However, the presenting bank is under no obligation with respect to goods represented by the documents except to follow any reasonable instructions seasonably received; it has a right to reimbursement for any expense incurred in following instructions and to prepayment of or indemnity for those expenses. (Code 1933, § 109A-4—503, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 1996, p. 1306, § 14.)

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 11 Am. Jur. 2d, Banks and Financial Institutions, §§ 993, 996.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 4-503.

**C.J.S.** — 9 C.J.S., Banks and Banking, § 414 et seq.

#### **11-4-504. Privilege of presenting bank to deal with goods; security interest for expenses.**

(a) A presenting bank that, following the dishonor of a documentary draft, has seasonably requested instructions but does not receive them within a reasonable time may store, sell, or otherwise deal with the goods in any reasonable manner.

(b) For its reasonable expenses incurred by action under subsection (a) of this Code section, the presenting bank has a lien upon the goods or their proceeds, which may be foreclosed in the same manner as an unpaid seller's lien. (Code 1933, § 109A-4—504, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 1996, p. 1306, § 14.)

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 11 Am. Jur. 2d, Banks and Financial Institutions, §§ 993, 996. 67 Am. Jur. 2d, Sales, § 38.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 4-504.

**C.J.S.** — 9 C.J.S., Banks and Banking, § 414 et seq.



## FUNDS TRANSFERS

### ARTICLE 4A

## FUNDS TRANSFERS

#### Part 1

##### Subject Matter and Definitions

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- 11-4A-101. Short title.
- 11-4A-102. Subject matter.
- 11-4A-103. Payment order — Definitions.
- 11-4A-104. Funds transfer — Definitions.
- 11-4A-105. Other definitions.
- 11-4A-106. Time payment order is received.
- 11-4A-107. Federal Reserve regulations and operating circulars.
- 11-4A-108. Exclusion of consumer transactions governed by federal law.

#### Part 2

##### Issue and Acceptance of Payment Order

- 11-4A-201. Security procedure.
- 11-4A-202. Authorized and verified payment orders.
- 11-4A-203. Unenforceability of certain verified payment orders.
- 11-4A-204. Refund of payment and duty of customer to report with respect to unauthorized payment order.
- 11-4A-205. Erroneous payment orders.
- 11-4A-206. Transmission of payment order through funds-transfer or other communication system.
- 11-4A-207. Misdescription of beneficiary.
- 11-4A-208. Misdescription of intermediary bank or beneficiary's bank.
- 11-4A-209. Acceptance of payment order.
- 11-4A-210. Rejection of payment order.
- 11-4A-211. Cancellation and amendment of payment order.
- 11-4A-212. Liability and duty of receiving bank regarding unaccepted payment order.

#### Part 3

##### Execution of Sender's Payment Order by Receiving Bank

- 11-4A-301. Execution and execution date.

Sec.

- 11-4A-302. Obligations of receiving bank in execution of payment order.
- 11-4A-303. Erroneous execution of payment order.
- 11-4A-304. Duty of sender to report erroneously executed payment order.
- 11-4A-305. Liability for late or improper execution or failure to execute payment order.

#### Part 4

##### Payment

- 11-4A-401. Payment date.
- 11-4A-402. Obligation of sender to pay receiving bank.
- 11-4A-403. Payment by sender to receiving bank.
- 11-4A-404. Obligation of beneficiary's bank to pay and give notice to beneficiary.
- 11-4A-405. Payment by beneficiary's bank to beneficiary.
- 11-4A-406. Payment by originator to beneficiary; discharge of underlying obligation.

#### Part 5

##### Miscellaneous Provisions

- 11-4A-501. Variation by agreement and effect of funds-transfer system rule.
- 11-4A-502. Creditor process served on receiving bank; setoff by beneficiary's bank.
- 11-4A-503. Injunction or restraining order with respect to funds transfer.
- 11-4A-504. Order in which items and payment orders may be charged to account; order of withdrawals from account.
- 11-4A-505. Preclusion of objection to debit of customer's account.
- 11-4A-506. Rate of interest.
- 11-4A-507. Choice of law.

**Law reviews.** — For note on 1992 enactment of this article, see 9 Ga. St. U.L. Rev. 163 (1992).

## PART 1

### SUBJECT MATTER AND DEFINITIONS

#### 11-4A-101. Short title.

This article shall be known and may be cited as the “Uniform Commercial Code—Funds Transfers.” (Code 1981, § 11-4A-101, enacted by Ga. L. 1992, p. 2685, § 4.)

#### RESEARCH REFERENCES

**U.L.A.** — Uniform Commercial Code  
(U.L.A.) § 4A-101.

#### 11-4A-102. Subject matter.

Except as otherwise provided in Code Section 11-4A-108, this article applies to funds transfers defined in Code Section 11-4A-104. (Code 1981, § 11-4A-102, enacted by Ga. L. 1992, p. 2685, § 4.)

#### RESEARCH REFERENCES

**U.L.A.** — Uniform Commercial Code  
(U.L.A.) § 4A-102.

#### 11-4A-103. Payment order — Definitions.

(a) In this article:

(1) “Payment order” means an instruction of a sender to a receiving bank, transmitted orally, electronically, or in writing, to pay, or to cause another bank to pay, a fixed or determinable amount of money to a beneficiary if:

(i) The instruction does not state a condition to payment to the beneficiary other than time of payment,

(ii) The receiving bank is to be reimbursed by debiting an account of, or otherwise receiving payment from, the sender, and

(iii) The instruction is transmitted by the sender directly to the receiving bank or to an agent, funds-transfer system, or communication system for transmittal to the receiving bank.

(2) “Beneficiary” means the person to be paid by the beneficiary’s bank.

(3) “Beneficiary’s bank” means the bank identified in a payment order in which an account of the beneficiary is to be credited pursuant to the order or which otherwise is to make payment to the beneficiary if the order does not provide for payment to an account.

(4) “Receiving bank” means the bank to which the sender’s instruction is addressed.

(5) “Sender” means the person giving the instruction to the receiving bank.

(b) If an instruction complying with subsection (a)(1) is to make more than one payment to a beneficiary, the instruction is a separate payment order with respect to each payment.

(c) A payment order is issued when it is sent to the receiving bank. (Code 1981, § 11-4A-103, enacted by Ga. L. 1992, p. 2685, § 4.)

#### RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 4A-103.

#### 11-4A-104. Funds transfer — Definitions.

In this article:

(a) “Funds transfer” means the series of transactions, beginning with the originator’s payment order, made for the purpose of making payment to the beneficiary of the order. The term includes any payment order issued by the originator’s bank or an intermediary bank intended to carry out the originator’s payment order. A funds transfer is completed by acceptance by the beneficiary’s bank of a payment order for the benefit of the beneficiary of the originator’s payment order.

(b) “Intermediary bank” means a receiving bank other than the originator’s bank or the beneficiary’s bank.

(c) “Originator” means the sender of the first payment order in a funds transfer.

(d) “Originator’s bank” means (i) the receiving bank to which the payment order of the originator is issued if the originator is not a bank, or (ii) the originator if the originator is a bank. (Code 1981, § 11-4A-104, enacted by Ga. L. 1992, p. 2685, § 4.)

#### RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 4A-104.



**11-4A-105. Other definitions.**

(a) In this article:

(1) “Authorized account” means a deposit account of a customer in a bank designated by the customer as a source of payment of payment orders issued by the customer to the bank. If a customer does not so designate an account, any account of the customer is an authorized account if payment of a payment order from that account is not inconsistent with a restriction on the use of that account.

(2) “Bank” means a person engaged in the business of banking and includes a savings bank, savings and loan association, credit union, and trust company. A branch or separate office of a bank is a separate bank for purposes of this article.

(3) “Customer” means a person, including a bank, having an account with a bank or from whom a bank has agreed to receive payment orders.

(4) “Funds-transfer business day” of a receiving bank means the part of a day during which the receiving bank is open for the receipt, processing, and transmittal of payment orders and cancellations and amendments of payment orders.

(5) “Funds-transfer system” means a wire transfer network, automated clearing house, or other communication system of a clearing house or other association of banks through which a payment order by a bank may be transmitted to the bank to which the order is addressed.

(6) “Good faith” means honesty in fact and the observance of reasonable commercial standards of fair dealing.

(7) “Prove” with respect to a fact means to meet the burden of establishing the fact (Code Section 11-1-201(8)).

(b) Other definitions applying to this article and the Code sections in which they appear are:

“Acceptance.” Code Section 11-4A-209.

“Beneficiary.” Code Section 11-4A-103.

“Beneficiary’s bank.” Code Section 11-4A-103.

“Executed.” Code Section 11-4A-301.

“Execution date.” Code Section 11-4A-301.

“Funds transfer.” Code Section 11-4A-104.

“Funds-transfer system rule.” Code Section 11-4A-501.

“Intermediary bank.” Code Section 11-4A-104.

“Originator.” Code Section 11-4A-104.

“Originator’s bank.” Code Section 11-4A-104.

“Payment by beneficiary’s bank to beneficiary.” Code Section 11-4A-405.

“Payment by originator to beneficiary.” Code Section 11-4A-406.

“Payment by sender to receiving bank.” Code Section 11-4A-403.

“Payment date.” Code Section 11-4A-401.

“Payment order.” Code Section 11-4A-103.

“Receiving bank.” Code Section 11-4A-103.

“Security procedure.” Code Section 11-4A-201.

“Sender.” Code Section 11-4A-103.

(c) The following definitions in Article 4 of this title apply to this article:

“Clearing house.” Code Section 11-4-104.

“Item.” Code Section 11-4-104.

“Suspends payments.” Code Section 11-4-104.

(d) In addition Article 1 of this title contains general definitions and principles of construction and interpretation applicable throughout this article. (Code 1981, § 11-4A-105, enacted by Ga. L. 1992, p. 2685, § 4.)

#### RESEARCH REFERENCES

**U.L.A.** — Uniform Commercial Code  
(U.L.A.) § 4A-105.

#### **11-4A-106. Time payment order is received.**

(a) The time of receipt of a payment order or communication canceling or amending a payment order is determined by the rules applicable to receipt of a notice stated in Code Section 11-1-201(27). A receiving bank may fix a cut-off time or times on a funds-transfer business day for the receipt and processing of payment orders and communications canceling or amending payment orders. Different cut-off times may apply to payment orders, cancellations, or amendments, or to different categories of payment orders. A cut-off time may apply to senders generally or different cut-off times may apply to different senders or categories of payment orders. If a payment order or communication canceling or amending a payment order is received after the close of a funds-transfer business day or after the appropriate cut-off time on a funds-transfer business day, the receiving bank may treat the payment order

or communication as received at the opening of the next funds-transfer business day.

(b) If this article refers to an execution date or payment date or states a day on which a receiving bank is required to take action, and the date or day does not fall on a funds-transfer business day, the next day that is a funds-transfer business day is treated as the date or day stated, unless the contrary is stated in this article. (Code 1981, § 11-4A-106, enacted by Ga. L. 1992, p. 2685, § 4.)

#### RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 4A-106.

#### 11-4A-107. Federal Reserve regulations and operating circulars.

Regulations of the Board of Governors of the Federal Reserve System and operating circulars of the federal reserve banks supersede any inconsistent provision of this article to the extent of the inconsistency. (Code 1981, § 11-4A-107, enacted by Ga. L. 1992, p. 2685, § 4; Ga. L. 2002, p. 415, § 11.)

**The 2002 amendment**, effective April 18, 2002, part of an Act to revise, modernize, and correct the Code, revised capitalization in this Code section.

#### RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 4A-107.

#### 11-4A-108. Exclusion of consumer transactions governed by federal law.

This article does not apply to a funds transfer any part of which is governed by the Electronic Fund Transfer Act of 1978 (Title XX, Public Law 95-630, 92 Stat. 3728, 15 U.S.C. Section 1693, et seq.) as amended from time to time. (Code 1981, § 11-4A-108, enacted by Ga. L. 1992, p. 2685, § 4; Ga. L. 2002, p. 415, § 11.)

**The 2002 amendment**, effective April 18, 2002, part of an Act to revise, modernize, and correct the Code, revised punctuation in this Code section.

#### RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 4A-108.



## PART 2

## ISSUE AND ACCEPTANCE OF PAYMENT ORDER

**11-4A-201. Security procedure.**

“Security procedure” means a procedure established by agreement of a customer and a receiving bank for the purpose of (i) verifying that a payment order or communication amending or canceling a payment order is that of the customer, or (ii) detecting error in the transmission or the content of the payment order or communication. A security procedure may require the use of algorithms or other codes, identifying words or numbers, encryption, callback procedures, or similar security devices. Comparison of a signature on a payment order or communication with an authorized specimen signature of the customer is not by itself a security procedure. (Code 1981, § 11-4A-201, enacted by Ga. L. 1992, p. 2685, § 4.)

**RESEARCH REFERENCES**

**U.L.A.** — Uniform Commercial Code  
(U.L.A.) § 4A-201.

**11-4A-202. Authorized and verified payment orders.**

(a) A payment order received by the receiving bank is the authorized order of the person identified as sender if that person authorized the order or is otherwise bound by it under the law of agency.

(b) If a bank and its customer have agreed that the authenticity of payment orders issued to the bank in the name of the customer as sender will be verified pursuant to a security procedure, a payment order received by the receiving bank is effective as the order of the customer, whether or not authorized, if (i) the security procedure is a commercially reasonable method of providing security against unauthorized payment orders, and (ii) the bank proves that it accepted the payment order in good faith and in compliance with the security procedure and any written agreement or instruction of the customer restricting acceptance of payment orders issued in the name of the customer. The bank is not required to follow an instruction that violates a written agreement with the customer or notice of which is not received at a time and in a manner affording the bank a reasonable opportunity to act on it before the payment order is accepted.

(c) Commercial reasonableness of a security procedure is a question of law to be determined by considering the wishes of the customer expressed to the bank, the circumstances of the customer known to the bank, including the size, type, and frequency of payment orders normally issued by the customer to the bank, alternative security procedures offered to the customer, and security procedures in general use by customers and

receiving banks similarly situated. A security procedure is deemed to be commercially reasonable if (i) the security procedure was chosen by the customer after the bank offered, and the customer refused, a security procedure that was commercially reasonable for that customer, and (ii) the customer expressly agreed in writing to be bound by any payment order, whether or not authorized, issued in its name and accepted by the bank in compliance with the security procedure chosen by the customer.

(d) The term “sender” in this article includes the customer in whose name a payment order is issued if the order is the authorized order of the customer under subsection (a), or it is effective as the order of the customer under subsection (b).

(e) This Code section applies to amendments and cancellations of payment orders to the same extent it applies to payment orders.

(f) Except as provided in this Code section and in Code Section 11-4A-203(a)(1), rights and obligations arising under this Code section or Code Section 11-4A-203 may not be varied by agreement. (Code 1981, § 11-4A-202, enacted by Ga. L. 1992, p. 2685, § 4.)

#### RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 4A-202.

#### **11-4A-203. Unenforceability of certain verified payment orders.**

(a) If an accepted payment order is not, under Code Section 11-4A-202(a), an authorized order of a customer identified as sender, but is effective as an order of the customer pursuant to Code Section 11-4A-202(b), the following rules apply:

(1) By express written agreement, the receiving bank may limit the extent to which it is entitled to enforce or retain payment of the payment order.

(2) The receiving bank is not entitled to enforce or retain payment of the payment order if the customer proves that the order was not caused, directly or indirectly, by a person (i) entrusted at any time with duties to act for the customer with respect to payment orders or the security procedure, or (ii) who obtained access to transmitting facilities of the customer or who obtained, from a source controlled by the customer and without authority of the receiving bank, information facilitating breach of the security procedure, regardless of how the information was obtained or whether the customer was at fault. Information includes any access device, computer software, or the like.

(b) This Code section applies to amendments of payment orders to the same extent it applies to payment orders. (Code 1981, § 11-4A-203, enacted by Ga. L. 1992, p. 2685, § 4.)

**RESEARCH REFERENCES**

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 4A-203.

**11-4A-204. Refund of payment and duty of customer to report with respect to unauthorized payment order.**

(a) If a receiving bank accepts a payment order issued in the name of its customer as sender which is (i) not authorized and not effective as the order of the customer under Code Section 11-4A-202, or (ii) not enforceable, in whole or in part, against the customer under Code Section 11-4A-203, the bank shall refund any payment of the payment order received from the customer to the extent the bank is not entitled to enforce payment and shall pay interest on the refundable amount calculated from the date the bank received payment to the date of the refund. However, the customer is not entitled to interest from the bank on the amount to be refunded if the customer fails to exercise ordinary care to determine that the order was not authorized by the customer and to notify the bank of the relevant facts within a reasonable time not exceeding 90 days after the date the customer received notification from the bank that the order was accepted or that the customer's account was debited with respect to the order. The bank is not entitled to any recovery from the customer on account of a failure by the customer to give notification as stated in this section.

(b) Reasonable time under subsection (a) may be fixed by agreement as stated in Code Section 11-1-204(1), but the obligation of a receiving bank to refund payment as stated in subsection (a) may not otherwise be varied by agreement. (Code 1981, § 11-4A-204, enacted by Ga. L. 1992, p. 2685, § 4.)

**RESEARCH REFERENCES**

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 4A-204.

**11-4A-205. Erroneous payment orders.**

(a) If an accepted payment order was transmitted pursuant to a security procedure for the detection of error and the payment order (i) erroneously instructed payment to a beneficiary not intended by the sender, (ii) erroneously instructed payment in an amount greater than the amount intended by the sender, or (iii) was an erroneously transmitted duplicate of a payment order previously sent by the sender, the following rules apply:

(1) If the sender proves that the sender or a person acting on behalf of the sender pursuant to Code Section 11-4A-206 complied with the security procedure and that the error would have been detected if the receiving bank had also complied, the sender is not obliged to pay the order to the extent stated in paragraphs (2) and (3).



(2) If the funds transfer is completed on the basis of an erroneous payment order described in clause (i) or (iii) of subsection (a), the sender is not obliged to pay the order and the receiving bank is entitled to recover from the beneficiary any amount paid to the beneficiary to the extent allowed by the law governing mistake and restitution.

(3) If the funds transfer is completed on the basis of a payment order described in clause (ii) of subsection (a), the sender is not obliged to pay the order to the extent the amount received by the beneficiary is greater than the amount intended by the sender. In that case, the receiving bank is entitled to recover from the beneficiary the excess amount received to the extent allowed by the law governing mistake and restitution.

(b) If (i) the sender of an erroneous payment order described in subsection (a) is not obliged to pay all or part of the order, and (ii) the sender receives notification from the receiving bank that the order was accepted by the bank or that the sender's account was debited with respect to the order, the sender has a duty to exercise ordinary care, on the basis of information available to the sender, to discover the error with respect to the order and to advise the bank of the relevant facts within a reasonable time, not exceeding 90 days, after the bank's notification was received by the sender. If the bank proves that the sender failed to perform that duty, the sender is liable to the bank for the loss the bank proves it incurred as a result of the failure, but the liability of the sender may not exceed the amount of the sender's order.

(c) This Code section applies to amendments to payment orders to the same extent it applies to payment orders. (Code 1981, § 11-4A-205, enacted by Ga. L. 1992, p. 2685, § 4.)

#### RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 4A-205.

#### **11-4A-206. Transmission of payment order through funds-transfer or other communication system.**

(a) If a payment order addressed to a receiving bank is transmitted to a funds-transfer system or other third-party communication system for transmittal to the bank, the system is deemed to be an agent of the sender for the purpose of transmitting the payment order to the bank. If there is a discrepancy between the terms of the payment order transmitted to the system and the terms of the payment order transmitted by the system to the bank, the terms of the payment order of the sender are those transmitted by the system. This Code section does not apply to a funds-transfer system of the federal reserve banks.

(b) This Code section applies to cancellations and amendments of payment orders to the same extent it applies to payment orders. (Code 1981, § 11-4A-206, enacted by Ga. L. 1992, p. 2685, § 4; Ga. L. 2002, p. 415, § 11.)

**The 2002 amendment**, effective April 18, 2002, part of an Act to revise, modernize, and correct the Code, revised capitalization in subsection (a).

#### RESEARCH REFERENCES

**U.L.A.** — Uniform Commercial Code  
(U.L.A.) § 4A-206.

#### **11-4A-207. Misdescription of beneficiary.**

(a) Subject to subsection (b), if, in a payment order received by the beneficiary's bank, the name, bank account number, or other identification of the beneficiary refers to a nonexistent or unidentifiable person or account, no person has rights as a beneficiary of the order and acceptance of the order cannot occur.

(b) If a payment order received by the beneficiary's bank identifies the beneficiary both by name and by an identifying or bank account number and the name and number identify different persons, the following rules apply:

(1) Except as otherwise provided in subsection (c), if the beneficiary's bank does not know that the name and number refer to different persons, it may rely on the number as the proper identification of the beneficiary of the order. The beneficiary's bank need not determine whether the name and number refer to the same person.

(2) If the beneficiary's bank pays the person identified by name or knows that the name and number identify different persons, no person has rights as beneficiary except the person paid by the beneficiary's bank if that person was entitled to receive payment from the originator of the funds transfer. If no person has rights as beneficiary, acceptance of the order cannot occur.

(c) If (i) a payment order described in subsection (b) is accepted, (ii) the originator's payment order described the beneficiary inconsistently by name and number, and (iii) the beneficiary's bank pays the person identified by number as permitted by subsection (b)(1), the following rules apply:

(1) If the originator is a bank, the originator is obliged to pay its order.

(2) If the originator is not a bank and proves that the person identified by number was not entitled to receive payment from the originator, the originator is not obliged to pay its order unless the originator's bank

proves that the originator, before acceptance of the originator's order, had notice that payment of a payment order issued by the originator might be made by the beneficiary's bank on the basis of an identifying or bank account number even if it identifies a person different from the named beneficiary. Proof of notice may be made by any admissible evidence. The originator's bank satisfies the burden of proof if it proves that the originator, before the payment order was accepted, signed a writing stating the information to which the notice relates.

(d) In a case governed by subsection (b)(1), if the beneficiary's bank rightfully pays the person identified by number and that person was not entitled to receive payment from the originator, the amount paid may be recovered from that person to the extent allowed by the law governing mistake and restitution as follows:

(1) If the originator is obliged to pay its payment order as stated in subsection (c), the originator has the right to recover.

(2) If the originator is not a bank and is not obliged to pay its payment order, the originator's bank has the right to recover. (Code 1981, § 11-4A-207, enacted by Ga. L. 1992, p. 2685, § 4.)

#### RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 4A-207.

#### **11-4A-208. Misdescription of intermediary bank or beneficiary's bank.**

(a) This subsection applies to a payment order identifying an intermediary bank or the beneficiary's bank only by an identifying number.

(1) The receiving bank may rely on the number as the proper identification of the intermediary or beneficiary's bank and need not determine whether the number identifies a bank.

(2) The sender is obliged to compensate the receiving bank for any loss and expenses incurred by the receiving bank as a result of its reliance on the number in executing or attempting to execute the order.

(b) This subsection applies to a payment order identifying an intermediary bank or the beneficiary's bank both by name and an identifying number if the name and number identify different persons.

(1) If the sender is a bank, the receiving bank may rely on the number as the proper identification of the intermediary or beneficiary's bank if the receiving bank, when it executes the sender's order, does not know that the name and number identify different persons. The receiving bank need not determine whether the name and number refer to the same person or whether the number refers to a bank. The sender is obliged to



compensate the receiving bank for any loss and expenses incurred by the receiving bank as a result of its reliance on the number in executing or attempting to execute the order.

(2) If the sender is not a bank and the receiving bank proves that the sender, before the payment order was accepted, had notice that the receiving bank might rely on the number as the proper identification of the intermediary or beneficiary's bank even if it identifies a person different from the bank identified by name, the rights and obligations of the sender and the receiving bank are governed by subsection (b)(1), as though the sender were a bank. Proof of notice may be made by any admissible evidence. The receiving bank satisfies the burden of proof if it proves that the sender, before the payment order was accepted, signed a writing stating the information to which the notice relates.

(3) Regardless of whether the sender is a bank, the receiving bank may rely on the name as the proper identification of the intermediary or beneficiary's bank if the receiving bank, at the time it executes the sender's order, does not know that the name and number identify different persons. The receiving bank need not determine whether the name and number refer to the same person.

(4) If the receiving bank knows that the name and number identify different persons, reliance on either the name or the number in executing the sender's payment order is a breach of the obligation stated in Code Section 11-4A-302(a)(1). (Code 1981, § 11-4A-208, enacted by Ga. L. 1992, p. 2685, § 4.)

#### RESEARCH REFERENCES

**U.L.A.** — Uniform Commercial Code  
(U.L.A.) § 4A-208.

#### **11-4A-209. Acceptance of payment order.**

(a) Subject to subsection (d), a receiving bank other than the beneficiary's bank accepts a payment order when it executes the order.

(b) Subject to subsections (c) and (d), a beneficiary's bank accepts a payment order at the earliest of the following times:

(1) When the bank (i) pays the beneficiary as stated in Code Section 11-4A-405(a) or 11-4A-405(b), or (ii) notifies the beneficiary of receipt of the order or that the account of the beneficiary has been credited with respect to the order unless the notice indicates that the bank is rejecting the order or that funds with respect to the order may not be withdrawn or used until receipt of payment from the sender of the order;

(2) When the bank receives payment of the entire amount of the sender's order pursuant to Code Section 11-4A-403(a)(1) or 11-4A-403(a)(2); or

(3) The opening of the next funds-transfer business day of the bank following the payment date of the order if, at that time, the amount of the sender's order is fully covered by a withdrawable credit balance in an authorized account of the sender or the bank has otherwise received full payment from the sender, unless the order was rejected before that time or is rejected within (i) one hour after that time, or (ii) one hour after the opening of the next business day of the sender following the payment date if that time is later. If notice of rejection is received by the sender after the payment date and the authorized account of the sender does not bear interest, the bank is obliged to pay interest to the sender on the amount of the order for the number of days elapsing after the payment date to the day the sender receives notice or learns that the order was not accepted, counting that day as an elapsed day. If the withdrawable credit balance during that period falls below the amount of the order, the amount of interest payable is reduced accordingly.

(c) Acceptance of a payment order cannot occur before the order is received by the receiving bank. Acceptance does not occur under subsection (b)(2) or (b)(3) if the beneficiary of the payment order does not have an account with the receiving bank, the account has been closed, or the receiving bank is not permitted by law to receive credits for the beneficiary's account.

(d) A payment order issued to the originator's bank cannot be accepted until the payment date if the bank is the beneficiary's bank, or the execution date if the bank is not the beneficiary's bank. If the originator's bank executes the originator's payment order before the execution date or pays the beneficiary of the originator's payment order before the payment date and the payment order is subsequently canceled pursuant to Code Section 11-4A-211(b), the bank may recover from the beneficiary any payment received to the extent allowed by the law governing mistake and restitution. (Code 1981, § 11-4A-209, enacted by Ga. L. 1992, p. 2685, § 4.)

#### RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 4A-209.

#### **11-4A-210. Rejection of payment order.**

(a) A payment order is rejected by the receiving bank by a notice of rejection transmitted to the sender orally, electronically, or in writing. A notice of rejection need not use any particular words and is sufficient if it indicates that the receiving bank is rejecting the order or will not execute

or pay the order. Rejection is effective when the notice is given if transmission is by a means that is reasonable in the circumstances. If notice of rejection is given by a means that is not reasonable, rejection is effective when the notice is received. If an agreement of the sender and receiving bank establishes the means to be used to reject a payment order, (i) any means complying with the agreement is reasonable and (ii) any means not complying is not reasonable unless no significant delay in receipt of the notice resulted from the use of the noncomplying means.

(b) This subsection applies if a receiving bank other than the beneficiary's bank fails to execute a payment order despite the existence on the execution date of a withdrawable credit balance in an authorized account of the sender sufficient to cover the order. If the sender does not receive notice of rejection of the order on the execution date and the authorized account of the sender does not bear interest, the bank is obliged to pay interest to the sender on the amount of the order for the number of days elapsing after the execution date to the earlier of the day the order is canceled pursuant to Code Section 11-4A-211(d) or the day the sender receives notice or learns that the order was not executed, counting the final day of the period as an elapsed day. If the withdrawable credit balance during that period falls below the amount of the order, the amount of interest is reduced accordingly.

(c) If a receiving bank suspends payments, all unaccepted payment orders issued to it are deemed rejected at the time the bank suspends payments.

(d) Acceptance of a payment order precludes a later rejection of the order. Rejection of a payment order precludes a later acceptance of the order. (Code 1981, § 11-4A-210, enacted by Ga. L. 1992, p. 2685, § 4.)

#### RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 4A-210.

#### **11-4A-211. Cancellation and amendment of payment order.**

(a) A communication of the sender of a payment order canceling or amending the order may be transmitted to the receiving bank orally, electronically, or in writing. If a security procedure is in effect between the sender and the receiving bank, the communication is not effective to cancel or amend the order unless the communication is verified pursuant to the security procedure or the bank agrees to the cancellation or amendment.

(b) Subject to subsection (a), a communication by the sender canceling or amending a payment order is effective to cancel or amend the order if notice of the communication is received at a time and in a manner



affording the receiving bank a reasonable opportunity to act on the communication before the bank accepts the payment order.

(c) After a payment order has been accepted, cancellation or amendment of the order is not effective unless the receiving bank agrees or a funds-transfer system rule allows cancellation or amendment without agreement of the bank.

(1) With respect to a payment order accepted by a receiving bank other than the beneficiary's bank, cancellation or amendment is not effective unless a conforming cancellation or amendment of the payment order issued by the receiving bank is also made.

(2) With respect to a payment order accepted by the beneficiary's bank, cancellation or amendment is not effective unless the order was issued in execution of an unauthorized payment order, or because of a mistake by a sender in the funds transfer which resulted in the issuance of a payment order (i) that is a duplicate of a payment order previously issued by the sender, (ii) that orders payment to a beneficiary not entitled to receive payment from the originator, or (iii) that orders payment in an amount greater than the amount the beneficiary was entitled to receive from the originator. If the payment order is canceled or amended, the beneficiary's bank is entitled to recover from the beneficiary any amount paid to the beneficiary to the extent allowed by the law governing mistake and restitution.

(d) An unaccepted payment order is canceled by operation of law at the close of the fifth funds-transfer business day of the receiving bank after the execution date or payment date of the order.

(e) A canceled payment order cannot be accepted. If an accepted payment order is canceled, the acceptance is nullified and no person has any right or obligation based on the acceptance. Amendment of a payment order is deemed to be cancellation of the original order at the time of amendment and issue of a new payment order in the amended form at the same time.

(f) Unless otherwise provided in an agreement of the parties or in a funds-transfer system rule, if the receiving bank, after accepting a payment order, agrees to cancellation or amendment of the order by the sender or is bound by a funds-transfer system rule allowing cancellation or amendment without the bank's agreement, the sender, whether or not cancellation or amendment is effective, is liable to the bank for any loss and expenses, including reasonable attorney's fees, incurred by the bank as a result of the cancellation or amendment or attempted cancellation or amendment.

(g) A payment order is not revoked by the death or legal incapacity of the sender unless the receiving bank knows of the death or of an

adjudication of incapacity by a court of competent jurisdiction and has reasonable opportunity to act before acceptance of the order.

(h) A funds-transfer system rule is not effective to the extent it conflicts with subsection (c)(2). (Code 1981, § 11-4A-211, enacted by Ga. L. 1992, p. 2685, § 4.)

#### RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 4A-211.

#### **11-4A-212. Liability and duty of receiving bank regarding unaccepted payment order.**

If a receiving bank fails to accept a payment order that it is obliged by express agreement to accept, the bank is liable for breach of the agreement to the extent provided in the agreement or in this article, but does not otherwise have any duty to accept a payment order or, before acceptance, to take any action, or refrain from taking action, with respect to the order except as provided in this article or by express agreement. Liability based on acceptance arises only when acceptance occurs as stated in Code Section 11-4A-209, and liability is limited to that provided in this article. A receiving bank is not the agent of the sender or beneficiary of the payment order it accepts, or of any other party to the funds transfer, and the bank owes no duty to any party to the funds transfer except as provided in this article or by express agreement. (Code 1981, § 11-4A-212, enacted by Ga. L. 1992, p. 2685, § 4.)

#### RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 4A-212.

### PART 3

#### EXECUTION OF SENDER'S PAYMENT ORDER BY RECEIVING BANK

#### **11-4A-301. Execution and execution date.**

(a) A payment order is “executed” by the receiving bank when it issues a payment order intended to carry out the payment order received by the bank. A payment order received by the beneficiary’s bank can be accepted but cannot be executed.

(b) “Execution date” of a payment order means the day on which the receiving bank may properly issue a payment order in execution of the sender’s order. The execution date may be determined by instruction of the sender but cannot be earlier than the day the order is received and, unless

otherwise determined, is the day the order is received. If the sender's instruction states a payment date, the execution date is the payment date or an earlier date on which execution is reasonably necessary to allow payment to the beneficiary on the payment date. (Code 1981, § 11-4A-301, enacted by Ga. L. 1992, p. 2685, § 4.)

#### RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 4A-301.

#### **11-4A-302. Obligations of receiving bank in execution of payment order.**

(a) Except as provided in subsections (b) through (d), if the receiving bank accepts a payment order pursuant to Code Section 11-4A-209(a), the bank has the following obligations in executing the order:

(1) The receiving bank is obliged to issue, on the execution date, a payment order complying with the sender's order and to follow the sender's instructions concerning (i) any intermediary bank or funds-transfer system to be used in carrying out the funds transfer, or (ii) the means by which payment orders are to be transmitted in the funds transfer. If the originator's bank issues a payment order to an intermediary bank, the originator's bank is obliged to instruct the intermediary bank according to the instruction of the originator. An intermediary bank in the funds transfer is similarly bound by an instruction given to it by the sender of the payment order it accepts.

(2) If the sender's instruction states that the funds transfer is to be carried out telephonically or by wire transfer or otherwise indicates that the funds transfer is to be carried out by the most expeditious means, the receiving bank is obliged to transmit its payment order by the most expeditious available means, and to instruct any intermediary bank accordingly. If a sender's instruction states a payment date, the receiving bank is obliged to transmit its payment order at a time and by means reasonably necessary to allow payment to the beneficiary on the payment date or as soon thereafter as is feasible.

(b) Unless otherwise instructed, a receiving bank executing a payment order may (i) use any funds-transfer system if use of that system is reasonable in the circumstances, and (ii) issue a payment order to the beneficiary's bank or to an intermediary bank through which a payment order conforming to the sender's order can expeditiously be issued to the beneficiary's bank if the receiving bank exercises ordinary care in the selection of the intermediary bank. A receiving bank is not required to follow an instruction of the sender designating a funds-transfer system to be used in carrying out the funds transfer if the receiving bank, in good faith, determines that it is not feasible to follow the instruction or that following the instruction would unduly delay completion of the funds transfer.



(c) Unless subsection (a)(2) applies or the receiving bank is otherwise instructed, the bank may execute a payment order by transmitting its payment order by first-class mail or by any means reasonable in the circumstances. If the receiving bank is instructed to execute the sender's order by transmitting its payment order by a particular means, the receiving bank may issue its payment order by the means stated or by any means as expeditious as the means stated.

(d) Unless instructed by the sender, the receiving bank (i) may not obtain payment of its charges for services and expenses in connection with the execution of the sender's order by issuing a payment order in an amount equal to the amount of the sender's order less the amount of the charges, and (ii) may not instruct a subsequent receiving bank to obtain payment of its charges in the same manner. (Code 1981, § 11-4A-302, enacted by Ga. L. 1992, p. 2685, § 4; Ga. L. 2002, p. 415, § 11.)

The 2002 amendment, effective April 18, "first-class" for "first class" in subsection 2002, part of an Act to revise, modernize, (c). and correct the Code, substituted

#### RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 4A-302.

#### **11-4A-303. Erroneous execution of payment order.**

(a) A receiving bank that (i) executes the payment order of the sender by issuing a payment order in an amount greater than the amount of the sender's order, or (ii) issues a payment order in execution of the sender's order and then issues a duplicate order, is entitled to payment of the amount of the sender's order under Code Section 11-4A-402(c) if that subsection is otherwise satisfied. The bank is entitled to recover from the beneficiary of the erroneous order the excess payment received to the extent allowed by the law governing mistake and restitution.

(b) A receiving bank that executes the payment order of the sender by issuing a payment order in an amount less than the amount of the sender's order is entitled to payment of the amount of the sender's order under Code Section 11-4A-402(c) if (i) that subsection is otherwise satisfied and (ii) the bank corrects its mistake by issuing an additional payment order for the benefit of the beneficiary of the sender's order. If the error is not corrected, the issuer of the erroneous order is entitled to receive or retain payment from the sender of the order it accepted only to the extent of the amount of the erroneous order. This subsection does not apply if the receiving bank executes the sender's payment order by issuing a payment order in an amount less than the amount of the sender's order for the purpose of obtaining payment of its charges for services and expenses pursuant to instruction of the sender.

(c) If a receiving bank executes the payment order of the sender by issuing a payment order to a beneficiary different from the beneficiary of the sender's order and the funds transfer is completed on the basis of that error, the sender of the payment order that was erroneously executed and all previous senders in the funds transfer are not obliged to pay the payment orders they issued. The issuer of the erroneous order is entitled to recover from the beneficiary of the order the payment received to the extent allowed by the law governing mistake and restitution. (Code 1981, § 11-4A-303, enacted by Ga. L. 1992, p. 2685, § 4.)

#### RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 4A-303.

#### **11-4A-304. Duty of sender to report erroneously executed payment order.**

If the sender of a payment order that is erroneously executed as stated in Code Section 11-4A-303 receives notification from the receiving bank that the order was executed or that the sender's account was debited with respect to the order, the sender has a duty to exercise ordinary care to determine, on the basis of information available to the sender, that the order was erroneously executed and to notify the bank of the relevant facts within a reasonable time not exceeding 90 days after the notification from the bank was received by the sender. If the sender fails to perform that duty, the bank is not obliged to pay interest on any amount refundable to the sender under Code Section 11-4A-402(d) for the period before the bank learns of the execution error. The bank is not entitled to any recovery from the sender on account of a failure by the sender to perform the duty stated in this section. (Code 1981, § 11-4A-304, enacted by Ga. L. 1992, p. 2685, § 4.)

#### RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 4A-304.

#### **11-4A-305. Liability for late or improper execution or failure to execute payment order.**

(a) If a funds transfer is completed but execution of a payment order by the receiving bank in breach of Code Section 11-4A-302 results in delay in payment to the beneficiary, the bank is obliged to pay interest to either the originator or the beneficiary of the funds transfer for the period of delay caused by the improper execution. Except as provided in subsection (c), additional damages are not recoverable.

(b) If execution of a payment order by a receiving bank in breach of Code Section 11-4A-302 results in (i) noncompletion of the funds transfer, (ii) failure to use an intermediary bank designated by the originator, or (iii) issuance of a payment order that does not comply with the terms of the payment order of the originator, the bank is liable to the originator for its expenses in the funds transfer and for incidental expenses and interest losses, to the extent not covered by subsection (a), resulting from the improper execution. Except as provided in subsection (c), additional damages are not recoverable.

(c) In addition to the amounts payable under subsections (a) and (b), damages, including consequential damages, are recoverable to the extent provided in an express written agreement of the receiving bank.

(d) If a receiving bank fails to execute a payment order it was obliged by express agreement to execute, the receiving bank is liable to the sender for its expenses in the transaction and for incidental expenses and interest losses resulting from the failure to execute. Additional damages, including consequential damages, are recoverable to the extent provided in an express written agreement of the receiving bank, but are not otherwise recoverable.

(e) Reasonable attorney's fees are recoverable if demand for compensation under subsection (a) or (b) is made and refused before an action is brought on the claim. If a claim is made for breach of an agreement under subsection (d) and the agreement does not provide for damages, reasonable attorney's fees are recoverable if demand for compensation under subsection (d) is made and refused before an action is brought on the claim.

(f) Except as stated in this Code section, the liability of a receiving bank under subsections (a) and (b) may not be varied by agreement. (Code 1981, § 11-4A-305, enacted by Ga. L. 1992, p. 2685, § 4.)

#### RESEARCH REFERENCES

**U.L.A.** — Uniform Commercial Code  
(U.L.A.) § 4A-305.

#### PART 4

#### PAYMENT

#### 11-4A-401. Payment date.

“Payment date” of a payment order means the day on which the amount of the order is payable to the beneficiary by the beneficiary's bank. The payment date may be determined by instruction of the sender but cannot be earlier than the day the order is received by the beneficiary's bank and,



unless otherwise determined, is the day the order is received by the beneficiary's bank. (Code 1981, § 11-4A-401, enacted by Ga. L. 1992, p. 2685, § 4.)

#### RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 4A-401.

#### **11-4A-402. Obligation of sender to pay receiving bank.**

(a) This section is subject to Code Sections 11-4A-205 and 11-4A-207.

(b) With respect to a payment order issued to the beneficiary's bank, acceptance of the order by the bank obliges the sender to pay the bank the amount of the order, but payment is not due until the payment date of the order.

(c) This subsection is subject to subsection (e) and to Code Section 11-4A-303. With respect to a payment order issued to a receiving bank other than the beneficiary's bank, acceptance of the order by the receiving bank obliges the sender to pay the bank the amount of the sender's order. Payment by the sender is not due until the execution date of the sender's order. The obligation of that sender to pay its payment order is excused if the funds transfer is not completed by acceptance by the beneficiary's bank of a payment order instructing payment to the beneficiary of that sender's payment order.

(d) If the sender of a payment order pays the order and was not obliged to pay all or part of the amount paid, the bank receiving payment is obliged to refund payment to the extent the sender was not obliged to pay. Except as provided in Code Sections 11-4A-204 and 11-4A-304, interest is payable on the refundable amount from the date of payment.

(e) If a funds transfer is not completed as stated in subsection (c) and an intermediary bank is obliged to refund payment as stated in subsection (d) but is unable to do so because not permitted by applicable law or because the bank suspends payments, a sender in the funds transfer that executed a payment order in compliance with an instruction, as stated in Code Section 11-4A-302(a)(1), to route the funds transfer through that intermediary bank is entitled to receive or retain payment from the sender of the payment order that it accepted. The first sender in the funds transfer that issued an instruction requiring routing through that intermediary bank is subrogated to the right of the bank that paid the intermediary bank to refund as stated in subsection (d).

(f) The right of the sender of a payment order to be excused from the obligation to pay the order as stated in subsection (c) or to receive refund under subsection (d) may not be varied by agreement. (Code 1981, § 11-4A-402, enacted by Ga. L. 1992, p. 2685, § 4.)

## RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 4A-402.

**11-4A-403. Payment by sender to receiving bank.**

(a) Payment of the sender's obligation under Code Section 11-4A-402 to pay the receiving bank occurs as follows:

(1) If the sender is a bank, payment occurs when the receiving bank receives final settlement of the obligation through a federal reserve bank or through a funds-transfer system.

(2) If the sender is a bank and the sender (i) credited an account of the receiving bank with the sender, or (ii) caused an account of the receiving bank in another bank to be credited, payment occurs when the credit is withdrawn or, if not withdrawn, at midnight of the day on which the credit is withdrawable and the receiving bank learns of that fact.

(3) If the receiving bank debits an account of the sender with the receiving bank, payment occurs when the debit is made to the extent the debit is covered by a withdrawable credit balance in the account.

(b) If the sender and receiving bank are members of a funds-transfer system that nets obligations multilaterally among participants, the receiving bank receives final settlement when settlement is complete in accordance with the rules of the system. The obligation of the sender to pay the amount of a payment order transmitted through the funds-transfer system may be satisfied, to the extent permitted by the rules of the system, by setting off and applying against the sender's obligation the right of the sender to receive payment from the receiving bank of the amount of any other payment order transmitted to the sender by the receiving bank through the funds-transfer system. The aggregate balance of obligations owed by each sender to each receiving bank in the funds-transfer system may be satisfied, to the extent permitted by the rules of the system, by setting off and applying against that balance the aggregate balance of obligations owed to the sender by other members of the system. The aggregate balance is determined after the right of setoff stated in the second sentence of this subsection has been exercised.

(c) If two banks transmit payment orders to each other under an agreement that settlement of the obligations of each bank to the other under Code Section 11-4A-402 will be made at the end of the day or other period, the total amount owed with respect to all orders transmitted by one bank shall be set off against the total amount owed with respect to all orders transmitted by the other bank. To the extent of the setoff, each bank has made payment to the other.

(d) In a case not covered by subsection (a), the time when payment of the sender's obligation under Code Section 11-4A-402(b) or 11-4A-402(c)

occurs is governed by applicable principles of law that determine when an obligation is satisfied. (Code 1981, § 11-4A-403, enacted by Ga. L. 1992, p. 2685, § 4; Ga. L. 2002, p. 415, § 11.)

The 2002 amendment, effective April 18, 2002, part of an Act to revise, modernize, and correct the Code, revised capitalization in paragraph (a)(1).

#### RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 4A-403.

#### **11-4A-404. Obligation of beneficiary's bank to pay and give notice to beneficiary.**

(a) Subject to Code Sections 11-4A-211(e), 11-4A-405(d), and 11-4A-405(e), if a beneficiary's bank accepts a payment order, the bank is obliged to pay the amount of the order to the beneficiary of the order. Payment is due on the payment date of the order, but if acceptance occurs on the payment date after the close of the funds-transfer business day of the bank, payment is due on the next funds-transfer business day. If the bank refuses to pay after demand by the beneficiary and receipt of notice of particular circumstances that will give rise to consequential damages as a result of nonpayment, the beneficiary may recover damages resulting from the refusal to pay to the extent the bank had notice of the damages, unless the bank proves that it did not pay because of a reasonable doubt concerning the right of the beneficiary to payment.

(b) If a payment order accepted by the beneficiary's bank instructs payment to an account of the beneficiary, the bank is obliged to notify the beneficiary of receipt of the order before midnight of the next funds-transfer business day following the payment date. If the payment order does not instruct payment to an account of the beneficiary, the bank is required to notify the beneficiary only if notice is required by the order. Notice may be given by first-class mail or any other means reasonable in the circumstances. If the bank fails to give the required notice, the bank is obliged to pay interest to the beneficiary on the amount of the payment order from the day notice should have been given until the day the beneficiary learned of receipt of the payment order by the bank. No other damages are recoverable. Reasonable attorney's fees are also recoverable if demand for interest is made and refused before an action is brought on the claim.

(c) The right of a beneficiary to receive payment and damages as stated in subsection (a) may not be varied by agreement or a funds-transfer system rule. The right of a beneficiary to be notified as stated in subsection (b) may be varied by agreement of the beneficiary or by a funds-transfer system rule if the beneficiary is notified of the rule before initiation of the funds transfer. (Code 1981, § 11-4A-404, enacted by Ga. L. 1992, p. 2685, § 4.)



## RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 4A-404.

**11-4A-405. Payment by beneficiary's bank to beneficiary.**

(a) If the beneficiary's bank credits an account of the beneficiary of a payment order, payment of the bank's obligation under Code Section 11-4A-404(a) occurs when and to the extent (i) the beneficiary is notified of the right to withdraw the credit, (ii) the bank lawfully applies the credit to a debt of the beneficiary, or (iii) funds with respect to the order are otherwise made available to the beneficiary by the bank.

(b) If the beneficiary's bank does not credit an account of the beneficiary of a payment order, the time when payment of the bank's obligation under Code Section 11-4A-404(a) occurs is governed by principles of law that determine when an obligation is satisfied.

(c) Except as stated in subsections (d) and (e), if the beneficiary's bank pays the beneficiary of a payment order under a condition to payment or agreement of the beneficiary giving the bank the right to recover payment from the beneficiary if the bank does not receive payment of the order, the condition to payment or agreement is not enforceable.

(d) A funds-transfer system rule may provide that payments made to beneficiaries of funds transfers made through the system are provisional until receipt of payment by the beneficiary's bank of the payment order it accepted. A beneficiary's bank that makes a payment that is provisional under the rule is entitled to refund from the beneficiary if (i) the rule requires that both the beneficiary and the originator be given notice of the provisional nature of the payment before the funds transfer is initiated, (ii) the beneficiary, the beneficiary's bank, and the originator's bank agreed to be bound by the rule, and (iii) the beneficiary's bank did not receive payment of the payment order that it accepted. If the beneficiary is obliged to refund payment to the beneficiary's bank, acceptance of the payment order by the beneficiary's bank is nullified and no payment by the originator of the funds transfer to the beneficiary occurs under Code Section 11-4A-406.

(e) This subsection applies to a funds transfer that includes a payment order transmitted over a funds-transfer system that (i) nets obligations multilaterally among participants, and (ii) has in effect a loss-sharing agreement among participants for the purpose of providing funds necessary to complete settlement of the obligations of one or more participants that do not meet their settlement obligations. If the beneficiary's bank in the funds transfer accepts a payment order and the system fails to complete settlement pursuant to its rules with respect to any payment order in the

funds transfer, (i) the acceptance by the beneficiary's bank is nullified and no person has any right or obligation based on the acceptance, (ii) the beneficiary's bank is entitled to recover payment from the beneficiary, (iii) no payment by the originator to the beneficiary occurs under Code Section 11-4A-406, and (iv) subject to Code Section 11-4A-402(e), each sender in the funds transfer is excused from its obligation to pay its payment order under Code Section 11-4A-402(c) because the funds transfer has not been completed. (Code 1981, § 11-4A-405, enacted by Ga. L. 1992, p. 2685, § 4; Ga. L. 2002, p. 415, § 11.)

**The 2002 amendment**, effective April 18, and correct the Code, revised punctuation 2002, part of an Act to revise, modernize, in paragraph (d).

#### RESEARCH REFERENCES

**U.L.A.** — Uniform Commercial Code  
(U.L.A.) § 4A-405.

#### **11-4A-406. Payment by originator to beneficiary; discharge of underlying obligation.**

(a) Subject to Code Sections 11-4A-211(e), 11-4A-405(d), and 11-4A-405(e), the originator of a funds transfer pays the beneficiary of the originator's payment order (i) at the time a payment order for the benefit of the beneficiary is accepted by the beneficiary's bank in the funds transfer and (ii) in an amount equal to the amount of the order accepted by the beneficiary's bank, but not more than the amount of the originator's order.

(b) If payment under subsection (a) is made to satisfy an obligation, the obligation is discharged to the same extent discharge would result from payment to the beneficiary of the same amount in money, unless (i) the payment under subsection (a) was made by a means prohibited by the contract of the beneficiary with respect to the obligation, (ii) the beneficiary, within a reasonable time after receiving notice of receipt of the order by the beneficiary's bank, notified the originator of the beneficiary's refusal of the payment, (iii) funds with respect to the order were not withdrawn by the beneficiary or applied to a debt of the beneficiary, and (iv) the beneficiary would suffer a loss that could reasonably have been avoided if payment had been made by a means complying with the contract. If payment by the originator does not result in discharge under this section, the originator is subrogated to the rights of the beneficiary to receive payment from the beneficiary's bank under Code Section 11-4A-404(a).

(c) For the purpose of determining whether discharge of an obligation occurs under subsection (b), if the beneficiary's bank accepts a payment order in an amount equal to the amount of the originator's payment order less charges of one or more receiving banks in the funds transfer, payment to the beneficiary is deemed to be in the amount of the originator's order

unless upon demand by the beneficiary the originator does not pay the beneficiary the amount of the deducted charges.

(d) Rights of the originator or of the beneficiary of a funds transfer under this Code section may be varied only by agreement of the originator and the beneficiary. (Code 1981, § 11-4A-406, enacted by Ga. L. 1992, p. 2685, § 4.)

RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 4A-406.

PART 5

MISCELLANEOUS PROVISIONS

11-4A-501. Variation by agreement and effect of funds-transfer system rule.

(a) Except as otherwise provided in this article, the rights and obligations of a party to a funds transfer may be varied by agreement of the affected party.

(b) “Funds-transfer system rule” means a rule of an association of banks (i) governing transmission of payment orders by means of a funds-transfer system of the association or rights and obligations with respect to those orders, or (ii) to the extent the rule governs rights and obligations between banks that are parties to a funds transfer in which a federal reserve bank, acting as an intermediary bank, sends a payment order to the beneficiary’s bank. Except as otherwise provided in this article, a funds-transfer system rule governing rights and obligations between participating banks using the system may be effective even if the rule conflicts with this Article and indirectly affects another party to the funds transfer who does not consent to the rule. A funds-transfer system rule may also govern rights and obligations of parties other than participating banks using the system to the extent stated in Code Sections 11-4A-404(c), 11-4A-405(d), and 11-4A-507(c). (Code 1981, § 11-4A-501, enacted by Ga. L. 1992, p. 2685, § 4; Ga. L. 2002, p. 415, § 11.)

The 2002 amendment, effective April 18, 2002, part of an Act to revise, modernize, and correct the Code, revised capitalization in subsection (b).

RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 4A-501.



**11-4A-502. Creditor process served on receiving bank; setoff by beneficiary's bank.**

(a) As used in this section, "creditor process" means levy, attachment, garnishment, notice of lien, sequestration, or similar process issued by or on behalf of a creditor or other claimant with respect to an account.

(b) This subsection applies to creditor process with respect to an authorized account of the sender of a payment order if the creditor process is served on the receiving bank. For the purpose of determining rights with respect to the creditor process, if the receiving bank accepts the payment order the balance in the authorized account is deemed to be reduced by the amount of the payment order to the extent the bank did not otherwise receive payment of the order, unless the creditor process is served at a time and in a manner affording the bank a reasonable opportunity to act on it before the bank accepts the payment order.

(c) If a beneficiary's bank has received a payment order for payment to the beneficiary's account in the bank, the following rules apply:

(1) The bank may credit the beneficiary's account. The amount credited may be set off against an obligation owed by the beneficiary to the bank or may be applied to satisfy creditor process served on the bank with respect to the account.

(2) The bank may credit the beneficiary's account and allow withdrawal of the amount credited unless creditor process with respect to the account is served at a time and in a manner affording the bank a reasonable opportunity to act to prevent withdrawal.

(3) If creditor process with respect to the beneficiary's account has been served and the bank has had a reasonable opportunity to act on it, the bank may not reject the payment order except for a reason unrelated to the service of process.

(d) Creditor process with respect to a payment by the originator to the beneficiary pursuant to a funds transfer may be served only on the beneficiary's bank with respect to the debt owed by that bank to the beneficiary. Any other bank served with the creditor process is not obliged to act with respect to the process. (Code 1981, § 11-4A-502, enacted by Ga. L. 1992, p. 2685, § 4.)

**RESEARCH REFERENCES**

**U.L.A.** — Uniform Commercial Code  
(U.L.A.) § 4A-502.

**11-4A-503. Injunction or restraining order with respect to funds transfer.**

For proper cause and in compliance with applicable law, a court may restrain (i) a person from issuing a payment order to initiate a funds transfer, (ii) an originator's bank from executing the payment order of the originator, or (iii) the beneficiary's bank from releasing funds to the beneficiary or the beneficiary from withdrawing the funds. A court may not otherwise restrain a person from issuing a payment order, paying or receiving payment of a payment order, or otherwise acting with respect to a funds transfer. (Code 1981, § 11-4A-503, enacted by Ga. L. 1992, p. 2685, § 4.)

**RESEARCH REFERENCES**

**U.L.A.** — Uniform Commercial Code  
(U.L.A.) § 4A-503.

**11-4A-504. Order in which items and payment orders may be charged to account; order of withdrawals from account.**

(a) If a receiving bank has received more than one payment order of the sender or one or more payment orders and other items that are payable from the sender's account, the bank may charge the sender's account with respect to the various orders and items in any sequence.

(b) In determining whether a credit to an account has been withdrawn by the holder of the account or applied to a debt of the holder of the account, credits first made to the account are first withdrawn or applied. (Code 1981, § 11-4A-504, enacted by Ga. L. 1992, p. 2685, § 4.)

**RESEARCH REFERENCES**

**U.L.A.** — Uniform Commercial Code  
(U.L.A.) § 4A-504.

**11-4A-505. Preclusion of objection to debit of customer's account.**

If a receiving bank has received payment from its customer with respect to a payment order issued in the name of the customer as sender and accepted by the bank, and the customer received notification reasonably identifying the order, the customer is precluded from asserting that the bank is not entitled to retain the payment unless the customer notifies the bank of the customer's objection to the payment within one year after the notification was received by the customer. (Code 1981, § 11-4A-505, enacted by Ga. L. 1992, p. 2685, § 4.)

**RESEARCH REFERENCES**

**U.L.A.** — Uniform Commercial Code  
(U.L.A.) § 4A-505.

**11-4A-506. Rate of interest.**

(a) If, under this article, a receiving bank is obliged to pay interest with respect to a payment order issued to the bank, the amount payable may be determined (i) by agreement of the sender and receiving bank, or (ii) by a funds-transfer system rule if the payment order is transmitted through a funds-transfer system.

(b) If the amount of interest is not determined by an agreement or rule as stated in subsection (a), the amount is calculated by multiplying the applicable Federal Funds rate by the amount on which interest is payable, and then multiplying the product by the number of days for which interest is payable. The applicable Federal Funds rate is the average of the Federal Funds rates published by the Federal Reserve Bank of New York for each of the days for which interest is payable divided by 360. The Federal Funds rate for any day on which a published rate is not available is the same as the published rate for the next preceding day for which there is a published rate. If a receiving bank that accepted a payment order is required to refund payment to the sender of the order because the funds transfer was not completed, but the failure to complete was not due to any fault by the bank, the interest payable is reduced by a percentage equal to the reserve requirement on deposits of the receiving bank. (Code 1981, § 11-4A-506, enacted by Ga. L. 1992, p. 2685, § 4.)

**RESEARCH REFERENCES**

**U.L.A.** — Uniform Commercial Code  
(U.L.A.) § 4A-506.

**11-4A-507. Choice of law.**

(a) The following rules apply unless the affected parties otherwise agree or subsection (c) applies:

(1) The rights and obligations between the sender of a payment order and the receiving bank are governed by the law of the jurisdiction in which the receiving bank is located.

(2) The rights and obligations between the beneficiary's bank and the beneficiary are governed by the law of the jurisdiction in which the beneficiary's bank is located.

(3) The issue of when payment is made pursuant to a funds transfer by the originator to the beneficiary is governed by the law of the jurisdiction in which the beneficiary's bank is located.



(b) If the parties described in each paragraph of subsection (a) have made an agreement selecting the law of a particular jurisdiction to govern rights and obligations between each other, the law of that jurisdiction governs those rights and obligations, whether or not the payment order or the funds transfer bears a reasonable relation to that jurisdiction.

(c) A funds-transfer system rule may select the law of a particular jurisdiction to govern (i) rights and obligations between participating banks with respect to payment orders transmitted or processed through the system, or (ii) the rights and obligations of some or all parties to a funds transfer any part of which is carried out by means of the system. A choice of law made pursuant to clause (i) is binding on participating banks. A choice of law made pursuant to clause (ii) is binding on the originator, other sender, or a receiving bank having notice that the funds-transfer system might be used in the funds transfer and of the choice of law by the system when the originator, other sender, or receiving bank issued or accepted a payment order. The beneficiary of a funds transfer is bound by the choice of law if, when the funds transfer is initiated, the beneficiary has notice that the funds-transfer system might be used in the funds transfer and of the choice of law by the system. The law of a jurisdiction selected pursuant to this subsection may govern, whether or not that law bears a reasonable relation to the matter in issue.

(d) In the event of inconsistency between an agreement under subsection (b) and a choice-of-law rule under subsection (c), the agreement under subsection (b) prevails.

(e) If a funds transfer is made by use of more than one funds-transfer system and there is inconsistency between choice-of-law rules of the systems, the matter in issue is governed by the law of the selected jurisdiction that has the most significant relationship to the matter in issue. (Code 1981, § 11-4A-507, enacted by Ga. L. 1992, p. 2685, § 4.)

#### RESEARCH REFERENCES

**U.L.A.** — Uniform Commercial Code  
(U.L.A.) § 4A-507.

## ARTICLE 5

## LETTERS OF CREDIT

Sec.		Sec.	
11-5-101.	Short title.	11-5-110.	Warranties.
11-5-102.	Definitions.	11-5-111.	Remedies.
11-5-103.	Scope.	11-5-112.	Transfer of letter of credit.
11-5-104.	Formal requirements.	11-5-113.	Transfer by operation of law.
11-5-105.	Consideration.	11-5-114.	Assignment of proceeds.
11-5-106.	Issuance, amendment, cancellation, and duration.	11-5-115.	Statute of limitations.
11-5-107.	Confirmer, nominated person, and adviser.	11-5-116.	Choice of law and forum.
11-5-108.	Issuer's rights and obligations.	11-5-117.	Subrogation of issuer, applicant, and nominated person.
11-5-109.	Fraud and forgery.	11-5-118.	Security interest of issuer or nominated person.

**Editor's notes.** — Ga. L. 2002, p. 995, § 1, effective July 1, 2002, repealed the Code sections formerly codified at Article 5 and enacted the current Article 5. The former Article 5 consisted of Code Sections 11-5-101 through 11-5-118, relating to letters of credit, and was based on Code 1933 §§ 109A-5-101 through 116, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 1963, p. 188, § 14; Ga. L. 1978, p. 1081, § 6; Ga. L. 1992,

p. 2626, § 2; Ga. L. 1998, p. 1323, § 18; Ga. L. 2001, p. 362, § 14.

Ga. L. 2002, p. 995, § 8, not codified by the General Assembly, provides that: "This Act shall become effective July 1, 2002, and shall apply to a letter of credit that is issued on or after July 1, 2002. This Act does not apply to a transaction, event, obligation, or duty arising out of or associated with a letter of credit that was issued before July 1, 2002."

**11-5-101. Short title.**

This article may be cited as "Uniform Commercial Code—Letters of Credit." (Code 1981, § 11-5-101, enacted by Ga. L. 2002, p. 995, § 1.)

**Effective date.** — This Code section became effective July 1, 2002.

## JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Article 5 are included in the annotations for this Code section.

**Contract law applicability.** — Letters of credit, being contracts, are subject to same general principles applicable to other written contracts. *First Nat'l Bank v. Wynne*, 149 Ga. App. 811, 256 S.E.2d 383 (1979).

**Silent confirmation of a letter of credit** may serve a purpose similar to that of a

former Article 5 confirmation by providing the beneficiary with an additional source of payment; however, it involves different parties and creates different rights and obligations and, clearly, a silent confirmation is not a former Article 5 confirmation and falls outside the operation of the UCC. *Dibrell Bros. Int'l v. Banca Nazionale Del Lavoro*, 38 F.3d 1571 (11th Cir. 1994).

Former Article 5 did not preclude recovery for breach of contract to silently confirm on a common law breach of contract theory.

Dibrell Bros. Int'l v. Banca Nazionale Del Lavoro, 38 F.3d 1571 (11th Cir. 1994).

**Cited** in Barclays Bank v. Mercantile Nat'l Bank, 481 F.2d 1224 (5th Cir. 1973).

### RESEARCH REFERENCES

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 5-101.

**ALR.** — What is a letter of credit under UCC §§ 5-102, 5-103, 44 ALR4th 172.

### 11-5-102. Definitions.

(a) As used in this article, the term:

(1) “Adviser” means a person who at the request of the issuer, a confirmer, or another adviser, notifies or requests another adviser to notify the beneficiary that a letter of credit has been issued, confirmed, or amended.

(2) “Applicant” means a person at whose request or for whose account a letter of credit is issued. The term includes a person who requests an issuer to issue a letter of credit on behalf of another if the person making the request undertakes an obligation to reimburse the issuer.

(3) “Beneficiary” means a person who under the terms of a letter of credit is entitled to have its complying presentation honored. The term includes a person to whom drawing rights have been transferred under a transferable letter of credit.

(4) “Confirmer” means a nominated person who undertakes, at the request or with the consent of the issuer, to honor a presentation under a letter of credit issued by another.

(5) “Dishonor” of a letter of credit means failure timely to honor or to take an interim action such as acceptance of a draft that may be required by the letter of credit.

(6) “Document” means a draft or other demand, document of title, investment security, certificate, invoice, or other record, statement or representation of fact, law, right, or opinion:

(A) Which is presented in a written or other medium permitted by the letter of credit or, unless prohibited by the letter of credit, by the standard practice referred to in subsection (e) of Code Section 11-5-108; and

(B) Which is capable of being examined for compliance with the terms and conditions of the letter of credit. A document may not be oral.

(7) “Good faith” means honesty in fact in the conduct or transaction.



(8) “Honor” of a letter of credit means performance of the issuer’s undertaking in the letter of credit to pay or deliver an item of value. Unless the letter of credit provides otherwise, “honor” occurs:

(A) Upon payment;

(B) If the letter of credit provides for acceptance, upon acceptance of a draft and at maturity, its payment; or

(C) If the letter of credit provides for incurring a deferred obligation, upon incurring the obligation and, at maturity, its performance.

(9) “Issuer” means a bank, entity, or other person that issues a letter of credit but does not include an individual who makes an engagement for personal, family, or household purposes.

(10) “Letter of credit” means a definite undertaking that satisfies the requirements of Code Section 11-5-104 by an issuer to a beneficiary at the request of or for the account of an applicant or, in the case of a financial institution, to itself or for its own account, to honor a documentary presentation by payment or delivery of an item of value.

(11) “Nominated person” means a person whom the issuer:

(A) Designates or authorizes to pay, accept, negotiate, or otherwise give value under a letter of credit; and

(B) Undertakes by agreement or custom and practice to reimburse.

(12) “Presentation” means delivery of a document to an issuer or nominated person for honor or giving of value under a letter of credit.

(13) “Presenter” means a person making a presentation as or on behalf of a beneficiary or nominated person.

(14) “Record” means information that is inscribed on a tangible medium or which is stored in an electronic or other medium and is retrievable in perceivable form.

(15) “Successor of a beneficiary” means a person who succeeds to substantially all of the rights of a beneficiary by operation of law, including a corporation with or into which a beneficiary has merged or consolidated, an administrator, executor, personal representative, trustee in bankruptcy, debtor in possession, liquidator, and receiver.

(b) Other definitions applying to this article and the Code sections in which they appear are:

“Accept” or “acceptance.” Code Section 11-3-409.

“Value.” Code Section 11-3-303 and 11-4-211.

(c) Article 1 of this title contains general definitions and principles of construction and interpretation applicable throughout this article. (Code 1981, § 11-5-102, enacted by Ga. L. 2002, p. 995, § 1.)

## JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Article 5 are included in the annotations for this Code section.

**Bank confirmation of nonbank credit.** — The fact that former O.C.G.A. § 11-5-103(1)(f) of this section provides a definition for a confirming bank with regard to letters of credit issued by a bank does not preclude existence of bank confirmation of a nonbank credit. *Barclays Bank D.C.O. v. Mercantile Nat'l Bank*, 339 F. Supp. 457 (N.D. Ga. 1972), *aff'd*, 481 F.2d 1224 (5th

Cir. 1973), *cert. dismissed*, 414 U.S. 1139, 94 S. Ct. 888, 39 L. Ed. 2d 96 (1974).

**Language precluding denial of purpose to act as a "confirming bank."** — See *Barclays Bank D.C.O. v. Mercantile Nat'l Bank*, 339 F. Supp. 457 (N.D. Ga. 1972), *aff'd*, 481 F.2d 1224 (5th Cir. 1973), *cert. dismissed*, 414 U.S. 1139, 94 S. Ct. 888, 39 L. Ed. 2d 96 (1974).

**Cited in** *Benton v. Thacker*, 257 Ga. 94, 355 S.E.2d 421 (1987); *Dibrell Bros. Int'l v. Banca Nazionale Del Lavoro*, 38 F.3d 1571 (11th Cir. 1994).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 50 Am. Jur. 2d, Letters of Credit, and Credit Cards, §§ 23, 32.

**C.J.S.** — 82 C.J.S., Statutes, § 309.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 5-102.

**ALR.** — What constitutes letter of credit, 30 ALR 1310.

Modification, revocation, or reformation of letter of credit—modern cases, 13 ALR5th 465.

Validity, construction, and application of the uniform customs and practice for documentary credits (UCP), 56 ALR5th 565.

## 11-5-103. Scope.

(a) This article applies to letters of credit and to certain rights and obligations arising out of transactions involving letters of credit.

(b) The statement of a rule in this article does not by itself require, imply, or negate application of the same or a different rule to a situation not provided for or to a person not specified in this article.

(c) With the exception of subsections (a), (b), and (d) of this Code section, paragraphs (9) and (10) of subsection (a) of Code Section 11-5-102, subsection (d) of Code Section 11-5-106, and subsection (d) of Code Section 11-5-114 and except to the extent prohibited in subsection (3) of Code Section 11-5-102 and subsection (d) of Code Section 11-5-117, the effect of this article may be varied by agreement or by a provision stated or incorporated by reference in an undertaking. A term in an agreement or undertaking generally excusing liability or generally limiting remedies for failure to perform obligations is not sufficient to vary obligations prescribed by this article.

(d) Rights and obligations of an issuer to a beneficiary or a nominated person under a letter of credit are independent of the existence, performance, or nonperformance of a contract or arrangement out of which the letter of credit arises or which underlies it including contracts or arrangements between the issuer and the applicant and between the applicant and

the beneficiary. (Code 1981, § 11-5-103, enacted by Ga. L. 2002, p. 995, § 1.)

JUDICIAL DECISIONS

**Editor’s notes.** — In light of the similarity of the provisions, decisions under former Article 5 are included in the annotations for this Code section.

**Court managed expansion of former Article 5 principles.** — Former O.C.G.A. § 11-5-102(3) expressly contemplates court-managed expansion of principles contained in former Article 5. *Barclays Bank v. Mercantile Nat’l Bank*, 481 F.2d 1224 (5th Cir. 1973), cert. dismissed, 414 U.S. 1139, 94 S. Ct. 888, 39 L. Ed. 2d 96, (1974).

**Bank confirmation of nonbank credit.** — The fact that former O.C.G.A. § 11-5-103(1)(f) provides a definition for a confirming bank with regard to letters of credit issued by a bank does not preclude

existence of bank confirmation of a nonbank credit. *Barclays Bank D.C.O. v. Mercantile Nat’l Bank*, 339 F. Supp. 457 (N.D. Ga. 1972), aff’d, 481 F.2d 1224 (5th Cir. 1973), cert. dismissed, 414 U.S. 1139, 94 S. Ct. 888, 39 L. Ed. 2d 96 (1974).

**Failure to give timely notice of dishonor.** — The issuing bank’s failure to give timely notice of dishonor was not excused by the fact that the beneficiary later admitted it could not have produced the documents in question, no matter how much time it was given. *Pro-Fab, Inc. v. Vipa, Inc.*, 772 F.2d 847 (11th Cir. 1985).

**Cited in** *Bank S. v. Roswell Jeep Eagle, Inc.*, 204 Ga. App. 432, 419 S.E.2d 522 (1992).

RESEARCH REFERENCES

**Am. Jur. 2d.** — 11 Am. Jur. 2d, Bills and Notes, § 337 et seq. 50 Am. Jur. 2d, Letters of Credit, and Credit Cards, §§ 19, 72, 73.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 5-103.

**ALR.** — Variance between description of goods in letter of credit and documents accompanying draft as affecting duty to accept draft, 30 ALR 353; 8 ALR5th 463.

Construction of provision for extension in letter of credit or guaranty for purchase price of goods, 45 ALR 1393.

Construction and effect of UCC Art. 5, dealing with letters of credit, 35 ALR3d 1404.

Modification, revocation, or reformation of letter of credit—modern cases, 13 ALR5th 465.

Validity, construction, and application of the uniform customs and practice for documentary credits (UCP), 56 ALR5th 565.

11-5-104. Formal requirements.

A letter of credit, confirmation, advice, transfer, amendment, or cancellation may be issued in any form that is a record and is authenticated:

- (1) By a signature; or
- (2) In accordance with the agreement of the parties or the standard practice referred to in subsection (e) of Code Section 11-5-108. (Code 1981, § 11-5-104, enacted by Ga. L. 2002, p. 995, § 1.)

JUDICIAL DECISIONS

**Editor’s notes.** — In light of the similarity of the provisions, decisions under former

Article 5 are included in the annotations for this Code section.



**Cited** in *Dibrell Bros. Int’l v. Banca Nazionale Del Lavoro*, 38 F.3d 1571 (11th Cir. 1994).

RESEARCH REFERENCES

**Am. Jur. 2d.** — 50 Am. Jur. 2d, Letters of Credit, and Credit Cards, §§ 8, 14.      **U.L.A.** — Uniform Commercial Code (U.L.A.) § 5-104.

11-5-105. **Consideration.**

Consideration is not required to issue, amend, transfer, or cancel a letter of credit, advice, or confirmation. (Code 1981, § 11-5-105, enacted by Ga. L. 2002, p. 995, § 1.)

JUDICIAL DECISIONS

**Editor’s notes.** — In light of the similarity of the provisions, decisions under former Article 5 are included in the annotations for this Code section.      **Cited** in *Barclays Bank v. Mercantile Nat’l Bank*, 481 F.2d 1224 (5th Cir. 1973).

RESEARCH REFERENCES

**Am. Jur. 2d.** — 50 Am. Jur. 2d, Letters of Credit, and Credit Cards, § 16.      **U.L.A.** — Uniform Commercial Code (U.L.A.) § 5-105.

11-5-106. **Issuance, amendment, cancellation, and duration.**

(a) A letter of credit is issued and becomes enforceable according to its terms against the issuer when the issuer sends or otherwise transmits it to the person requested to advise or to the beneficiary. A letter of credit is revocable only if it provides that it is revocable.

(b) After a letter of credit is issued, rights and obligations of a beneficiary, applicant, confirmer, and issuer are not affected by an amendment or cancellation to which that person has not consented except to the extent the letter of credit provides that it is revocable or that the issuer may amend or cancel the letter of credit without that consent.

(c) If there is no stated expiration date or other provision that determines its duration, a letter of credit expires one year after its stated date of issuance or, if none is stated, one year after the date on which it is issued.

(d) A letter of credit that states that it is perpetual expires five years after its stated date of issuance or, if none is stated, five years after the date on which it is issued. (Code 1981, § 11-5-106, enacted by Ga. L. 2002, p. 995, § 1.)

## JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Article 5 are included in the annotations for this Code section.

**Cited** in *Barclays Bank v. Mercantile Nat'l Bank*, 481 F.2d 1224 (5th Cir. 1973);

*Goodwin Bros. Leasing v. Citizens Bank*, 587 F.2d 730 (5th Cir. 1979); *Pro-Fab, Inc. v. Vipa, Inc.*, 772 F.2d 847 (11th Cir. 1985); *Dibrell Bros. Int'l v. Banca Nazionale Del Lavoro*, 38 F.3d 1571 (11th Cir. 1994).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 50 Am. Jur. 2d, Letters of Credit, and Credit Cards, §§ 17, 23, 32.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 5-106.

**ALR.** — Liability of one who purchases

draft and secures its payment after letter of credit has expired, 56 ALR 1190.

Modification, revocation, or reformation of letter of credit—modern cases, 13 ALR5th 465.

**11-5-107. Confirmer, nominated person, and adviser.**

(a) A confirmer is directly obligated on a letter of credit and has the rights and obligations of an issuer to the extent of its confirmation. The confirmer also has rights against and obligations to the issuer as if the issuer were an applicant and the confirmer had issued the letter of credit at the request of and for the account of the issuer.

(b) A nominated person who is not a confirmer is not obligated to honor or otherwise give value for a presentation.

(c) A person required to advise may decline to act as an adviser. An adviser that is not a confirmer is not obligated to honor or give value for a presentation. An adviser undertakes to the issuer and to the beneficiary accurately to advise the terms of the letter of credit, confirmation, amendment, or advice received by that person and undertakes to the beneficiary to check the apparent authenticity of the requirement to advise. Even if the advice is inaccurate, the letter of credit, confirmation, or amendment is enforceable as issued.

(d) A person who notifies a transferee beneficiary of the terms of a letter of credit, confirmation, amendment, or advice has the rights and obligations of an adviser under subsection (c) of this Code section. The terms in the notice to the transferee beneficiary may differ from the terms in any notice to the transferor beneficiary to the extent permitted by the letter of credit, confirmation, amendment, or advice received by the person who so notifies. (Code 1981, § 11-5-107, enacted by Ga. L. 2002, p. 995, § 1.)

**Law reviews.** — For annual survey article discussing letter of credit issues, see 46 Mercer L. Rev. 71 (1994).

## JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Article 5 are included in the annotations for this Code section.

**A bank may confirm credit issued by nonbank,** thus becoming primarily liable on it. *Barclays Bank v. Mercantile Nat'l Bank*, 481 F.2d 1224 (5th Cir. 1973), cert. dismissed, 414 U.S. 1139, 94 S. Ct. 888, 39 L. Ed. 2d 96 (1974).

**Language precluding denial of purpose to act as a "confirming bank."** — See *Barclays Bank D.C.O. v. Mercantile Nat'l Bank*, 339 F. Supp. 457 (N.D. Ga. 1972), aff'd, 481 F.2d 1224 (5th Cir. 1973), cert. dismissed, 414 U.S. 1139, 94 S. Ct. 888, 39 L. Ed. 2d 96 (1974).

**Cited in** *Dibrell Bros. Int'l v. Banca Nazionale Del Lavoro*, 38 F.3d 1571 (11th Cir. 1994).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 50 Am. Jur. 2d, Letters of Credit and Credit Cards, §§ 80, 81.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 5-107.

**11-5-108. Issuer's rights and obligations.**

(a) Except as otherwise provided in Code Section 11-5-109, an issuer shall honor a presentation that, as determined by the standard practice referred to in subsection (e) of this Code section, appears on its face strictly to comply with the terms and conditions of the letter of credit. Except as otherwise provided in Code Section 11-5-113 and unless otherwise agreed with the applicant, an issuer shall dishonor a presentation that does not appear to comply.

(b) An issuer has a reasonable time after presentation, but not beyond the end of the seventh business day of the issuer after the day of its receipt of documents:

(1) To honor;

(2) If the letter of credit provides for honor to be completed more than seven business days after presentation, to accept a draft or incur a deferred obligation; or

(3) To give notice to the presenter of discrepancies in the presentation.

(c) Except as otherwise provided in subsection (d) of this Code section, an issuer is precluded from asserting as a basis for dishonor any discrepancy if timely notice is not given or from asserting as a basis for dishonor any discrepancy not stated in the notice if timely notice is given.

(d) Failure to give the notice specified in subsection (b) of this Code section or to mention fraud, forgery, or expiration in the notice does not preclude the issuer from asserting as a basis for dishonor, fraud, or forgery as described in subsection (a) of Code Section 11-5-109 or expiration of the letter of credit before presentation.



(e) An issuer shall observe the standard practice of financial institutions that regularly issue letters of credit. Determination of the issuer's observance of the standard practice is a matter of interpretation for the court. The court shall offer the parties a reasonable opportunity to present evidence of the standard practice.

(f) An issuer is not responsible for:

(1) The performance or nonperformance of the underlying contract, arrangement, or transaction;

(2) An act or omission of others; or

(3) Observance of knowledge of the usage of a particular trade other than the standard practice referred to in subsection (e) of this Code section.

(g) If an undertaking constituting a letter of credit under paragraph (10) of subsection (a) of Code Section 11-5-102 contains nondocumentary conditions, an issuer shall disregard the nondocumentary conditions and treat them as if they were not stated.

(h) An issuer that has dishonored a presentation shall return the documents to the presenter or hold the documents at the disposal of the presenter and send advice to that effect to the presenter.

(i) An issuer that has honored a presentation as permitted or required by this article:

(1) Is entitled to be reimbursed by the applicant in immediately available funds not later than the date of its payment of funds;

(2) Takes the documents free of claims of the beneficiary or presenter;

(3) Is precluded from asserting a right of recourse on a draft under Code Sections 11-3-414 and 11-3-415;

(4) Except as otherwise provided in Code Sections 11-5-110 and 11-5-117, is precluded from restitution of money paid or other value given by mistake to the extent the mistake concerns discrepancies in the documents or tender which are apparent on the face of the presentation; and

(5) Is discharged to the extent of its performance under the letter of credit unless the issuer honored a presentation in which a required signature of a beneficiary was forged. (Code 1981, § 11-5-108, enacted by Ga. L. 2002, p. 995, § 1.)

**Law reviews.** — For article supporting the retention of waiver of defense clauses in credit card agreements, see 10 Ga. St. B.J. 17 (1973).

For note on 1992 amendment of this Code section, see 9 Ga. St. U.L. Rev. 168 (1992).

## JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Article 5 are included in the annotations for this Code section.

**Meaning of issuer's duty of "care."** — Duty resting on issuer is one of exercising "care" and this will undoubtedly be interpreted as meaning "reasonable care under the circumstances" so that to some extent, a deviation, if permissible, in exercise of due care would not impose liability. *First Nat'l Bank v. Wynne*, 149 Ga. App. 811, 256 S.E.2d 383 (1979).

**A beneficiary must comply with terms of letter of credit** or there is no liability on part of issuer to honor beneficiary's draft. *First Nat'l Bank v. Wynne*, 149 Ga. App. 811, 256 S.E.2d 383 (1979).

**Failure to comply with terms.** — The beneficiary, which failed to present all the documents called for in the letter of credit, did not substantially comply with the letter of credit, although the omitted documents passed through another department of the bank to which the letter of credit was presented. *Pro-Fab, Inc. v. Vipa, Inc.*, 772 F.2d 847 (11th Cir. 1985).

**Placing refusal to pay on one ground waives all others.** — Where letters of credit are concerned, by formally placing refusal to pay on one ground, defendant is held to have waived all others. *Barclays Bank D.C.O.*

*v. Mercantile Nat'l Bank*, 339 F. Supp. 457 (N.D. Ga. 1972), *aff'd*, 481 F.2d 1224 (5th Cir. 1973), *cert. dismissed*, 414 U.S. 1139, 94 S. Ct. 888, 39 L. Ed. 2d 96 (1974).

**Failure to comply with terms.** — The beneficiary, which failed to present all the documents called for in the letter of credit, did not substantially comply with the letter of credit, even though the omitted documents passed through another department of the bank to which the letter of credit was presented. *Pro-Fab, Inc. v. Vipa, Inc.*, 772 F.2d 847 (11th Cir. 1985).

**Fraud exception to independence principle inapplicable.** — In an action to enjoin enforcement of a letter of credit, the fraud exception to the "independence principle" of O.C.G.A. § 11-5-114 did not apply because the complaint did not allege fraud and the allegations in plaintiff's brief were not sufficient to show fraud. *Jurisco, Inc. v. Bank South*, 228 Ga. App. 799, 492 S.E.2d 765 (1997).

**Cited in** *Barclays Bank v. Mercantile Nat'l Bank*, 481 F.2d 1224 (5th Cir. 1973); *Barclays Bank v. Mercantile Nat'l Bank*, 481 F.2d 1224 (5th Cir. 1973); *Dibrell Bros. Int'l v. Banca Nazionale Del Lavoro*, 38 F.3d 1571 (11th Cir. 1994); *Vass v. Gainesville Bank & Trust*, 224 Ga. App. 259, 480 S.E.2d 294 (1997); *Strozso v. Sea Island Bank*, 240 Ga. App. 183, 521 S.E.2d 392 (1999).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 11 Am. Jur. 2d, Banks and Financial Institutions, §§ 993, 996. 50 Am. Jur. 2d, Letters of Credit, and Credit Cards, §§ 35 et seq., 37 et seq., 58 et seq.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 5-108.

**ALR.** — Variance between description of goods in letter of credit and documents accompanying draft as affecting duty to accept draft, 30 ALR 353; 8 ALR5th 463.

Rights and remedies of holder of draft issued under letter of credit which is dishonored, 53 ALR 57.

Recovery of money paid for unused traveler's check, letter of credit, or foreign exchange, 62 ALR 509.

Procuring signature by fraud as forgery, 11 ALR3d 1074.

What constitutes fraud or forgery justifying refusal to honor, or injunction against honoring, letter of credit under UCC § 5-114(1)(2), 25 ALR4th 239.

Applicability of waiver or estoppel to preclude claim of nonconformance of documents as ground for dishonor or presentment under letter of credit under UCC § 5-114, 53 ALR5th 667.

Validity, construction, and application of the uniform customs and practice for documentary credits (UCP), 56 ALR5th 565.

**11-5-109. Fraud and forgery.**

(a) If a presentation is made that appears on its face strictly to comply with the terms and conditions of the letter of credit, but a required document is forged or materially fraudulent, or honor of the presentation would facilitate a material fraud by the beneficiary on the issuer or applicant:

(1) The issuer shall honor the presentation, if honor is demanded by:

(A) A nominated person who has given value in good faith and without notice of forgery or material fraud;

(B) A confirmer who has honored its confirmation in good faith;

(C) A holder in due course of a draft drawn under the letter of credit which was taken after acceptance by the issuer or nominated person; or

(D) An assignee of the issuer's or nominated person's deferred obligation that was taken for value and without notice of forgery or material fraud after the obligation was incurred by the issuer or nominated persons; and

(2) The issuer, acting in good faith, may honor or dishonor the presentation in any other case.

(b) If an applicant claims that a required document is forged or materially fraudulent or that honor of the presentation would facilitate a material fraud by the beneficiary on the issuer or applicant, a court of competent jurisdiction may temporarily or permanently enjoin the issuer from honoring a presentation or grant similar relief against the issuer or other persons only if the court finds that:

(1) The relief is not prohibited under the law applicable to an accepted draft or deferred obligation incurred by the issuer;

(2) A beneficiary, issuer, or nominated person who may be adversely affected is adequately protected against loss that it may suffer because the relief is granted;

(3) All of the conditions to entitle a person to the relief under the law of this state have been met; and

(4) On the basis of the information submitted to the court, the applicant is more likely than not to succeed under its claim of forgery or material fraud and the person demanding honor does not qualify for protection under paragraph (1) of subsection (a) of this Code section. (Code 1981, § 11-5-109, enacted by Ga. L. 2002, p. 995, § 1.)



**RESEARCH REFERENCES**

**U.L.A.** — Uniform Commercial Code  
(U.L.A.) § 5-109.

**11-5-110. Warranties.**

(a) If its presentation is honored, the beneficiary warrants:

(1) To the issuer, any other person to whom presentation is made, and the applicant that there is no fraud or forgery of the kind described in subsection (a) of Code Section 11-5-109; and

(2) To the applicant that the drawing does not violate any agreement between the applicant and beneficiary or any other agreement intended by them to be augmented by the letter of credit.

(b) The warranties in subsection (a) of this Code section are in addition to warranties arising under Articles 3, 4, 7, and 8 of this title because of the presentation or transfer of documents covered by any of those articles. (Code 1981, § 11-5-110, enacted by Ga. L. 2002, p. 995, § 1.)

**RESEARCH REFERENCES**

**U.L.A.** — Uniform Commercial Code  
(U.L.A.) § 5-110.

**11-5-111. Remedies.**

(a) If an issuer wrongfully dishonors or repudiates its obligation to pay money under a letter of credit before presentation, the beneficiary, successor, or nominated person presenting on its own behalf may recover from the issuer the amount that is the subject of the dishonor or repudiation. If the issuer's obligation under the letter of credit is not for the payment of money the claimant may obtain specific performance or at the claimant's election recover an amount equal to the value of performance from the issuer. In either case the claimant may also recover incidental damages but not consequential damages. The claimant is not obligated to take action to avoid damages that might be due from the issuer under this subsection. If, although not obligated to do so, the claimant avoids damages, the claimant's recovery from the issuer must be reduced by the amount of damages avoided. The issuer has the burden of proving the amount of damages avoided. In the case of repudiation the claimant need not present any document.

(b) If an issuer wrongfully dishonors a draft or demand presented under a letter of credit or honors a draft or demand in breach of its obligation to the applicant, the applicant may recover damages resulting from the breach, including incidental damages but not consequential damages, less any amount saved as a result of the breach.

(c) If an adviser or nominated person other than a confirmer breaches an obligation under this article or an issuer breaches an obligation not covered in subsection (a) or (b) of this Code section, a person to whom the obligation is owed may recover damages resulting from the breach, including incidental damages but not consequential damages, less any amount saved as a result of the breach. To the extent of the confirmation, a confirmer has the liability of an issuer specified in this subsection and in subsections (a) and (b) of this Code section.

(d) An issuer, nominated person, or adviser who is found liable under subsection (a), (b), or (c) of this Code section shall pay interest on the amount owed thereunder from the date of wrongful dishonor or other appropriate date.

(e) Reasonable attorney's fees and other expenses of litigation shall be awarded to the prevailing party in an action in which a remedy is sought under this article.

(f) Damages that would otherwise be payable by a party for breach of an obligation under this article may be liquidated by agreement or undertaking but only in an amount or by a formula that is reasonable in light of the harm anticipated. (Code 1981, § 11-5-111, enacted by Ga. L. 2002, p. 995, § 1.)

### JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Article 5 are included in the annotations for this Code section.

**Mitigation of damages.** — Former Code Section 11-5-115(1) did not expressly impose or negate duty to mitigate damages. *Beckman Cotton Co. v. First Nat'l Bank*, 666 F.2d 181 (5th Cir. 1982).

**Measurement of damages.** — Former Code Section 11-5-115(1) did not automatically require that face amount of draft be sole measure of damages. *Beckman Cotton Co. v. First Nat'l Bank*, 666 F.2d 181 (5th Cir. 1982).

**What constitutes incidental damages.** — If issuer wrongfully dishonors draft or demand

for payment under credit letter, person entitled to honor may recover from issuer the face amount of the draft or demand together with incidental damages. Incidental damages include all commercially reasonable expenditures. The test of commercial reasonableness is a practical one, requiring primarily honesty and good faith in attempting to minimize damages. What is commercially reasonable is to be determined from all the facts and circumstances of each case, and must be judged in light of one viewing situation at time problem was presented. *Beckman Cotton Co. v. First Nat'l Bank*, 666 F.2d 181 (5th Cir. 1982).

**Cited in** *Pro-Fab, Inc. v. Vipa, Inc.*, 772 F.2d 847 (11th Cir. 1985).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 15A Am. Jur. 2d, Commercial Code, § 67. 50 Am. Jur. 2d, Letters of Credit, and Credit Cards, § 75 et seq. 68A Am. Jur. 2d, Secured Transactions, § 13.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 5-111.

**ALR.** — Rights and remedies of holder of draft issued under letter of credit which is dishonored, 53 ALR 57.

Liability of one who purchases draft and secures its payment after letter of credit has expired, 56 ALR 1190.

Recovery of money paid for unused traveler's check, letter of credit, or foreign exchange, 62 ALR 509.

Damages recoverable for wrongful dishonor of letter of credit under UCC § 5-115, 2 ALR4th 665.

### 11-5-112. Transfer of letter of credit.

(a) Except as otherwise provided in Code Section 11-5-113, unless a letter of credit provides that it is transferable the right of a beneficiary to draw or otherwise demand performance under a letter of credit may not be transferred.

(b) Even if a letter of credit provides that it is transferable, the issuer may refuse to recognize or carry out a transfer if:

(1) The transfer would violate applicable law; or

(2) The transferor or transferee has failed to comply with any requirement stated in the letter of credit or any other requirement relating to transfer imposed by the issuer which is within the standard practice referred to in subsection (e) of Code Section 11-5-108 or is otherwise reasonable under the circumstances. (Code 1981, § 11-5-112, enacted by Ga. L. 2002, p. 995, § 1.)

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 50 Am. Jur. 2d, Letters of Credit, and Credit Cards, §§ 21, 22. 68A Am. Jur. 2d, Secured Transactions, §§ 16. 39 et seq.

**C.J.S.** — 6A C.J.S., Assignments, § 1 et seq.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 5-112.

### 11-5-113. Transfer by operation of law.

(a) A successor of a beneficiary may consent to amendments, sign and present documents, and receive payment or other items of value in the name of the beneficiary without disclosing its status as a successor.

(b) A successor of a beneficiary may consent to amendments, sign and present documents, and receive payment or other items of value in its own name as the disclosed successor of the beneficiary. Except as otherwise provided in subsection (e) of this Code section, an issuer shall recognize a disclosed successor of a beneficiary as beneficiary in full substitution for its predecessor upon compliance with the requirements for recognition by the issuer of a transfer of drawing rights by operation of law under the standard practice referred to in subsection (e) of Code Section 11-5-108 or, in the absence of such a practice, compliance with other reasonable procedures sufficient to protect the issuer.

(c) An issuer is not obliged to determine whether a purported successor is a successor of a beneficiary or whether the signature of a purported successor is genuine or authorized.



(d) Honor of a purported successor's apparently complying presentation under subsection (a) or (b) of this Code section has the consequences specified in subsection (i) of Code Section 11-5-108 even if the purported successor is not the successor of a beneficiary. Documents signed in the name of the beneficiary or of a disclosed successor by a person who is neither the beneficiary nor the successor of the beneficiary are forged documents for the purposes of Code Section 11-5-109.

(e) An issuer whose rights of reimbursement are not covered by subsection (d) of this Code section or substantially similar law and any confirmer or nominated person may decline to recognize a presentation under subsection (b) of this Code section.

(f) A beneficiary whose name is changed after the issuance of a letter of credit has the same rights and obligations as a successor of a beneficiary under this Code section. (Code 1981, § 11-5-113, enacted by Ga. L. 2002, p. 995, § 1.)

#### RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 5-113.

#### **11-5-114. Assignment of proceeds.**

(a) As used in this Code section, the term "proceeds of a letter of credit" means the cash, check, accepted draft, or other item of value paid or delivered upon honor or giving of value by the issuer or any nominated person under the letter of credit. The term does not include a beneficiary's drawing rights or documents presented by the beneficiary.

(b) A beneficiary may assign its right to part or all of the proceeds of a letter of credit. The beneficiary may do so before presentation as a present assignment of its right to receive proceeds contingent upon its compliance with the terms and conditions of the letter of credit.

(c) An issuer or nominated person need not recognize an assignment of proceeds of a letter of credit until it consents to the assignment.

(d) An issuer or nominated person has no obligation to give or withhold its consent to an assignment of proceeds of a letter of credit, but consent may not be unreasonably withheld if the assignee possesses and exhibits the letter of credit and presentation of the letter of credit is a condition to honor.

(e) Rights of a transferee beneficiary or nominated person are independent of the beneficiary's assignment of the proceeds of a letter of credit and are superior to the assignee's right to the proceeds.

(f) Neither the rights recognized by this Code section between an assignee and an issuer, transferee beneficiary, or nominated person nor the

issuer's or nominated person's payment of proceeds to an assignee or a third person affect the rights between the assignee and any person other than the issuer, transferee beneficiary, or nominated person. The mode of creating and perfecting a security interest in or granting an assignment of a beneficiary's rights to proceeds is governed by Article 9 of this title or other law. Against persons other than the issuer, transferee beneficiary, or nominated person, the rights and obligations arising upon the creation of a security interest or other assignment of a beneficiary's right to proceeds and its perfection are governed by Article 9 of this title or other law. (Code 1981, § 11-5-114, enacted by Ga. L. 2002, p. 995, § 1.)

#### RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 5-114.

#### 11-5-115. Statute of limitations.

An action to enforce a right or obligation arising under this article must be commenced within one year after the expiration date of the relevant letter of credit or one year after the cause of action accrues, whichever occurs later. A cause of action accrues when the breach occurs regardless of the aggrieved party's lack of knowledge of the breach. (Code 1981, § 11-5-115, enacted by Ga. L. 2002, p. 995, § 1.)

#### RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 5-115.

#### 11-5-116. Choice of law and forum.

(a) The liability of an issuer, nominated person, or adviser for any action or omission is governed by the law of the jurisdiction chosen by an agreement in the form of a record signed or otherwise authenticated by the affected parties in the manner provided in Code Section 11-5-104 or by a provision in the person's letter of credit, confirmation, or other undertaking. The jurisdiction whose law is chosen need not bear any relation to the transaction.

(b) Unless subsection (a) of this Code section applies, the liability of an issuer, nominated person, or adviser for any action or omission is governed by the law of the jurisdiction in which the person is located. The person is considered to be located at the address indicated in the person's undertaking. If more than one address is indicated, the person is considered to be located at the address from which the person's undertaking was issued. For the purpose of jurisdiction, choice of law, and recognition of interbranch letters of credit, but not enforcement of a judgment, all branches of a bank

long as the debtor does not have possession of the document. (Code 1981, § 11-5-118, enacted by Ga. L. 2002, p. 995, § 1.)

#### RESEARCH REFERENCES

**U.L.A.** — Uniform Commercial Code  
(U.L.A.) § 5-118.



## BULK TRANSFERS

### ARTICLE 6

#### BULK TRANSFERS

Sec.		Sec.	
11-6-101.	Short title.	11-6-105.	Notice to creditors.
11-6-102.	"Bulk transfer"; transfers of equipment; enterprises subject to this article; bulk transfers subject to this article.	11-6-106.	Definition of public notice.
11-6-103.	Transfers excepted from this article.	11-6-107.	The notice.
11-6-104.	Schedule of property, list of creditors.	11-6-108.	Auction sales; "auctioneer."
		11-6-109.	What creditors protected.
		11-6-110.	Subsequent transfers.
		11-6-111.	Limitation of actions and levies.

**Cross references.** — Requirement that bulk sales of heating fuel be accompanied by delivery ticket containing identification of commodities, count of packages, etc., § 10-2-10.

**Law reviews.** — For survey article on commercial law, see 34 Mercer L. Rev. 31 (1982). For article, "Leveraged Buyouts in Bankruptcy," see 20 Ga. L. Rev. 73 (1985).

### JUDICIAL DECISIONS

#### ANALYSIS

##### GENERAL CONSIDERATION

##### REMEDIES

#### General Consideration

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Civil Code 1910, § 3226, and former Code 1933, § 28-203 are included in the annotations for this article.

**Article derogates common law, and one's right to alienate one's own property without restriction** and is therefore to be strictly construed. *Yancey v. Lamar-Rankin Drug Co.*, 140 Ga. 359, 78 S.E. 1078 (1913); *Martin v. Taylor*, 24 Ga. App. 598, 101 S.E. 690 (1919); *Bank of LaGrange v. Rutland*, 27 Ga. App. 442, 108 S.E. 821 (1921), later appeal, 29 Ga. App. 478, 116 S.E. 49 (1923) (decided under former Civil Code 1910, § 3226).

**Purpose of article.** — Purpose of this article is not to eliminate remedy of original seller, but rather to protect seller on contractual indebtedness assumed to have been made at least partly on implication of solvency of purchaser arising from ownership of inventory of a going business. *McClain v. Laurens Glass Co.*, 127 Ga. App. 316, 193 S.E.2d 194 (1972).

Central purpose underlying Art. 6 of the Uniform Commercial Code is to deal with type of commercial fraud in which merchant debtor sells stock and trade to another, pockets the proceeds, and then absconds, leaving the merchant's creditors unpaid. *Johnson v. Vincent Brass & Aluminum Co.*, 244 Ga. 412, 260 S.E.2d 325 (1979).

Purpose of article is to protect creditors against fraudulent sales by debtors. *W.W. Stovall Co. v. W.E. Shepherd Co.*, 10 Ga. App. 498, 73 S.E. 761 (1912) (decided under former Civil Code 1910, § 3226).

Purpose of article is to permit seller's creditors to subject consideration of proposed sale to garnishment before buyer disburses funds of such sale. *McLean v. G.T. Duke Co.*, 95 Ga. App. 135, 97 S.E.2d 537 (1957) (decided under former Code 1933, § 28-203).

This article is for protection of creditors existing at time of sale, who are to be notified, and in absence of fraud such sale cannot be attacked by subsequent creditors for noncompliance with this article. *Dodd v.*

**General Consideration (Cont'd)**

Raines, 1 F.2d 658 (N.D. Ga. 1924) (decided under former Civil Code 1910, § 3226).

**This article creates right in creditor not known at common law.** — In imposing obligation upon third party buyer (transferee) and allowing cause of action against that party for breach of obligation, the article creates right in creditor not known at common law. *Indon Indus., Inc. v. Charles S. Martin Distrib. Co.*, 234 Ga. 845, 218 S.E.2d 562 (1975).

**Article require's transferee to help in creditor protection.** — The effect of this article is to require transferee to help in creditor protection, principally a matter of giving notice, if transferee wants to ensure that they cannot reach goods in transferee's hands after transferee has paid for them. *McClain v. Laurens Glass Co.*, 127 Ga. App. 316, 193 S.E.2d 194 (1972).

**Article applies to secured as well as to unsecured creditors.** *NCR Co. v. Stubbs*, 29 Ga. App. 543, 116 S.E. 44 (1923) (decided under former Civil Code 1910, § 3226).

**No distinction between creditors on basis of source of debt owed to them.** — This article draws no distinction between those creditors whose debts may have arisen from sale of merchandise and such creditors as sustain that relation by reason of indebtedness created by debtor for other independent and disassociated reasons. It applies as well to a sale of a stock of goods in bulk by a debtor to a creditor in extinguishment of debtor's debt as to a sale for cash or on credit. *Anderson v. Merchants & Miners State Bank*, 161 Ga. 12, 129 S.E. 650 (1925) (decided under former Civil Code 1910, § 3226).

**Levying upon property for which title has been transferred.** — This article does not inhibit creditors, where statute has been complied with, from obtaining judgment against original purchaser who received goods and contracted with supplier to pay for them; compliance with its provisions merely prevents creditors, after judgment, from levying on property, title to which has passed out of judgment debtor's hands. *McClain v. Laurens Glass Co.*, 127 Ga. App. 316, 193 S.E.2d 194 (1972).

**Cited in** *Kamlapat v. Purvis-Wade Carpet Mills*, 112 Ga. App. 781, 146 S.E.2d 138 (1965).

**Remedies**

**Compliance by transferee necessary for protection.** — Unless transferee complies with requirements of this article, creditors may pursue goods as though they still belonged to transferor. *McClain v. Laurens Glass Co.*, 127 Ga. App. 316, 193 S.E.2d 194 (1972).

**Defense of payment directly to defendant's other creditors.** — Where article has not been complied with, it is no defense that purchase price of property was paid by purchaser directly to another of defendant's creditors. *McLean v. G.T. Duke Co.*, 95 Ga. App. 135, 97 S.E.2d 537 (1957) (decided under former Code 1933, § 28-203).

**Effect of noncompliance on transferred inventory.** — Noncompliance with this article subjects inventory transferred to attachment within 12-month statute of limitation. *Willson v. Johnson Stores, Inc.*, 139 Ga. App. 308, 228 S.E.2d 340 (1976).

**Contract action on open account against transferee not available remedy.** — Inasmuch as transfers in violation of this article are ineffective to pass title of goods from transferor to transferee, remedies available to original seller are those seller would have had against transferor, and contract action on open account against transferee is not such a remedy. *American Express Co. v. Bomar Shoe Co.*, 125 Ga. App. 408, 187 S.E.2d 922 (1972).

**Only in rem actions permitted.** — This article permits only in rem action against transferred goods or proceeds therefrom, not in personam action against transferee. *American Express Co. v. Bomar Shoe Co.*, 127 Ga. App. 837, 195 S.E.2d 479 (1973).

The Bulk Transfer Act, O.C.G.A. § 11-6-101 et seq., preserves a creditor's remedy against the goods, not against the transferee personally, and permits a creditor to pursue goods in the hands of a transferee as though they still belonged to the transferor. Consequently, this act does not authorize a direct action for negligence against the transferee of corporate stock. *Brown Transp. Corp. v. Street*, 194 Ga. App. 717, 391 S.E.2d 699 (1990).

**Seller to one thereafter selling in bulk.** — This article has no language which compels creditor of one who thereafter sells to another in bulk to look to latter for payment, whether or not as between debtor and debt-

or's transferee there is an agreement that latter will pay the debt, where original seller has not agreed to substitute transferee in place of purchaser and is stranger to contract between the latter. *McClain v. Laurens Glass Co.*, 127 Ga. App. 316, 193 S.E.2d 194 (1972).

**Availability of common law remedies.** — Where the relationship of the creditor to the bulk transferor is multifaceted, the creditor may pursue common law and equitable remedies, if any, against the transferee without reliance on the bulk transfer law. *Boss v. Bassett Furn. Indus. of N.C., Inc.*, 249 Ga. 166, 288 S.E.2d 559 (1982).

There is nothing in the Uniform Commercial Code to indicate that the creditor of a bulk transferor may not proceed on any common law or equitable cause of action the creditor may have against the transferee, notwithstanding the bulk transfer law. On the contrary, the Uniform Commercial Code provides that unless displaced by particular provisions, the principles of law and equity, including fraud, etc., shall supplement its provisions. *Boss v. Bassett Furn. Indus. of N.C., Inc.*, 249 Ga. 166, 288 S.E.2d 559 (1982).

### RESEARCH REFERENCES

**ALR.** — Rights between parties to sale in violation of Bulk Sales Law, 5 ALR 1517.

Applicability of Bulk Sales Law to chattel mortgages and sales thereunder, 9 ALR 473; 14 ALR 753; 57 ALR 1049.

Right of creditor to judgment for value of goods against transferee in violation of Bulk Sales Law, 61 ALR 364.

Subrogation of purchaser at sale contrary to Bulk Sales Law to rights of creditors, 80 ALR 712.

Garnishment as remedy in case of violation of Bulk Sales Law, 155 ALR 1061.

Bulk transfers: construction and effect of UCC Article 6, dealing with transfers in bulk, 47 ALR3d 1114.

### 11-6-101. Short title.

This article shall be known and may be cited as "Uniform Commercial Code — Bulk Transfers." (Code 1933, § 109A-6—101, enacted by Ga. L. 1962, p. 156, § 1.)

### RESEARCH REFERENCES

**C.J.S.** — 37 C.J.S., Fraudulent Conveyances, § 275 et seq.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 6-101.

### 11-6-102. "Bulk transfer"; transfers of equipment; enterprises subject to this article; bulk transfers subject to this article.

(1) A "bulk transfer" is any transfer in bulk and not in the ordinary course of the transferor's business of a major part of the materials, supplies, merchandise, or other inventory (Code Section 11-9-102) of an enterprise subject to this article.

(2) A transfer of a substantial part of the equipment (Code Section 11-9-102) of such an enterprise is a bulk transfer if it is made in connection with a bulk transfer of inventory, but not otherwise.



(3) The enterprises subject to this article are all those whose principal business is the sale of merchandise from stock, including those who manufacture what they sell.

(4) Except as limited by Code Section 11-6-103 all bulk transfers of goods located within this state are subject to this article. (Code 1933, § 109A-6—102, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 2001, p. 362, § 15.)

**The 2001 amendment**, effective July 1, 2001, substituted “Code Section 11-9-102” for “Code Section 11-9-109” in paragraphs (1) and (2).

### JUDICIAL DECISIONS

**Editor’s notes.** — In light of the similarity of the issues dealt with under the provisions, decisions under former Civil Code 1910, § 3226 and former Code 1933, §§ 28-203 and 28-206 are included in the annotations for this section.

**Applicability of section.** — O.C.G.A. § 11-6-102 is inapplicable to sales of “goods, wares, and merchandise,” or to services performed or sold. *Marlick Constr. Co. v. T. Lynn Davis Realty & Auction Co.*, 140 Ga. App. 867, 232 S.E.2d 147 (1977).

**Sale of stock.** — A sale of corporate stock is not included within the definition of a bulk transfer in the act; the transfer of equipment is only included if transferred in connection with a bulk transfer of inventory. *Brown Transp. Corp. v. Street*, 194 Ga. App. 717, 391 S.E.2d 699 (1990).

**Seller and assembler of premanufactured housing units.** — Whether seller and assembler of premanufactured housing units is subject to O.C.G.A. § 11-6-102 is jury question. *Marlick Constr. Co. v. T. Lynn Davis Realty & Auction Co.*, 140 Ga. App. 867, 232 S.E.2d 147 (1977).

**Bulk transfer.** — The subsequent purchase of only additional pieces of equipment was itself a “bulk transfer” because it had been “made in connection with” the previ-

ous “bulk transfer” of all of the seller’s inventory. *Professional Mktg. Distribs., Inc. v. Feldman Assocs.*, 202 Ga. App. 338, 414 S.E.2d 666 (1991).

**Mere sale of fixtures and accessories alone** will not bring transaction within scope of section. *Martin v. Taylor*, 24 Ga. App. 598, 101 S.E. 690 (1919) (decided under former Civil Code 1910, § 3226).

**Character of thing sold determines a bulk sale transaction** and not character of purchasing enterprise. *Southern Optical Serv., Inc. v. Chominski*, 102 Ga. App. 330, 116 S.E.2d 254 (1960) (decided under former Code 1933, § 28-206).

**Sale of equipment accompanied by small amount of inventory.** — Sale of shoe repair equipment did not become a sale of stock of “goods, wares or merchandise in bulk” merely because several dozen shoe laces and bottles of white shoe polish to be offered for sale to public were also included in the sale. *Harris v. Kilgore*, 56 Ga. App. 516, 193 S.E. 179 (1937) (decided under former Code 1933, § 28-203).

**Cited in** *McInvale v. Tifton Air Serv., Inc.*, 119 Ga. App. 821, 168 S.E.2d 898 (1969); *Indon Indus., Inc. v. Charles S. Martin Distrib. Co.*, 234 Ga. 845, 218 S.E.2d 562 (1975).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 15A Am. Jur. 2d, Commercial Code, § 11. 37 Am. Jur. 2d, Fraudulent Conveyances, §§ 238, 245, 247, 252, 253, 255, 256, 258, 260. 67 Am. Jur. 2d, Sales, § 99. 68A Am. Jur. 2d, Secured Transactions, § 17.

**C.J.S.** — 37 C.J.S., Fraudulent Conveyances, § 277 et seq.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 6-102.

**ALR.** — Applicability of Bulk Sales Law to chattel mortgages and sales thereunder, 9

ALR 473; 14 ALR 753; 57 ALR 1049.

Sale of entire stock of one branch or department of business as within Bulk Sales Law, 33 ALR 62.

Right of creditor to judgment for value of goods against transferee in violation of Bulk Sales Law, 41 ALR 1478; 61 ALR 364.

Sale to one already having interest in property as within Bulk Sales Act, 51 ALR 403.

Applicability of Bulk Sales Law to chattel mortgages and sales thereunder, 57 ALR 1049.

Fixtures as within contemplation of bulk sales or bulk mortgage act, 118 ALR 847.

Businesses or sellers subject to bulk sales statutes, 168 ALR 735.

Types of property subject to bulk sales statutes, 168 ALR 762.

Sales of "off-season" or "obsolete" merchandise as within scope of Bulk Sales Law, 36 ALR2d 1141.

Return of merchandise to original seller in satisfaction of purchase price as transfer violating Bulk Sales Law, 59 ALR2d 1115.

### 11-6-103. Transfers excepted from this article.

The following transfers are not subject to this article:

- (1) Those made to give security for the performance of an obligation;
- (2) General assignments for the benefit of all the creditors of the transferor, and subsequent transfers by the assignee thereunder;
- (3) Transfers in settlement or realization of a lien or other security interest;
- (4) Sales by executors, administrators, receivers, trustees in bankruptcy, or any public officer under judicial process;
- (5) Sales made in the course of judicial or administrative proceedings for the dissolution or reorganization of a corporation and of which notice is sent to the creditors of the corporation pursuant to order of the court or administrative agency;
- (6) Transfers to a person maintaining a known place of business in this state who becomes bound to pay the debts of the transferor in full and gives public notice of that fact, and who is solvent after becoming so bound;
- (7) A transfer to a new business enterprise organized to take over and continue the business, if public notice of the transaction is given and the new enterprise assumes the debts of the transferor and he receives nothing from the transaction except an interest in the new enterprise junior to the claims of creditors;
- (8) Transfers of property which is exempt from execution. (Code 1933, § 109A-6—103, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 1963, p. 188, § 15.)

### JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the issues dealt with under the provisions, decisions under former Code 1933, § 28-203

are included in the annotations for this chapter.

**Third person to sell debtor's goods for**

**creditor's benefit.** — This section has no application to general settlement made by debtor with creditors, where, by terms of settlement, all creditors agree that debtor's stock of goods, wares, and merchandise shall be turned over to a third person, who shall sell same solely for benefit of creditors, and where third person, in pursuance of common agreement, does sell stock in bulk and pays over to creditors, according to agreed pro rata, all proceeds of sale. *W.W. Stovall Co. v. W.E. Shepherd Co.*, 10 Ga. App. 498, 73 S.E. 761 (1912) (decided under former Civil Code 1910, § 3226).

**Deeds to secure debt.** — A deed to secure payment of debt, although purporting to pass title to purchaser, is not covered by provisions of this article. *B.F. Avery & Sons v. Carter*, 18 Ga. App. 527, 89 S.E. 1051 (1916);

*Wright v. Cline*, 27 Ga. App. 129, 107 S.E. 593 (1921); *Bank of LaGrange v. Rutland*, 27 Ga. App. 442, 108 S.E. 821 (1921), later appeal, 29 Ga. App. 478, 116 S.E. 49 (1923) (decided under former Civil Code 1910, § 3226).

Transaction by which debtor gave creditor deed to secure debt is not within purview of Bulk Sales Law. *Mackler v. Lahman*, 196 Ga. 535, 27 S.E.2d 35 (1943) (decided under former Code 1933, § 28-203).

**Sale to copartner of interest in stock of merchandise.** — Article inapplicable to sale by partner of interest in stock of merchandise to copartner. *W.W. Stovall Co. v. W.E. Shepherd Co.*, 10 Ga. App. 498, 73 S.E. 761 (1912) (decided under former Civil Code 1910, § 3226).

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 7 Am. Jur. 2d, Assignments for Benefit of Creditors, § 63. 37 Am. Jur. 2d, Fraudulent Conveyances, § 250.

**C.J.S.** — 37 C.J.S., Fraudulent Conveyances, §§ 277, 279.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 6-103.

**ALR.** — Applicability of Bulk Sales Law to chattel mortgages and sales thereunder, 9 ALR 473; 14 ALR 753; 57 ALR 1049.

What constitutes "transfers in settlement or realization of a lien or other security interest" within UCC § 6-103(3) of bulk sales transfers act, 86 ALR4th 1104.

#### 11-6-104. Schedule of property, list of creditors.

(1) Except as provided with respect to auction sales (Code Section 11-6-108), a bulk transfer subject to this article is ineffective against any creditor of the transferor unless:

(a) The transferee requires the transferor to furnish a list of his existing creditors prepared as stated in this Code section; and

(b) The parties prepare a schedule of the property transferred sufficient to identify it; and

(c) The transferee preserves the list and schedule for six months next following the transfer and permits inspection of either or both and copying therefrom at all reasonable hours by any creditor of the transferor, or files the list and schedule in the office of the clerk of the superior court as follows: when the seller is a resident individual, in the county where he resides, or when the seller is a nonresident individual, or is a partnership, corporation, or other business entity, in the county of the seller's principal place of business in this state.

(2) The list of creditors must be signed and sworn to or affirmed by the transferor or his agent. It must contain the names and business addresses of



all creditors of the transferor, with the amounts when known, and also the names of all persons who are known to the transferor to assert claims against him even though such claims are disputed.

(3) Responsibility for the completeness and accuracy of the list of creditors rests on the transferor, and the transfer is not rendered ineffective by errors or omissions therein unless the transferee is shown to have had knowledge. (Code 1933, § 109A-6—104, enacted by Ga. L. 1962, p. 156, § 1.)

### JUDICIAL DECISIONS

**Meaning of “knowledge” under subsection (3).** — The few cases which have considered the question have held that “knowledge” under O.C.G.A. § 11-6-104(3) requires “actual knowledge” under O.C.G.A. § 11-1-201(25). *Johnson v. Vincent Brass & Aluminum Co.*, 244 Ga. 412, 260 S.E.2d 325 (1979).

**Relationship between state and dealer.** — Relationship of debtor and creditor does not exist between state and dealer. “Dealer’s relationship to state is that of taxpayer.” *Richards v. Blackmon*, 233 Ga. 739, 213 S.E.2d 638 (1975).

**Effect on purchasers of seller’s affidavit**

**listing no creditors.** — Affidavit of seller of business listing no creditors pursuant to provisions of this article does not relieve the purchaser from tax assessment made under former Code 1933, § 92-3422a (see O.C.G.A. § 48-8-46). *Richards v. Blackmon*, 233 Ga. 739, 213 S.E.2d 638 (1975).

**Cited in** *American Express Co. v. Bomar Shoe Co.*, 125 Ga. App. 408, 187 S.E.2d 922 (1972); *Marlick Constr. Co. v. T. Lynn Davis Realty & Auction Co.*, 140 Ga. App. 867, 232 S.E.2d 147 (1977); *Boss v. Bassett Furn. Indus. of N.C., Inc.*, 249 Ga. 166, 288 S.E.2d 559 (1982).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 37 Am. Jur. 2d, *Fraudulent Conveyances and Transfers*, §§ 231, 241, 252.

**C.J.S.** — 37 C.J.S., *Fraudulent Conveyances*, § 275 et seq.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 6-104.

**ALR.** — Stockholders of corporation which transfers its assets as creditors within Bulk Sales Act, 16 ALR2d 1315.

**Right of purchaser to decline perfor-**

**mance of contract for sale of business or goods because of seller’s failure to comply with Bulk Sales Law**, 24 ALR2d 1030.

**Extent of duty of transferee of bulk sale to investigate regarding seller’s creditors under Uniform Commercial Code Article 6**, 67 ALR3d 1056.

**Rights and remedies of creditor of bulk sales transferor not listed in accordance with UCC § 6-104(1)(a), (2) and (3)**, 18 ALR4th 1090.

### 11-6-105. Notice to creditors.

In addition to the requirements of Code Section 11-6-104, any bulk transfer subject to this article except one made by auction sale (Code Section 11-6-108) is ineffective against any creditor of the transferor unless at least ten days before he takes possession of the goods or pays for them, whichever happens first, the transferee gives notice of the transfer in the manner and to the persons hereafter provided (Code Section 11-6-107). (Code 1933, § 109A-6—105, enacted by Ga. L. 1962, p. 156, § 1.)

## JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Civil Code 1910, § 3227 are included in the annotations for this section.

**Effect of verbal notice by vendor to creditors.** — Purchaser of merchandise in bulk is not relieved from the duty of notifying the creditors of the vendor of such proposed sale, as prescribed by O.C.G.A. § 11-6-105, by reason of a verbal notice given to them by the vendor personally. *Moultrie Grocery Co. v. Holmes-Hartsfield Co.*, 22 Ga. App. 512, 96 S.E. 346 (1918).

**Effect of knowledge by creditor's attorney.** — Mere knowledge by attorney who holds for collection the claim of a creditor, of those matters in reference to sale in bulk of

which notice to creditors is required by O.C.G.A. § 11-6-105 will not relieve purchaser of duty of giving such notice. *NCR Co. v. Stubbs*, 29 Ga. App. 543, 116 S.E. 44 (1923).

**Cited in** *McInvale v. Tifton Air Serv., Inc.*, 119 Ga. App. 821, 168 S.E.2d 898 (1969); *American Express Co. v. Bomar Shoe Co.*, 125 Ga. App. 408, 187 S.E.2d 922 (1972); *McClain v. Laurens Glass Co.*, 127 Ga. App. 316, 193 S.E.2d 194 (1972); *Johnson v. Vincent Brass & Aluminum Co.*, 244 Ga. 412, 260 S.E.2d 325 (1979); *Boss v. Bassett Furn. Indus. of N.C., Inc.*, 249 Ga. 166, 288 S.E.2d 559 (1982); *Hall v. Holbrook*, 220 Ga. App. 675, 469 S.E.2d 868 (1996).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 37 Am. Jur. 2d, *Fraudulent Conveyances and Transfers*, §§ 237, 252.

**C.J.S.** — 37 C.J.S., *Fraudulent Conveyances*, § 275 et seq.

**U.L.A.** — *Uniform Commercial Code* (U.L.A.) § 6-105.

## 11-6-106. Definition of public notice.

Public notice under Code Section 11-6-103 shall be given as follows: by advertising the transfer, giving the name of the transferor, the transferee, and the effective date thereof, once a week for two weeks in the newspaper in which sheriffs' advertisements are published in the county where the former business enterprise taken over had its principal place of business in this state. (Code 1933, § 109A-6—106, enacted by Ga. L. 1962, p. 156, § 1.)

## JUDICIAL DECISIONS

**Legislative intent behind nonuniform § 11-6-106.** — By not adopting § 6-106 of the Uniform Commercial Code, but inserting O.C.G.A. § 11-6-106, a provision relative to "definition of public notice," the legisla-

ture intended not to impose personal liability on transferees, but to leave creditor with traditional remedies of garnishment, etc. *American Express Co. v. Bomar Shoe Co.*, 125 Ga. App. 408, 187 S.E.2d 922 (1972).

## RESEARCH REFERENCES

**C.J.S.** — 37 C.J.S., *Fraudulent Conveyances*, § 275 et seq.

**11-6-107. The notice.**

(1) The notice to creditors (Code Section 11-6-105) shall state:

(a) That a bulk transfer is about to be made; and

(b) The names and business addresses of the transferor and transferee, and all other business names and addresses used by the transferor within three years last past so far as known to the transferee; and

(c) Whether or not all the debts of the transferor are to be paid in full as they fall due as a result of the transaction, and if so, the address to which creditors should send their bills.

(2) If the debts of the transferor are not to be paid in full as they fall due or if the transferee is in doubt on that point then the notice shall state further:

(a) The location and general description of the property to be transferred and the estimated total of the transferor's debts;

(b) The address where the schedule of property and list of creditors (Code Section 11-6-104) may be inspected;

(c) Whether the transfer is to pay existing debts and if so the amount of such debts and to whom owing;

(d) Whether the transfer is for new consideration and if so the amount of such consideration and the time and place of payment.

(3) The notice in any case shall be delivered personally or sent by registered or certified mail or statutory overnight delivery to all the persons shown on the list of creditors furnished by the transferor (Code Section 11-6-104) and to all other persons who are known to the transferee to hold or assert claims against the transferor. (Code 1933, § 109A-6—107, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 1963, p. 188, § 16; Ga. L. 2000, p. 1589, § 3.)

**The 2000 amendment**, effective July 1, 2000, substituted "certified mail or statutory overnight delivery" for "certified mail" near the beginning of subsection (3).

**Editor's notes.** — Ga. L. 2000, p. 1589, § 16, not codified by the General Assembly, makes subsection (3) of this Code section

applicable with respect to notices delivered on or after July 1, 2000.

**Law reviews.** — For article on the 1963 amendment to the Georgia Uniform Commercial Code, see 14 Mercer L. Rev. 378 (1963).

### JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Civil Code 1910, § 3227 are included in the annotations for this section.

**Notices must be sent, not received, in**

**time.** — Under this section requirement that purchaser shall give notice personally or by registered mail is met by sending proper notice by registered mail at least five days (now ten days) before completion of pur-



chase of payment therefor. It is not necessary that the notice so mailed shall be received by creditor five days before such completion. *Wyone Shoe Co. v. Daniels & Co.*, 136 Ga. 192, 71 S.E. 1 (1911) (decided under Civil Code 1910, § 3227).

**Transferee having knowledge of one asserting claim against transferor.** — Where a

person was actually known to transferee to be asserting claim against transferor, under O.C.G.A. § 11-6-107(3) of this section, transferee was required to give said person the detailed notice of transfer specified in subsections (1) and (2) of this section. *Johnson v. Vincent Brass & Aluminum Co.*, 244 Ga. 412, 260 S.E.2d 325 (1979).

RESEARCH REFERENCES

**Am. Jur. 2d.** — 37 Am. Jur. 2d, Fraudulent Conveyances and Transfers, § 241.

**C.J.S.** — 37 C.J.S., Fraudulent Conveyances, § 275 et seq.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 6-107.

11-6-108. Auction sales; “auctioneer.”

(1) A bulk transfer is subject to this article even though it is by sale at auction, but only in the manner and with the results stated in this Code section.

(2) The transferor shall furnish a list of his creditors and assist in the preparation of a schedule of the property to be sold, both prepared as before stated (Code Section 11-6-104).

(3) The person or persons other than the transferor who direct, control, or are responsible for the auction are collectively called the “auctioneer.” The auctioneer shall:

(a) Receive and retain the list of creditors and prepare and retain the schedule of property for the period stated in this article (Code Section 11-6-104); and

(b) Give notice of the auction personally or by registered or certified mail or statutory overnight delivery at least ten days before it occurs to all persons shown on the list of creditors and to all other persons who are known to him to hold or assert claims against the transferor.

(4) Failure of the auctioneer to perform any of these duties does not affect the validity of the sale or the title of the purchasers, but if the auctioneer knows that the auction constitutes a bulk transfer such failure renders the auctioneer liable to the creditors of the transferor as a class for the sums owing to them from the transferor up to but not exceeding the net proceeds of the auction. If the auctioneer consists of several persons their liability is joint and several. (Code 1933, § 109A-6—108, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 1963, p. 188, § 17; Ga. L. 2000, p. 1589, § 3.)

**The 2000 amendment**, effective July 1, 2000, substituted “certified mail or statutory overnight delivery” for “certified mail” near

the beginning of paragraph (b) of subsection (3).

**Editor’s notes.** — Ga. L. 2000, p. 1589,

§ 16, not codified by the General Assembly, makes paragraph (b)(3) of this Code section applicable with respect to notices delivered on or after July 1, 2000.

**Law reviews.** — For article on the 1963 amendment to the Georgia Uniform Commercial Code, see 14 Mercer L. Rev. 378 (1963).

### JUDICIAL DECISIONS

**Cited** in Marlick Constr. Co. v. T. Lynn Davis Realty & Auction Co., 140 Ga. App. 867, 232 S.E.2d 147 (1977).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 37 Am. Jur. 2d, Fraudulent Conveyances and Transfers, §§ 233, 244.

**C.J.S.** — 37 C.J.S., Fraudulent Conveyances, § 275 et seq.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 6-108.

#### 11-6-109. What creditors protected.

The creditors of the transferor mentioned in this article are those holding claims based on transactions or events occurring before the bulk transfer, but creditors who become such after notice to creditors is given (Code Sections 11-6-105 and 11-6-107) are not entitled to notice. (Code 1933, § 109A-6—109, enacted by Ga. L. 1962, p. 156, § 1.)

### JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Civil Code 1910, § 3226 are included in the annotations for this section.

**Creditors intended to be protected** are unsecured creditors of transferor before time of transfer. McClain v. Laurens Glass Co., 127 Ga. App. 316, 193 S.E.2d 194 (1972).

**Effect of creditor's retention of title to property sold.** — Creditor is not barred

from protection of this section merely because, as security for debt, creditor has retained title to property sold to person by whom sale of the stock of merchandise in bulk is made, nor even by additional fact that property to which creditor has so retained title is excluded by parties thereto from operation of sale in bulk. NCR Co. v. Stubbs, 29 Ga. App. 543, 116 S.E. 44 (1923) (decided under former Civil Code 1910, § 3226).

### RESEARCH REFERENCES

**C.J.S.** — 37 C.J.S., Fraudulent Conveyances, § 277 et seq.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 6-109.

**ALR.** — Right of creditor to judgment for

value of goods against transferee in violation of Bulk Sales Law, 41 ALR 1478; 61 ALR 364.

Character or class of creditors within contemplation of Bulk Sales Law, 85 ALR2d 1211.

**11-6-110. Subsequent transfers.**

When the title of a transferee to property is subject to a defect by reason of his noncompliance with the requirements of this article, then:

(1) A purchaser of any of such property from such transferee who pays no value or who takes with notice of such noncompliance takes subject to such defect, but

(2) A purchaser for value in good faith and without such notice takes free of such defect. (Code 1933, § 109A-6—110, enacted by Ga. L. 1962, p. 156, § 1.)

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 37 Am. Jur. 2d, Fraudulent Conveyances and Transfers, § 250.

**C.J.S.** — 37 C.J.S., Fraudulent Conveyances, § 277.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 6-110.

**ALR.** — Right of creditor to judgment for value of goods against transferee in violation

of Bulk Sales Law, 41 ALR 1478; 61 ALR 364.

Remedy of general creditor or judgment creditor as affected by Uniform Fraudulent Conveyance Act, 119 ALR 949.

Rule denying relief to one who conveyed his property to defraud his creditors as applicable where the claim which motivated the conveyance was never established, 6 ALR4th 862.

**11-6-111. Limitation of actions and levies.**

No action under this article shall be brought nor levy made more than 12 months after the date on which the transferee took possession of the goods unless the transfer has been concealed. If the transfer has been concealed, actions may be brought or levies made within 12 months after its discovery. (Code 1933, § 109A-6—111, enacted by Ga. L. 1962, p. 156, § 1.)

**JUDICIAL DECISIONS**

**Statute of limitation of state creating statute controls.** — Since this article creates cause of action not known at common law, the statute of limitation of the state creating the statute controls. *Indon Indus., Inc. v. Charles S. Martin Distrib. Co.*, 234 Ga. 845, 218 S.E.2d 562 (1975).

**Action barred.** — Any action under the bulk transfer provisions of the Uniform Commercial Code would be barred by the time limitation of O.C.G.A. § 11-6-111

where, whether or not there was a concealment that would have tolled the 12 month period, more than 12 months elapsed from the discovery of the sale and the date when suit was brought. *Boss v. Bassett Furn. Indus. of N.C., Inc.*, 249 Ga. 166, 288 S.E.2d 559 (1982).

**Cited in** *Charles S. Martin Distrib. Co. v. Indon Indus., Inc.*, 134 Ga. App. 179, 213 S.E.2d 900 (1975); *Vincent Brass & Aluminum Co. v. Johnson*, 149 Ga. App. 537, 254 S.E.2d 752 (1979).

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 37 Am. Jur. 2d, Fraudulent Conveyances and Transfers, § 252.

**C.J.S.** — 37 C.J.S., Fraudulent Conveyances, § 277. 54 C.J.S., Limitation of Actions, § 206.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 6-111.

**ALR.** — Running of limitations against an action to recover on account of removal of timber by a trespasser, 27 ALR 1005.



Effect of fraud to toll the period for bringing action prescribed in statute creating the right of action, 15 ALR2d 500.

Waiver, estoppel, acquiescence, or laches, of creditor with respect to attack on sale under Bulk Sales Act, 15 ALR2d 937.

Settlement negotiations as estopping reliance on statute of limitations, 39 ALR3d 127.

Fraud as extending statutory limitations period for contesting will or its probate, 48 ALR4th 1094.

ARTICLE 7

WAREHOUSE RECEIPTS, BILLS OF LADING, AND OTHER DOCUMENTS OF TITLE

Part 1

General

Sec.

- 11-7-101. Short title.
- 11-7-102. Definitions and index of definitions.
- 11-7-103. Relation of article to treaty, statute, tariff, classification, or regulation.
- 11-7-104. Negotiable and nonnegotiable warehouse receipt, bill of lading, or other document of title.
- 11-7-105. Construction against negative implication.

Part 2

Warehouse Receipts: Special Provisions

- 11-7-201. Who may issue a warehouse receipt; storage under government bond.
- 11-7-202. Form of warehouse receipt; essential terms; optional terms.
- 11-7-203. Liability for nonreceipt or misdescription.
- 11-7-204. Duty of care; contractual limitation of warehouseman's liability.
- 11-7-205. Title under warehouse receipt defeated in certain cases.
- 11-7-206. Termination of storage at warehouseman's option.
- 11-7-207. Goods must be kept separate; fungible goods.
- 11-7-208. Altered warehouse receipts.
- 11-7-209. Lien of warehouseman.
- 11-7-210. Enforcement of warehouseman's lien.

Part 3

Bills of Lading: Special Provisions

- 11-7-301. Liability for nonreceipt or misdescription; "said to contain"; "shipper's load and count"; improper handling.
- 11-7-302. Through bills of lading and similar documents.
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Sec.

- 11-7-304. Bills of lading in a set.
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- 11-7-306. Altered bills of lading.
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- 11-7-309. Duty of care; contractual limitation of carrier's liability.

Part 4

Warehouse Receipts and Bills of Lading: General Obligations

- 11-7-401. Irregularities in issue of receipt or bill or conduct of issuer.
- 11-7-402. Duplicate receipt or bill; overissue.
- 11-7-403. Obligation of warehouseman or carrier to deliver; excuse.
- 11-7-404. No liability for good faith delivery pursuant to receipt or bill.

Part 5

Warehouse Receipts and Bills of Lading: Negotiation and Transfer

- 11-7-501. Form of negotiation and requirements of "due negotiation."
- 11-7-502. Rights acquired by due negotiation.
- 11-7-503. Document of title to goods defeated in certain cases.
- 11-7-504. Rights acquired in the absence of due negotiation; effect of diversion; seller's stoppage of delivery.
- 11-7-505. Indorser not a guarantor for other parties.
- 11-7-506. Delivery without indorsement; right to compel indorsement.
- 11-7-507. Warranties on negotiation or transfer of receipt or bill.
- 11-7-508. Warranties of collecting bank as to documents.
- 11-7-509. Receipt or bill: when adequate compliance with commercial contract.

Part 6		Sec.
Warehouse Receipts and Bills of Lading: Miscellaneous Provisions		11-7-602. Attachment of goods covered by a negotiable document.
		11-7-603. Conflicting claims; interpleader.
	Sec.	
	11-7-601. Lost and missing documents.	

**Cross references.** — Bailments generally, § 44-12-40 et seq. Issuance of freight receipts, freight bills, and freight lists by common carriers, § 46-9-110 et seq. Warehousemen generally, Ch. 4, T. 10.

JUDICIAL DECISIONS

**Cited** in *Kamlapat v. Purvis-Wade Carpet Mills*, 112 Ga. App. 781, 146 S.E.2d 138 (1965).

RESEARCH REFERENCES

**Am. Jur. 2d.** — 15A Am. Jur. 2d, Commercial Code, § 35 et seq. of lading, and other documents of title, 21 ALR3d 1339.

**ALR.** — Construction and effect of UCC Art. 7, dealing with warehouse receipts, bills

PART 1

GENERAL

11-7-101. Short title.

This article shall be known and may be cited as “Uniform Commercial Code — Documents of Title.” (Code 1933, § 109A-7—101, enacted by Ga. L. 1962, p. 156, § 1.)

RESEARCH REFERENCES

**C.J.S.** — 13 C.J.S., Carriers, § 128. 80 C.J.S., Shipping, § 256 et seq. 93 C.J.S., Warehousemen and Safe Depositaries, § 3.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 7-101.

11-7-102. Definitions and index of definitions.

- (1) In this article, unless the context otherwise requires:
- (a) “Bailee” means the person who by a warehouse receipt, bill of lading, or other document of title acknowledges possession of goods and contracts to deliver them.



(b) “Consignee” means the person named in a bill to whom or to whose order the bill promises delivery.

(c) “Consignor” means the person named in a bill as the person from whom the goods have been received for shipment.

(d) “Delivery order” means a written order to deliver goods directed to a warehouseman, carrier, or other person who in the ordinary course of business issues warehouse receipts or bills of lading.

(e) “Document” means document of title as defined in the general definitions in Article 1 of this title (Code Section 11-1-201).

(f) “Goods” means all things which are treated as movable for the purpose of a contract of storage or transportation.

(g) “Issuer” means a bailee who issues a document except that in relation to an unaccepted delivery order it means the person who orders the possessor of goods to deliver. Issuer includes any person for whom an agent or employee purports to act in issuing a document if the agent or employee has real or apparent authority to issue documents, notwithstanding that the issuer received no goods or that the goods were misdescribed or that in any other respect the agent or employee violated his instructions.

(h) “Warehouseman” is a person engaged in the business of storing goods for hire.

(2) Other definitions applying to this article or to specified parts thereof, and the Code sections in which they appear are:

“Duly negotiate.” Code Section 11-7-501.

“Person entitled under the document.” Code Section 11-7-403(4).

(3) Definitions in other articles of this title applying to this article and the Code sections in which they appear are:

“Contract for sale.” Code Section 11-2-106.

“Overseas.” Code Section 11-2-323.

“Receipt” of goods. Code Section 11-2-103.

(4) In addition Article 1 of this title contains general definitions and principles of construction and interpretation applicable throughout this article. (Code 1933, § 109A-7—102, enacted by Ga. L. 1962, p. 156, § 1.)

### JUDICIAL DECISIONS

**Cited** in *Citizens Bank & Trust Co. v. SLT Whse. Co.*, 368 F. Supp. 1042 (M.D. Ga. 1974); *Sanchez v. Aaron Van Lines*, 160 Ga. App. 173, 286 S.E.2d 469 (1981); *McDaniel v. American Druggists Ins. Co. (In re Nat'l Buy-Rite, Inc.)*, 11 Bankr. 196 (Bankr. N.D. Ga. 1981).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 15A Am. Jur. 2d, Commercial Code, §§ 36 et seq., 43, 49 et seq.

**C.J.S.** — 13 C.J.S., Carriers, § 128. 80 C.J.S., Shipping, § 256 et seq. 82 C.J.S., Statutes, § 309. 93 C.J.S., Warehousemen and Safe Depositaries, §§ 1, 23 et seq.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 7-102.

**ALR.** — Character of bill of lading contemplated by a guaranty of payment of a draft with bill of lading attached, 13 ALR 166.

Warehouseman's right to interplead rival claimants to goods stored or their proceeds, 100 ALR 425.

Duty of warehouseman to take up and cancel negotiable receipt upon delivering goods as delegable or nondelegable, 139 ALR 1488.

Liability of bailee of airplane for damage thereto, 44 ALR3d 862.

Liability of operator of marina or boatyard for loss of or injury to pleasure boat left for storage or repair, 44 ALR3d 1332.

### 11-7-103. Relation of article to treaty, statute, tariff, classification, or regulation.

To the extent that any treaty or statute of the United States, regulatory statute of this state, or tariff, classification, or regulation filed or issued pursuant thereto is applicable, the provisions of this article are subject thereto. (Code 1933, § 109A-7—103, enacted by Ga. L. 1962, p. 156, § 1.)

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 13 Am. Jur. 2d, Carriers, § 323. 14 Am. Jur. 2d, Carriers, § 555. 15A Am. Jur. 2d, Commercial Code, § 35 et seq.

**C.J.S.** — 81A C.J.S., States, § 7. 87 C.J.S., Treaties, § 15.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 7-103.

### 11-7-104. Negotiable and nonnegotiable warehouse receipt, bill of lading, or other document of title.

(1) A warehouse receipt, bill of lading, or other document of title is negotiable:

(a) If by its terms the goods are to be delivered to bearer or to the order of a named person; or

(b) Where recognized in overseas trade, if it runs to a named person or assigns.

(2) Any other document is nonnegotiable. A bill of lading in which it is stated that the goods are consigned to a named person is not made negotiable by a provision that the goods are to be delivered only against a written order signed by the same or another named person. (Code 1933, § 109A-7—104, enacted by Ga. L. 1962, p. 156, § 1.)

## JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, decisions under Ga. L. 1937-38, p. 390, §§ 6 and 7, subsequently codified as former Code 1933, §§ 111-406 and 111-407, are included in the annotations for this section.

**Effect of one-year provision in warehouse receipt on negotiability.** — Where warehouse receipts with word "negotiable" conspicuously printed upon them recited that cotton was accepted for storage for one year from date of receipts, and they were transferred

more than one year after they were dated, insertion of one-year clause did not impair negotiability of the receipts as respects warehouseman if holder purchased them for value supposing them to be negotiable, even if, as respects any party to transaction other than warehouseman, it would not be negotiable. *Peoples Whse. Co. v. Commercial Bank & Trust Co.*, 74 Ga. App. 67, 38 S.E.2d 855 (1946) (decided under former provisions).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 11 Am. Jur. 2d, Bills and Notes, § 15. 13 Am. Jur. 2d, Carriers, § 324. 15A Am. Jur. 2d, Commercial Code, §§ 37, 38, 48, 53, 61. Am. Jur. 2d, Secured Transactions, § 49. 78 Am. Jur. 2d, Warehouses, § 59.

**C.J.S.** — 13 C.J.S., Carriers, §§ 398-401. 80 C.J.S., Shipping, §§ 256 et seq., 367. 93 C.J.S., Warehousemen and Safe Depositaries, § 36 et seq.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 7-104.

## 11-7-105. Construction against negative implication.

The omission from either Part 2 or Part 3 of this article of a provision corresponding to a provision made in the other part does not imply that a corresponding rule of law is not applicable. (Code 1933, § 109A-7—105, enacted by Ga. L. 1962, p. 156, § 1.)

## RESEARCH REFERENCES

**C.J.S.** — 82 C.J.S., Statutes, §§ 352, 374.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 7-105.

## PART 2

## WAREHOUSE RECEIPTS: SPECIAL PROVISIONS

**Cross references.** — Regulation of state licensed and bonded warehouses, § 10-4-1 et seq.

## 11-7-201. Who may issue a warehouse receipt; storage under government bond.

(1) A warehouse receipt may be issued by any warehouseman.

(2) Where goods including distilled spirits and agricultural commodities are stored under a statute requiring a bond against withdrawal or a license for the issuance of receipts in the nature of warehouse receipts, a receipt



issued for the goods has like effect as a warehouse receipt even though issued by a person who is the owner of the goods and is not a warehouseman. (Code 1933, § 109A-7—201, enacted by Ga. L. 1962, p. 156, § 1.)

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 68A Am. Jur. 2d, Secured Transactions, § 109. 78 Am. Jur. 2d, Warehouses, § 42.

**C.J.S.** — 93 C.J.S., Warehousemen and Safe Depositaries, § 25 et seq.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 7-201.

**ALR.** — Right of surety on warehouseman's bond to be subrogated to rights of owner of property stored as against third person, 4 ALR 518.

#### 11-7-202. Form of warehouse receipt; essential terms; optional terms.

(1) A warehouse receipt need not be in any particular form.

(2) Unless a warehouse receipt embodies within its written or printed terms each of the following, the warehouseman is liable for damages caused by the omission to a person injured thereby:

(a) The location of the warehouse where the goods are stored;

(b) The date of issue of the receipt;

(c) The consecutive number of the receipt;

(d) A statement whether the goods received will be delivered to the bearer, to a specified person, or to a specified person or his order;

(e) The rate of storage and handling charges, except that where goods are stored under a field warehousing arrangement a statement of that fact is sufficient on a nonnegotiable receipt;

(f) A description of the goods or of the packages containing them;

(g) The signature of the warehouseman, which may be made by his authorized agent;

(h) If the receipt is issued for goods of which the warehouseman is owner, either solely or jointly or in common with others, the fact of such ownership; and

(i) A statement of the amount of advances made and of liabilities incurred for which the warehouseman claims a lien or security interest (Code Section 11-7-209). If the precise amount of such advances made or of such liabilities incurred is, at the time of the issue of the receipt, unknown to the warehouseman or to his agent who issues it, a statement of the fact that advances have been made or liabilities incurred and the purpose thereof is sufficient.

(3) A warehouseman may insert in his receipt any other terms which are not contrary to the provisions of this title and do not impair his obligation

of delivery (Code Section 11-7-403) or his duty of care (Code Section 11-7-204). Any contrary provisions shall be ineffective. (Code 1933, § 109A-7—202, enacted by Ga. L. 1962, p. 156, § 1.)

**Cross references.** — Further provisions as to form of warehouse receipts, § 10-4-20.

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 78 Am. Jur. 2d, Warehouses, § 44.

**C.J.S.** — 93 C.J.S., Warehousemen and Safe Depositaries, § 27 et seq.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 7-202.

**ALR.** — 'Warehouse purchase receipt' as bailment or contract of sale, 91 ALR 907.

Validity and applicability of stipulation in warehouseman's receipt fixing valuation of property as basis of responsibility, 142 ALR 776.

Liability of warehouseman or other bailee for loss of goods stored at other than agreed-upon place, 76 ALR4th 883.

### 11-7-203. Liability for nonreceipt or misdescription.

A party to or purchaser for value in good faith of a document of title other than a bill of lading relying in either case upon the description therein of the goods may recover from the issuer damages caused by the nonreceipt or misdescription of the goods, except to the extent that the document conspicuously indicates that the issuer does not know whether any part or all of the goods in fact were received or conform to the description, as where the description is in terms of marks or labels or kind, quantity, or condition, or the receipt or description is qualified by "contents, condition, and quality unknown," "said to contain," or the like, if such indication be true, or the party or purchaser otherwise has notice. (Code 1933, § 109A-7—203, enacted by Ga. L. 1962, p. 156, § 1.)

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 15A Am. Jur. 2d, Commercial Code, § 52. 78 Am. Jur. 2d, Warehouses, §§ 44, 48, 139, 140, 148, 188, 248, 251.

**C.J.S.** — 8 C.J.S., Bailments, § 40. 93

C.J.S., Warehousemen and Safe Depositaries, § 41 et seq.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 7-203.

### 11-7-204. Duty of care; contractual limitation of warehouseman's liability.

(1) A warehouseman is liable for damages for loss of or injury to the goods caused by his failure to exercise such care in regard to them as a reasonably careful man would exercise under like circumstances but unless otherwise agreed he is not liable for damages which could not have been avoided by the exercise of such care.

(2) Damages may be limited by a term in the warehouse receipt or storage agreement limiting the amount of liability in case of loss or damage, and setting forth a specific liability per article or item, or value per unit of

weight, beyond which the warehouseman shall not be liable; provided, however, that such liability may on written request of the bailor at the time of signing such storage agreement or within a reasonable time after receipt of the warehouse receipt be increased on part or all of the goods thereunder, in which event increased rates may be charged based on such increased valuation, but that no such increase shall be permitted contrary to a lawful limitation of liability contained in the warehouseman's tariff, if any. No such limitation is effective with respect to the warehouseman's liability for conversion to his own use.

(3) Reasonable provisions as to the time and manner of presenting claims and instituting actions based on the bailment may be included in the warehouse receipt or tariff. (Code 1933, § 109A-7—204, enacted by Ga. L. 1962, p. 156, § 1.)

**Cross references.** — Care required of depositaries for hire, § 44-12-92.

### JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, decisions under Ga. L. 1937-38, p. 390, § 23, subsequently codified as former Code 1933, § 111-423, are included in the annotations for this section.

**Lost profits.** — In appropriate cases, O.C.G.A. § 11-7-204(1) should be construed to cover lost profits as consequential damages. *Georgia Ports Auth. v. Servac Int'l*, 202 Ga. App. 777, 415 S.E.2d 516 (1992).

**Warehouseman is not insurer against loss of goods by theft** and will not be liable for loss of this character in absence of negligence or other fault. *Citizens Bank & Trust Co. v. SLT Whse. Co.*, 368 F. Supp. 1042 (M.D. Ga. 1974), *aff'd*, 515 F.2d 1382 (5th Cir. 1975).

**Duty of ordinary care.** — Warehouseman owes duty of ordinary care in protecting goods from theft or other wrongful taking. *Citizens Bank & Trust Co. v. SLT Whse. Co.*, 368 F. Supp. 1042 (M.D. Ga. 1974), *aff'd*, 515 F.2d 1382 (5th Cir. 1975).

Defendant storage company is bound to exercise ordinary care to protect plaintiff's property, and failure to deliver goods on demand establishes *prima facie* case for plaintiff, which defendant can overcome only by establishing exercise of ordinary care to prevent loss or destruction. *Harper Whse., Inc. v. Henry Chanin Corp.*, 102 Ga. App. 489, 116 S.E.2d 641 (1960) (decided under former Code 1933, § 111-423).

Defendant storage company is bound to exercise ordinary care to protect plaintiff's property, and failure to deliver goods on demand establishes *prima facie* case for plaintiff. *Washburn Storage Co. v. Mobley*, 94 Ga. App. 113, 94 S.E.2d 37 (1956) (decided under former Code 1933, § 111-423).

**Warehouseman does not guarantee title** to particular goods received by and receipted for by him. *Citizens Bank & Trust Co. v. SLT Whse. Co.*, 368 F. Supp. 1042 (M.D. Ga. 1974), *aff'd*, 515 F.2d 1382 (5th Cir. 1975).

**Where warehouseman without knowledge that depositor lacked title.** — There is one situation in which it is entirely clear that a warehouseman is not liable to holders of receipts, and this is when goods deposited in warehouse turn out not to have been owned by borrower-depositor and circumstances are such that warehouseman is not chargeable with knowledge of depositor's lack of title. *Citizens Bank & Trust Co. v. SLT Whse. Co.*, 368 F. Supp. 1042 (M.D. Ga. 1974), *aff'd*, 515 F.2d 1382 (5th Cir. 1975).

**Liability tied to base rate valid.** — Agreement provision which limited warehouse's liability to 100 times base or monthly storage rate was valid under O.C.G.A. § 11-7-204(2) where base or monthly storage rate was calculated on a per item basis. *Sun Valley, Inc. v. Southland Bonded Whse. Inc.*, 171 Ga. App. 233, 319 S.E.2d 91 (1984).



Cited in *A.A.A. Parking, Inc. v. Bigger*, 113 Ga. App. 578, 149 S.E.2d 255 (1966).

#### RESEARCH REFERENCES

**C.J.S.** — 93 C.J.S., Warehousemen and Safe Depositaries, § 56 et seq.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 7-204.

**ALR.** — Liability of warehouseman for damage to or destruction of property by fire, 16 ALR 280.

Provision in warehouseman's receipt limiting liability as applicable where warehouseman converts property, 99 ALR 266.

Duty of warehouseman to take up and cancel negotiable receipt upon delivering goods as delegable or nondelegable, 139 ALR 1488.

Validity and applicability of stipulation in warehouseman's receipt fixing valuation of property as basis of responsibility, 142 ALR 776.

Necessity of bringing to bailor's attention provision in warehouse receipt limiting liability of warehouseman, 160 ALR 1112.

Damages recoverable from warehouseman for negligence causing injury to, or destruction of, goods of a perishable nature, 32 ALR2d 910.

Liability of warehouseman for injury to stored goods as result of failure to maintain proper temperatures, 92 ALR2d 1298.

Presumption and burden of proof where subject of bailment is destroyed or damaged by windstorm or other meteorological phenomena, 43 ALR3d 607.

Liability of warehouseman or other bailee for loss of goods stored at other than agreed-upon place, 76 ALR4th 883.

#### 11-7-205. Title under warehouse receipt defeated in certain cases.

A buyer in the ordinary course of business of fungible goods sold and delivered by a warehouseman who is also in the business of buying and selling such goods takes free of any claim under a warehouse receipt even though it has been duly negotiated. (Code 1933, § 109A-7—205, enacted by Ga. L. 1962, p. 156, § 1.)

#### JUDICIAL DECISIONS

**Obtaining of negotiable warehouse receipt by due negotiation.** — One obtaining negotiable warehouse receipt by due negotiation obtains substantial rights enumerated

in O.C.G.A. § 11-7-205. *Citizens Bank & Trust Co. v. SLT Whse. Co.*, 368 F. Supp. 1042 (M.D. Ga. 1974), *aff'd*, 515 F.2d 1382 (5th Cir. 1975).

#### RESEARCH REFERENCES

**C.J.S.** — 15A C.J.S., Confusion of Goods, § 1 et seq. 93 C.J.S., Warehousemen and Safe Depositaries, §§ 14, 15, 62.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 7-205.

#### 11-7-206. Termination of storage at warehouseman's option.

(1) A warehouseman may on notifying the person on whose account the goods are held and any other person known to claim an interest in the goods require payment of any charges and removal of the goods from the warehouse at the termination of the period of storage fixed by the document, or, if no period is fixed, within a stated period not less than 30

days after the notification. If the goods are not removed before the date specified in the notification, the warehouseman may sell them in accordance with the provisions of the Code section on enforcement of a warehouseman's lien (Code Section 11-7-210).

(2) If a warehouseman in good faith believes that the goods are about to deteriorate or decline in value to less than the amount of his lien within the time prescribed in subsection (1) of this Code section for notification, advertisement, and sale, the warehouseman may specify in the notification any reasonable, shorter time for removal of the goods and in case the goods are not removed, may sell them at public sale held not less than one week after a single advertisement or posting.

(3) If as a result of a quality or condition of the goods of which the warehouseman had no notice at the time of deposit the goods are a hazard to other property or to the warehouse or to persons, the warehouseman may sell the goods at public or private sale without advertisement on reasonable notification to all persons known to claim an interest in the goods. If the warehouseman after a reasonable effort is unable to sell the goods he may dispose of them in any lawful manner and shall incur no liability by reason of such disposition.

(4) The warehouseman must deliver the goods to any person entitled to them under this article upon due demand made at any time prior to sale or other disposition under this Code section.

(5) The warehouseman may satisfy his lien from the proceeds of any sale or disposition under this Code section but must hold the balance for delivery on the demand of any person to whom he would have been bound to deliver the goods. (Code 1933, § 109A-7—206, enacted by Ga. L. 1962, p. 156, § 1.)

**Law reviews.** — For article surveying developments in Georgia commercial law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 33 (1981).

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 78 Am. Jur. 2d, Warehouses, §§ 144, 213, 227.

**C.J.S.** — 93 C.J.S., Warehousemen and Safe Depositaries, §§ 11 et seq., 80 et seq.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 7-206.

**ALR.** — Liability of warehouseman for injury to stored goods as result of failure to maintain proper temperatures, 92 ALR2d 1298.

#### 11-7-207. Goods must be kept separate; fungible goods.

(1) Unless the warehouse receipt otherwise provides, a warehouseman must keep separate the goods covered by each receipt so as to permit at all times identification and delivery of those goods except that different lots of fungible goods may be commingled.

(2) Fungible goods so commingled are owned in common by the persons entitled thereto and the warehouseman is severally liable to each owner for that owner's share. Where because of overissue a mass of fungible goods is insufficient to meet all the receipts which the warehouseman has issued against it, the persons entitled include all holders to whom overissued receipts have been duly negotiated. (Code 1933, § 109A-7—207, enacted by Ga. L. 1962, p. 156, § 1.)

### JUDICIAL DECISIONS

**Depletion of fungible goods without fault of warehouseman.** — Prima facie case of receipt holder made by nondelivery is completely overcome by showing that quantity of fungible goods has been depleted without

fault upon part of warehousemen. *Citizens Bank & Trust Co. v. SLT Whse. Co.*, 368 F. Supp. 1042 (M.D. Ga. 1974), *aff'd*, 515 F.2d 1382 (5th Cir. 1975).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 15A Am. Jur. 2d, Commercial Code, § 44. 78 Am. Jur. 2d, Warehouses, §§ 39, 179, 181, 228.

**C.J.S.** — 93 C.J.S., Warehousemen and Safe Depositaries, § 13 et seq.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 7-207.

### 11-7-208. Altered warehouse receipts.

Where a blank in a negotiable warehouse receipt has been filled in without authority, a purchaser for value and without notice of the want of authority may treat the insertion as authorized. Any other unauthorized alteration leaves any receipt enforceable against the issuer according to its original tenor. (Code 1933, § 109A-7—208, enacted by Ga. L. 1962, p. 156, § 1.)

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 15A Am. Jur. 2d, Commercial Code, §§ 45, 62.

**C.J.S.** — 3A C.J.S., Alteration of Instruments, § 1 et seq. 93 C.J.S., Warehousemen and Safe Depositaries, § 41 et seq.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 7-208.

### 11-7-209. Lien of warehouseman.

(1) A warehouseman has a lien against the bailor on the goods covered by a warehouse receipt or on the proceeds thereof in his possession for charges for storage or transportation (including demurrage and terminal charges), insurance, labor, or charges present or future in relation to the goods, and for expenses necessary for preservation of the goods or reasonably incurred in their sale pursuant to law. If the person on whose account the goods are held is liable for like charges or expenses in relation



to other goods whenever deposited and it is stated in the receipt that a lien is claimed for charges and expenses in relation to other goods, the warehouseman also has a lien against him for such charges and expenses whether or not the other goods have been delivered by the warehouseman. But against a person to whom a negotiable warehouse receipt is duly negotiated a warehouseman's lien is limited to charges in an amount or at a rate specified on the receipt or if no charges are so specified then to a reasonable charge for storage of the goods covered by the receipt subsequent to the date of the receipt.

(2) The warehouseman may also reserve a security interest against the bailor for a maximum amount specified on the receipt for charges other than those specified in subsection (1) of this Code section, such as for money advanced and interest. Such a security interest is governed by the article on secured transactions (Article 9 of this title).

(3) (a) A warehouseman's lien for charges and expenses under subsection (1) of this Code section or a security interest under subsection (2) of this Code section is also effective against any person who so entrusted the bailor with possession of the goods that a pledge of them by him to a good faith purchaser for value would have been valid but is not effective against a person as to whom the document confers no right in the goods covered by it under Code Section 11-7-503.

(b) A warehouseman's lien on household goods for charges and expenses in relation to the goods under subsection (1) of this Code section is also effective against all persons if the depositor was the legal possessor of the goods at the time of deposit. "Household goods" means furniture, furnishings, and personal effects used by the depositor in a dwelling.

(4) A warehouseman loses his lien on any goods which he voluntarily delivers or which he unjustifiably refuses to deliver. (Code 1933, § 109A-7—209, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 1973, p. 437, § 1.)

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 68A Am. Jur. 2d, Secured Transactions, §§ 18, 869-894. 78 Am. Jur. 2d, Warehouses, §§ 116, 118, 119, 121, 188.

**C.J.S.** — 93 C.J.S., Warehousemen and Safe Depositaries, § 106 et seq.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 7-209.

**ALR.** — Warehouseman's right to interplead rival claimants to goods stored or their proceeds, 100 ALR 425.

#### 11-7-210. Enforcement of warehouseman's lien.

(1) Except as provided in subsection (2) of this Code section, a warehouseman's lien may be enforced by public or private sale of the goods in bloc or in parcels, at any time or place, and on any terms which are

(2) Fungible goods so commingled are owned in common by the persons entitled thereto and the warehouseman is severally liable to each owner for that owner's share. Where because of overissue a mass of fungible goods is insufficient to meet all the receipts which the warehouseman has issued against it, the persons entitled include all holders to whom overissued receipts have been duly negotiated. (Code 1933, § 109A-7—207, enacted by Ga. L. 1962, p. 156, § 1.)

### JUDICIAL DECISIONS

**Depletion of fungible goods without fault of warehouseman.** — Prima facie case of receipt holder made by nondelivery is completely overcome by showing that quantity of fungible goods has been depleted without

fault upon part of warehousemen. *Citizens Bank & Trust Co. v. SLT Whse. Co.*, 368 F. Supp. 1042 (M.D. Ga. 1974), *aff'd*, 515 F.2d 1382 (5th Cir. 1975).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 15A Am. Jur. 2d, Commercial Code, § 44. 78 Am. Jur. 2d, Warehouses, §§ 39, 179, 181, 228.

**C.J.S.** — 93 C.J.S., Warehousemen and Safe Depositaries, § 13 et seq.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 7-207.

### 11-7-208. Altered warehouse receipts.

Where a blank in a negotiable warehouse receipt has been filled in without authority, a purchaser for value and without notice of the want of authority may treat the insertion as authorized. Any other unauthorized alteration leaves any receipt enforceable against the issuer according to its original tenor. (Code 1933, § 109A-7—208, enacted by Ga. L. 1962, p. 156, § 1.)

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 15A Am. Jur. 2d, Commercial Code, §§ 45, 62.

**C.J.S.** — 3A C.J.S., Alteration of Instruments, § 1 et seq. 93 C.J.S., Warehousemen and Safe Depositaries, § 41 et seq.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 7-208.

### 11-7-209. Lien of warehouseman.

(1) A warehouseman has a lien against the bailor on the goods covered by a warehouse receipt or on the proceeds thereof in his possession for charges for storage or transportation (including demurrage and terminal charges), insurance, labor, or charges present or future in relation to the goods, and for expenses necessary for preservation of the goods or reasonably incurred in their sale pursuant to law. If the person on whose account the goods are held is liable for like charges or expenses in relation

to other goods whenever deposited and it is stated in the receipt that a lien is claimed for charges and expenses in relation to other goods, the warehouseman also has a lien against him for such charges and expenses whether or not the other goods have been delivered by the warehouseman. But against a person to whom a negotiable warehouse receipt is duly negotiated a warehouseman's lien is limited to charges in an amount or at a rate specified on the receipt or if no charges are so specified then to a reasonable charge for storage of the goods covered by the receipt subsequent to the date of the receipt.

(2) The warehouseman may also reserve a security interest against the bailor for a maximum amount specified on the receipt for charges other than those specified in subsection (1) of this Code section, such as for money advanced and interest. Such a security interest is governed by the article on secured transactions (Article 9 of this title).

(3) (a) A warehouseman's lien for charges and expenses under subsection (1) of this Code section or a security interest under subsection (2) of this Code section is also effective against any person who so entrusted the bailor with possession of the goods that a pledge of them by him to a good faith purchaser for value would have been valid but is not effective against a person as to whom the document confers no right in the goods covered by it under Code Section 11-7-503.

(b) A warehouseman's lien on household goods for charges and expenses in relation to the goods under subsection (1) of this Code section is also effective against all persons if the depositor was the legal possessor of the goods at the time of deposit. "Household goods" means furniture, furnishings, and personal effects used by the depositor in a dwelling.

(4) A warehouseman loses his lien on any goods which he voluntarily delivers or which he unjustifiably refuses to deliver. (Code 1933, § 109A-7—209, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 1973, p. 437, § 1.)

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 68A Am. Jur. 2d, Secured Transactions, §§ 18, 869-894. 78 Am. Jur. 2d, Warehouses, §§ 116, 118, 119, 121, 188.

**C.J.S.** — 93 C.J.S., Warehousemen and Safe Depositaries, § 106 et seq.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 7-209.

**ALR.** — Warehouseman's right to interplead rival claimants to goods stored or their proceeds, 100 ALR 425.

#### 11-7-210. Enforcement of warehouseman's lien.

(1) Except as provided in subsection (2) of this Code section, a warehouseman's lien may be enforced by public or private sale of the goods in bloc or in parcels, at any time or place, and on any terms which are



commercially reasonable, after notifying all persons known to claim an interest in the goods. Such notification must include a statement of the amount due, the nature of the proposed sale, and the time and place of any public sale. The fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by the warehouseman is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner. If the warehouseman either sells the goods in the usual manner in any recognized market therefor, or if he sells at the price current in such market at the time of his sale, or if he has otherwise sold in conformity with commercially reasonable practices among dealers in the type of goods sold, he has sold in a commercially reasonable manner. A sale of more goods than apparently necessary to be offered to insure satisfaction of the obligation is not commercially reasonable except in cases covered by the preceding sentence.

(2) A warehouseman's lien on goods other than goods stored by a merchant in the course of his business may be enforced only as follows:

(a) All persons known to claim an interest in the goods must be notified.

(b) The notification must be delivered in person or sent by registered letter to the last known address of any person to be notified.

(c) The notification must include an itemized statement of the claim, a description of the goods subject to the lien, a demand for payment within a specified time not less than ten days after receipt of the notification, and a conspicuous statement that unless the claim is paid within that time the goods will be advertised for sale and sold by auction at a specified time and place.

(d) The sale must conform to the terms of the notification.

(e) The sale must be held at the nearest suitable place to that where the goods are held or stored.

(f) After the expiration of the time given in the notification, an advertisement of the sale must be published once a week for two weeks consecutively in a newspaper of general circulation where the sale is to be held. The advertisement must include a description of the goods, the name of the person on whose account they are being held, and the time and place of the sale. The sale must take place at least 15 days after the first publication. If there is no newspaper of general circulation where the sale is to be held, the advertisement must be posted at least ten days before the sale in not less than six conspicuous places in the neighborhood of the proposed sale.

(3) Before any sale pursuant to this Code section any person claiming a right in the goods may pay the amount necessary to satisfy the lien and the reasonable expenses incurred under this Code section. In that event the

goods must not be sold, but must be retained by the warehouseman subject to the terms of the receipt and this article.

(4) The warehouseman may buy at any public sale pursuant to this Code section.

(5) A purchaser in good faith of goods sold to enforce a warehouseman's lien takes the goods free of any rights of persons against whom the lien was valid, despite noncompliance by the warehouseman with the requirements of this Code section.

(6) The warehouseman may satisfy his lien from the proceeds of any sale pursuant to this Code section but must hold the balance, if any, for delivery on demand to any person to whom he would have been bound to deliver the goods.

(7) The rights provided by this Code section shall be in addition to all other rights allowed by law to a creditor against his debtor.

(8) Where a lien is on goods stored by a merchant in the course of his business the lien may be enforced in accordance with either subsection (1) or (2) of this Code section.

(9) The warehouseman is liable for damages caused by failure to comply with the requirements for sale under this Code section and in case of willful violation is liable for conversion. (Code 1933, § 109A-7—210, enacted by Ga. L. 1962, p. 156, § 1.)

### JUDICIAL DECISIONS

**Cited** in *REA Express, Inc. v. Ginn*, 131 Ga. App. 33, 205 S.E.2d 94 (1974).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 13 Am. Jur. 2d, Carriers, § 533. 78 Am. Jur. 2d, Warehouses, § 122.

**C.J.S.** — 93 C.J.S., Warehousemen and Safe Depositaries, §§ 113, 114.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 7-210.

**ALR.** — Warehouseman's right to interplead rival claimants to goods stored or their proceeds, 100 ALR 425.

## PART 3

### BILLS OF LADING: SPECIAL PROVISIONS

#### **11-7-301. Liability for nonreceipt or misdescription; "said to contain"; "shipper's load and count"; improper handling.**

(1) A consignee of a nonnegotiable bill who has given value in good faith or a holder to whom a negotiable bill has been duly negotiated relying in

either case upon the description therein of the goods, or upon the date therein shown, may recover from the issuer damages caused by the misdating of the bill or the nonreceipt or misdescription of the goods, except to the extent that the document indicates that the issuer does not know whether any part or all of the goods in fact were received or conform to the description, as where the description is in terms of marks or labels or kind, quantity, or condition or the receipt or description is qualified by "contents or condition of contents of packages unknown," "said to contain," "shipper's weight, load, and count," or the like, if such indication be true.

(2) When goods are loaded by an issuer who is a common carrier, the issuer must count the packages of goods if package freight and ascertain the kind and quantity if bulk freight. In such cases "shipper's weight, load, and count" or other words indicating that the description was made by the shipper are ineffective except as to freight concealed by packages.

(3) When bulk freight is loaded by a shipper who makes available to the issuer adequate facilities for weighing such freight, an issuer who is a common carrier must ascertain the kind and quantity within a reasonable time after receiving the written request of the shipper to do so. In such cases "shipper's weight" or other words of like purport are ineffective.

(4) The issuer may by inserting in the bill the words "shipper's weight, load, and count" or other words of like purport indicate that the goods were loaded by the shipper; and if such statement be true the issuer shall not be liable for damages caused by the improper loading. But their omission does not imply liability for such damages.

(5) The shipper shall be deemed to have guaranteed to the issuer the accuracy at the time of shipment of the description, marks, labels, number, kind, quantity, condition, and weight, as furnished by him; and the shipper shall indemnify the issuer against damage caused by inaccuracies in such particulars. The right of the issuer to such indemnity shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper. (Code 1933, § 109A-7—301, enacted by Ga. L. 1962, p. 156, § 1.)

### JUDICIAL DECISIONS

**"Shipper's weight, load, and count" term as defense for carrier.** — Where evidence establishes that damage was direct result of improper loading, the "shipper's weight, load, and count" bill of lading shall operate as complete defense for carrier as to such damage notwithstanding knowledge on part

of carrier of shipper's negligence. *D.H. Overmyer Co. v. Nelson-Brantley Glass Co.*, 119 Ga. App. 599, 168 S.E.2d 176 (1969).

**Cited** in *Georgia Ports Auth. v. Mitsubishi Int'l Corp.*, 156 Ga. App. 304, 274 S.E.2d 699 (1980).



## RESEARCH REFERENCES

**Am. Jur. 2d.** — 13 Am. Jur. 2d, Carriers, §§ 350, 351. 14 Am. Jur. 2d, Carriers, § 532. 15A Am. Jur. 2d, Commercial Code, § 52.

**C.J.S.** — 13 C.J.S., Carriers, § 128.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 7-301.

**ALR.** — Marking freight bill “Paid,” or “Prepaid,” as estopping carrier to deny that freight has been paid, 10 ALR 736.

Liability of one not named as consignor or

consignee for freight on goods delivered to and accepted by him, 61 ALR 422.

Carrier’s issuance of bill of lading or shipping receipt, without notation thereon of visible damage or defects in shipment, as creating presumption or prima facie case of good condition when received, 33 ALR2d 867.

Conclusiveness of receipt clauses in bill of lading, 67 ALR2d 1028.

**11-7-302. Through bills of lading and similar documents.**

(1) The issuer of a through bill of lading or other document embodying an undertaking to be performed in part by persons acting as its agents or by connecting carriers is liable to anyone entitled to recover on the document for any breach by such other persons or by a connecting carrier of its obligation under the document but to the extent that the bill covers an undertaking to be performed overseas or in territory not contiguous to the continental United States or an undertaking including matters other than transportation this liability may be varied by agreement of the parties.

(2) Where goods covered by a through bill of lading or other document embodying an undertaking to be performed in part by persons other than the issuer are received by any such person, he is subject with respect to his own performance while the goods are in his possession to the obligation of the issuer. His obligation is discharged by delivery of the goods to another such person pursuant to the document, and does not include liability for breach by any other such persons or by the issuer.

(3) The issuer of such through bill of lading or other document shall be entitled to recover from the connecting carrier or such other person in possession of the goods when the breach of the obligation under the document occurred, the amount it may be required to pay to anyone entitled to recover on the document therefor, as may be evidenced by any receipt, judgment, or transcript thereof, and the amount of any expense reasonably incurred by it in defending any action brought by anyone entitled to recover on the document therefor. (Code 1933, § 109A-7—302, enacted by Ga. L. 1962, p. 156, § 1.)

**Law reviews.** — For note, “The Law of Evidence in the Uniform Commercial Code,” see 1 Ga. L. Rev. 44 (1966).

## JUDICIAL DECISIONS

**Agent of issuer absolved of liability upon delivery of goods to principal.** — Issuer of

bill of lading, rather than the issuer’s agent, was liable for breach of contract with owner

of goods, as agent was personally absolved of liability upon delivery of goods to principal who breached. *Sanchez v. Aaron Van Lines*, 160 Ga. App. 173, 286 S.E.2d 469 (1981).

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 14 Am. Jur. 2d, Carriers, § 691.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 7-302.

**C.J.S.** — 13 C.J.S., Carriers, §§ 398-401, 460-462. 80 C.J.S., Shipping, § 260 et seq.

### 11-7-303. Diversion; reconsignment; change of instructions.

(1) Unless the bill of lading otherwise provides, the carrier may deliver the goods to a person or destination other than that stated in the bill or may otherwise dispose of the goods on instructions from:

- (a) The holder of a negotiable bill; or
- (b) The consignor on a nonnegotiable bill notwithstanding contrary instructions from the consignee; or
- (c) The consignee on a nonnegotiable bill in the absence of contrary instructions from the consignor, if the goods have arrived at the billed destination or if the consignee is in possession of the bill; or
- (d) The consignee on a nonnegotiable bill if he is entitled as against the consignor to dispose of them.

(2) Unless such instructions are noted on a negotiable bill of lading, a person to whom the bill is duly negotiated can hold the bailee according to the original terms. (Code 1933, § 109A-7—303, enacted by Ga. L. 1962, p. 156, § 1.)

#### RESEARCH REFERENCES

**C.J.S.** — 13 C.J.S., Carriers, § 411. 80 C.J.S., Shipping, § 272.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 7-303.

### 11-7-304. Bills of lading in a set.

(1) Except where customary in overseas transportation, a bill of lading must not be issued in a set of parts. The issuer is liable for damages caused by violation of this subsection.

(2) Where a bill of lading is lawfully drawn in a set of parts, each of which is numbered and expressed to be valid only if the goods have not been delivered against any other part, the whole of the parts constitute one bill.

(3) Where a bill of lading is lawfully issued in a set of parts and different parts are negotiated to different persons, the title of the holder to whom the first due negotiation is made prevails as to both the document and the goods even though any later holder may have received the goods from the

carrier in good faith and discharged the carrier's obligation by surrender of his part.

(4) Any person who negotiates or transfers a single part of a bill of lading drawn in a set is liable to holders of that part as if it were the whole set.

(5) The bailee is obliged to deliver in accordance with Part 4 of this article against the first presented part of a bill of lading lawfully drawn in a set. Such delivery discharges the bailee's obligation on the whole bill. (Code 1933, § 109A-7—304, enacted by Ga. L. 1962, p. 156, § 1.)

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 13 Am. Jur. 2d, Carriers, § 327. 15A Am. Jur. 2d, Commercial Code, § 44. **U.L.A.** — Uniform Commercial Code (U.L.A.) § 7-304.

**C.J.S.** — 13 C.J.S., Carriers, § 393. 80 C.J.S., Shipping, § 260 et seq.

#### 11-7-305. Destination bills.

(1) Instead of issuing a bill of lading to the consignor at the place of shipment a carrier may at the request of the consignor procure the bill to be issued at destination or at any other place designated in the request.

(2) Upon request of anyone entitled as against the carrier to control the goods while in transit and on surrender of any outstanding bill of lading or other receipt covering such goods, the issuer may procure a substitute bill to be issued at any place designated in the request. (Code 1933, § 109A-7—305, enacted by Ga. L. 1962, p. 156, § 1.)

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 13 Am. Jur. 2d, Carriers, § 331. 15 Am. Jur. 2d, Commercial Code, § 45. **U.L.A.** — Uniform Commercial Code (U.L.A.) § 7-305.

**C.J.S.** — 13 C.J.S., Carriers, § 393. 80 C.J.S., Shipping, § 260 et seq.

#### 11-7-306. Altered bills of lading.

An unauthorized alteration or filling in of a blank in a bill of lading leaves the bill enforceable according to its original tenor. (Code 1933, § 109A-7—306, enacted by Ga. L. 1962, p. 156, § 1.)

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 13 Am. Jur. 2d, Carriers, § 329. **C.J.S.** — 3A C.J.S., Alteration of Instruments, § 6.



**U.L.A.** — Uniform Commercial Code  
(U.L.A.) § 7-306.

### 11-7-307. Lien of carrier.

(1) A carrier has a lien on the goods covered by a bill of lading for charges subsequent to the date of its receipt of the goods for storage or transportation (including demurrage and terminal charges) and for expenses necessary for preservation of the goods incident to their transportation or reasonably incurred in their sale pursuant to law. But against a purchaser for value of a negotiable bill of lading a carrier's lien is limited to charges stated in the bill or the applicable tariffs, or if no charges are stated then to a reasonable charge.

(2) A lien for charges and expenses under subsection (1) of this Code section on goods which the carrier was required by law to receive for transportation is effective against the consignor or any person entitled to the goods unless the carrier had notice that the consignor lacked authority to subject the goods to such charges and expenses. Any other lien under subsection (1) of this Code section is effective against the consignor and any person who permitted the bailor to have control or possession of the goods unless the carrier had notice that the bailor lacked such authority.

(3) A carrier loses his lien on any goods which he voluntarily delivers or which he unjustifiably refuses to deliver. (Code 1933, § 109A-7—307, enacted by Ga. L. 1962, p. 156, § 1.)

**Cross references.** — For further provisions regarding carriers' liens, see § 46-9-190 et seq.

### RESEARCH REFERENCES

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| <p><b>Am. Jur. 2d.</b> — 13 Am. Jur. 2d, Carriers, § 527 et seq.</p> <p><b>C.J.S.</b> — 13 C.J.S., Carriers, § 484. 80 C.J.S., Shipping, §§ 377, 378.</p> <p><b>U.L.A.</b> — Uniform Commercial Code (U.L.A.) § 7-307.</p> <p><b>ALR.</b> — Liability for freight charge as</p> | <p>affected by delivery without collecting charge as stipulated or directed, 24 ALR 1163; 78 ALR 926; 129 ALR 213.</p> <p>Necessity of notice to consignor to render him liable for demurrage, 32 ALR 642.</p> <p>Right of carrier to lien on goods shipped without owner's authority, 39 ALR 168.</p> |
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### 11-7-308. Enforcement of carrier's lien.

(1) A carrier's lien may be enforced by public or private sale of the goods, in bloc or in parcels, at any time or place, and on any terms which are commercially reasonable, after notifying all persons known to claim an interest in the goods. Such notification must include a statement of the amount due, the nature of the proposed sale, and the time and place of any public sale. The fact that a better price could have been obtained by a sale

at a different time or in a different method from that selected by the carrier is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner. If the carrier either sells the goods in the usual manner in any recognized market therefor or if he sells at the price current in such market at the time of his sale or if he has otherwise sold in conformity with commercially reasonable practices among dealers in the type of goods sold he has sold in a commercially reasonable manner. A sale of more goods than apparently necessary to be offered to ensure satisfaction of the obligation is not commercially reasonable except in cases covered by the preceding sentence.

(2) Before any sale pursuant to this Code section any person claiming a right in the goods may pay the amount necessary to satisfy the lien and the reasonable expenses incurred under this Code section. In that event the goods must not be sold, but must be retained by the carrier subject to the terms of the bill and this article.

(3) The carrier may buy at any public sale pursuant to this Code section.

(4) A purchaser in good faith of goods sold to enforce a carrier's lien takes the goods free of any rights of persons against whom the lien was valid, despite noncompliance by the carrier with the requirements of this Code section.

(5) The carrier may satisfy his lien from the proceeds of any sale pursuant to this Code section but must hold the balance, if any, for delivery on demand to any person to whom he would have been bound to deliver the goods.

(6) The rights provided by this Code section shall be in addition to all other rights allowed by law to a creditor against his debtor.

(7) A carrier's lien may be enforced in accordance with either subsection (1) of this Code section or the procedure set forth in subsection (2) of Code Section 11-7-210.

(8) The carrier is liable for damages caused by failure to comply with the requirements for sale under this Code section and in case of willful violation is liable for conversion. (Code 1933, § 109A-7—308, enacted by Ga. L. 1962, p. 156, § 1.)

**Cross references.** — For further provisions regarding carriers' liens, see § 46-9-190 et seq.

### JUDICIAL DECISIONS

**Enforcement procedure coextensive with that of warehouseman.** — O.C.G.A. § 11-7-308 is intended to give carrier an enforcement procedure of its lien coexten-

sive with that of warehouseman. *REA Express, Inc. v. Ginn*, 131 Ga. App. 33, 205 S.E.2d 94 (1974).

**Purpose of subsection (4).** — Provisions of

O.C.G.A. § 11-7-308(4) are intended to confirm title of good-faith purchasers at foreclosure sales and to secure more bidding and

better prices. *REA Express, Inc. v. Ginn*, 131 Ga. App. 33, 205 S.E.2d 94 (1974).

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 13 Am. Jur. 2d, Carriers, § 533.

**C.J.S.** — 13 C.J.S., Carriers, § 484. 80 C.J.S., Shipping, §§ 377, 378.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 7-308.

**ALR.** — Necessity of notice to consignor

to render him liable for demurrage, 32 ALR 642.

Validity, construction, and application of state statute giving carrier lien on goods for transportation and incidental charges, 45 ALR5th 227.

### 11-7-309. Duty of care; contractual limitation of carrier's liability.

(1) A carrier who issues a bill of lading whether negotiable or nonnegotiable must exercise the degree of care in relation to the goods which a reasonably careful man would exercise under like circumstances. This subsection does not repeal or change any law or rule of law which imposes liability upon a common carrier for damages not caused by its negligence.

(2) Damages may be limited by a provision that the carrier's liability shall not exceed a value stated in the document if the carrier's rates are dependent upon value and the consignor by the carrier's tariff is afforded an opportunity to declare a higher value or a value as lawfully provided in the tariff, or where no tariff is filed he is otherwise advised of such opportunity; but no such limitation is effective with respect to the carrier's liability for conversion to its own use.

(3) Reasonable provisions as to the time and manner of presenting claims and instituting actions based on the shipment may be included in a bill of lading or tariff. (Code 1933, § 109A-7—309, enacted by Ga. L. 1962, p. 156, § 1.)

**Cross references.** — Standard of care for carriers and common carriers generally,

§ 46-9-1. Power of common carriers to limit liability generally, § 46-9-2.

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 14 Am. Jur. 2d, Carriers, §§ 555, 560, 571, 579.

**C.J.S.** — 13 C.J.S., Carriers, §§ 418, 419, 448. 80 C.J.S., Shipping, § 68 et seq.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 7-309.

**ALR.** — Carrier's liability where shipper furnishes or selects car, 5 ALR 108.

Freight as an element of damage where contract fixes value or limits carrier's liability for property lost or damaged, 5 ALR 152.

Stipulation limiting amount of carrier's

liability as applicable where goods are stolen by its employee, 5 ALR 986; 52 ALR 1073.

Duty of carrier to shipper as to condition of stock pens or yards, 15 ALR 200.

Liability of carrier for furnishing unwholesome water or food to livestock, 18 ALR 1116.

Validity, construction, and effect of provision of contract for carriage of livestock whereby shipper assumes responsibility for condition of car, 28 ALR 526.

Duty of carrier to render special service to



protect goods en route, as affected by the fact that it is not provided for by the published tariff, 32 ALR 111.

Necessity of notice to consignor to render him liable for demurrage, 32 ALR 642.

Construction of provision of Interstate Commerce Act dispensing with notice or filing of claim, 44 ALR 1360.

Liability of carrier which negligently delays transportation or delivery for loss of or damage to goods from causes for which it is not otherwise responsible, 46 ALR 302.

Stipulation limiting amount of carrier's liability as applicable where goods are stolen by its employee, 52 ALR 1073.

Presumption and burden of proof as to carrier's responsibility for goods received in good condition and delivered to consignee in bad condition, 53 ALR 996; 106 ALR 1156.

Wholesale or retail price as measure of damages against carrier for loss of goods, 67 ALR 1427.

Remedy as against carrier of consignor or consignee who wrongfully refuses to accept goods and pay freight because of damages for which carrier is responsible, 96 ALR 774.

One in general employment of carrier as servant temporarily of shipper or consignee while aiding in loading or unloading or moving cars, as regards responsibility for his negligence, and vice versa, 102 ALR 514.

Liability of consignee who reconsigns for the freight, 105 ALR 1216.

Necessity of proving specific reason for injury or damage to shipment of fruit or vegetables in order to overcome prima facie case against carrier where shipment was received in good condition and delivered in bad condition, 115 ALR 1274.

Provision in telegraph or carrier's contract regarding amount of recovery or damages as provision for liquidated damages (or valuation of right) or a mere limitation of liability, 128 ALR 632.

Carriers: sufficiency of compliance with stipulation requiring claim, or notice of claim, for damages to shipment, 175 ALR 1162.

Liability of carrier by land or air for damage to goods shipped resulting from improper loading, 44 ALR2d 993.

Shipper's misdescription of goods as affecting carrier's liability for loss or damage, 1 ALR3d 736.

Validity and construction of stipulation exempting carrier from liability for loss or damage to property at nonagency station, 16 ALR3d 1111.

Validity, construction, and effect of provision in shipping contract or bill of lading that carrier shall have benefit of shipper's insurance against loss of or damage to shipment, 27 ALR3d 984.

## PART 4

### WAREHOUSE RECEIPTS AND BILLS OF LADING: GENERAL OBLIGATIONS

#### 11-7-401. Irregularities in issue of receipt or bill or conduct of issuer.

The obligations imposed by this article on an issuer apply to a document of title regardless of the fact that:

(a) The document may not comply with the requirements of this article or of any other law or regulation regarding its issue, form, or content; or

(b) The issuer may have violated laws regulating the conduct of his business; or

(c) The goods covered by the document were owned by the bailee at the time the document was issued; or

(d) The person issuing the document does not come within the definition of warehouseman if it purports to be a warehouse receipt. (Code 1933, § 109A-7—401, enacted by Ga. L. 1962, p. 156, § 1.)

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 13 Am. Jur. 2d, Carriers, §§ 339, 340. 78 Am. Jur. 2d, Warehouses, § 42. 15A Am. Jur. 2d, Commercial Code, §§ 43, 47.

**C.J.S.** — 13 C.J.S., Carriers, § 394. 80 C.J.S., Shipping, § 256 et seq. 93 C.J.S., Warehousemen and Safe Depositaries, § 27 et seq.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 7-401.

**ALR.** — Legal effect of transaction by which grain or other commodity is received for storage by one who has not complied with statutory conditions necessary to become a public warehouseman, 108 ALR 928.

Warehouseman's liability for loss occasioned by failure to issue a proper receipt to depositor, 168 ALR 945.

### 11-7-402. Duplicate receipt or bill; overissue.

Neither a duplicate nor any other document of title purporting to cover goods already represented by an outstanding document of the same issuer confers any right in the goods, except as provided in the case of bills in a set, overissue of documents for fungible goods, and substitutes for lost, stolen, or destroyed documents. But the issuer is liable for damages caused by his overissue or failure to identify a duplicate document as such by conspicuous notation on its face. (Code 1933, § 109A-7—402, enacted by Ga. L. 1962, p. 156, § 1.)

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 13 Am. Jur. 2d, Carriers, § 327. 15A Am. Jur. 2d, Commercial Code, § 44.

**C.J.S.** — 13 C.J.S., Carriers, § 402. 80

C.J.S., Shipping, § 256 et seq. 93 C.J.S., Warehousemen and Safe Depositaries, § 31.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 7-402.

### 11-7-403. Obligation of warehouseman or carrier to deliver; excuse.

(1) The bailee must deliver the goods to a person entitled under the document who complies with subsections (2) and (3) of this Code section, unless and to the extent that the bailee establishes any of the following:

(a) Delivery of the goods to a person whose receipt was rightful as against the claimant;

(b) Damage to or delay, loss, or destruction of the goods for which the bailee is not liable;

(c) Previous sale or other disposition of the goods in lawful enforcement of a lien or on warehouseman's lawful termination of storage;

(d) The exercise by a seller of his right to stop delivery pursuant to the provisions of the article on sales (Code Section 11-2-705);

(e) A diversion, reconsignment, or other disposition pursuant to the provisions of this article (Code Section 11-7-303) or tariff regulating such right;

(f) Release, satisfaction, or any other fact affording a personal defense against the claimant;

(g) Any other lawful excuse.

(2) A person claiming goods covered by a document of title must satisfy the bailee's lien where the bailee so requests or where the bailee is prohibited by law from delivering the goods until the charges are paid.

(3) Unless the person claiming is one against whom the document confers no right under Code Section 11-7-503(1), he must surrender for cancellation or notation of partial deliveries any outstanding negotiable document covering the goods, and the bailee must cancel the document or conspicuously note the partial delivery thereon or be liable to any person to whom the document is duly negotiated.

(4) "Person entitled under the document" means holder in the case of a negotiable document, or the person to whom delivery is to be made by the terms of or pursuant to written instructions under a nonnegotiable document. (Code 1933, § 109A-7—403, enacted by Ga. L. 1962, p. 156, § 1.)

### JUDICIAL DECISIONS

**Protection of bona fide purchaser of warehouse receipt.** — A bona fide purchaser of negotiable warehouse receipt obtains full protection of Uniform Commercial Code only if purchaser obtains negotiable receipt

by due negotiation. *Citizens Bank & Trust Co. v. SLT Whse. Co.*, 368 F. Supp. 1042 (M.D. Ga. 1974), *aff'd*, 515 F.2d 1382 (5th Cir. 1975).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 8A Am. Jur. 2d, Bailments, § 225. 13 Am. Jur. 2d, Carriers, §§ 460, 463, 473. 78 Am. Jur. 2d, Warehouses, §§ 38, 201, 212, 217, 219, 255, 293.

**C.J.S.** — 13 C.J.S., Carriers, §§ 394, 484. 80 C.J.S., Shipping, §§ 260 et seq., 377, 378. 93 C.J.S., Warehousemen and Safe Depositories, §§ 41 et seq., 109.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 7-403.

**ALR.** — Assumption of risk and contributory negligence in connection with injuries arising from improper manner of loading or fastening load on freight car, 106 ALR 1140.

Duty of warehouseman to take up and cancel negotiable receipt upon delivering goods as delegable or nondelegable, 139 ALR 1488.

Initial carrier's liability as that of carrier or of warehouseman in respect of goods while in its warehouse awaiting delivery to connecting carrier, 172 ALR 802.

Deviation by carrier in transportation of property, 33 ALR2d 145.

Presumption and burden of proof where subject of bailment is destroyed or damaged by windstorm or other meteorological phenomena, 43 ALR3d 607.



**11-7-404. No liability for good faith delivery pursuant to receipt or bill.**

A bailee who in good faith including observance of reasonable commercial standards has received goods and delivered or otherwise disposed of them according to the terms of the document of title or pursuant to this article is not liable therefor. This rule applies even though the person from whom he received the goods had no authority to procure the document or to dispose of the goods and even though the person to whom he delivered the goods had no authority to receive them. (Code 1933, § 109A-7—404, enacted by Ga. L. 1962, p. 156, § 1.)

**JUDICIAL DECISIONS**

**Liability of warehouseman delivering to true owner.** — Paramount title of “true owner” is not cut off by unauthorized bailment or issuance of documents of title, and the true owner may replevy them from warehouseman or from anyone else who has them. If warehouseman delivers the goods to

true owner, the warehouseman is relieved from liability even to a good faith purchaser of negotiable receipts and, a fortiori, from liability to any other sort of receipt holder. *Citizens Bank & Trust Co. v. SLT Whse. Co.*, 368 F. Supp. 1042 (M.D. Ga. 1974), *aff’d*, 515 F.2d 1382 (5th Cir. 1975).

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 13 Am. Jur. 2d, Carriers, § 474. 78 Am. Jur. 2d, Warehouses, § 201.

**C.J.S.** — 13 C.J.S., Carriers, § 394. 80 C.J.S., Shipping, § 260 et seq. 93 C.J.S., Warehousemen and Safe Depositaries, § 41 et seq.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 7-404.

**ALR.** — Character of bill of lading contemplated by a guaranty of payment of a draft with bill of lading attached, 13 ALR 166.

Liability of warehouseman, and of surety on bond, in respect of collection and remittance of proceeds of sale of merchandise, 121 ALR 1155.

**PART 5****WAREHOUSE RECEIPTS AND BILLS OF LADING:  
NEGOTIATION AND TRANSFER****11-7-501. Form of negotiation and requirements of “due negotiation.”**

(1) A negotiable document of title running to the order of a named person is negotiated by his indorsement and delivery. After his indorsement in blank or to bearer any person can negotiate it by delivery alone.

(2) (a) A negotiable document of title is also negotiated by delivery alone when by its original terms it runs to bearer.

(b) When a document running to the order of a named person is delivered to him the effect is the same as if the document had been negotiated.

(3) Negotiation of a negotiable document of title after it has been indorsed to a specified person requires indorsement by the special indorsee as well as delivery.

(4) A negotiable document of title is “duly negotiated” when it is negotiated in the manner stated in this Code section to a holder who purchases it in good faith without notice of any defense against or claim to it on the part of any person and for value, unless it is established that the negotiation is not in the regular course of business or financing or involves receiving the document in settlement or payment of a money obligation.

(5) Indorsement of a nonnegotiable document neither makes it negotiable nor adds to the transferee’s rights.

(6) The naming in a negotiable bill of a person to be notified of the arrival of the goods does not limit the negotiability of the bill nor constitute notice to a purchaser thereof of any interest of such person in the goods. (Code 1933, § 109A-7—501, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 1963, p. 188, § 18.)

#### JUDICIAL DECISIONS

**Cited** in *Citizens Bank & Trust Co. v. SLT Whse. Co.*, 368 F. Supp. 1042 (M.D. Ga. 1974); *Alpert v. Wickes Cos.*, 182 Ga. App. 51, 354 S.E.2d 674 (1987).

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 13 Am. Jur. 2d, Carriers, §§ 363, 364. 15A Am. Jur. 2d, Commercial Code, § 54 et seq. 68A Am. Jur. 2d, Secured Transactions, §§ 109, 926 et seq. 78 Am. Jur. 2d, Warehouses, §§ 58, 63, 66, 69.

80 C.J.S., Shipping, § 259. 93 C.J.S., Warehousemen and Safe Depositaries, § 36 et seq.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 7-501.

**C.J.S.** — 13 C.J.S., Carriers, §§ 398-401.

#### 11-7-502. Rights acquired by due negotiation.

(1) Subject to Code Section 11-7-503 and to the provisions of Code Section 11-7-205 on fungible goods, a holder to whom a negotiable document of title has been duly negotiated acquires thereby:

(a) Title to the document;

(b) Title to the goods;

(c) All rights accruing under the law of agency or estoppel, including rights to goods delivered to the bailee after the document was issued; and

(d) The direct obligation of the issuer to hold or deliver the goods according to the terms of the document free of any defense or claim by him except those arising under the terms of the document or under this article. In the case of a delivery order the bailee’s obligation accrues only

upon acceptance and the obligation acquired by the holder is that the issuer and any indorser will procure the acceptance of the bailee.

(2) Subject to Code Section 11-7-503, title and rights so acquired are not defeated by any stoppage of the goods represented by the document or by surrender of such goods by the bailee, and are not impaired even though the negotiation or any prior negotiation constituted a breach of duty or even though any person has been deprived of possession of the document by misrepresentation, fraud, accident, mistake, duress, loss, theft, or conversion, or even though a previous sale or other transfer of the goods or document has been made to a third person. (Code 1933, § 109A-7—502, enacted by Ga. L. 1962, p. 156, § 1.)

### JUDICIAL DECISIONS

**Cited** in *Citizens Bank & Trust Co. v. SLT* 1974); *Alpert v. Wickes Cos.*, 182 Ga. App. Whsec. Co., 368 F. Supp. 1042 (M.D. Ga. 51, 354 S.E.2d 674 (1987)).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 15A Am. Jur. 2d, Commercial Code, § 61 et seq. 68A Am. Jur. 2d, Secured Transactions, § 109. 78 Am. Jur. 2d, Warehouses, §§ 68, 69, 72, 74, 80.

80 C.J.S., Shipping, § 259. 93 C.J.S., Warehousemen and Safe Depositaries, § 36 et seq.

**C.J.S.** — 13 C.J.S., Carriers, §§ 398-401.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 7-502.

### 11-7-503. Document of title to goods defeated in certain cases.

(1) A document of title confers no right in goods against a person who before issuance of the document had a legal interest or a perfected security interest in them and who neither:

(a) Delivered or entrusted them or any document of title covering them to the bailor or the bailor's nominee with actual or apparent authority to ship, store, or sell or with power to obtain delivery under this article (Code Section 11-7-403) or with power of disposition under this title (Code Sections 11-2-403 and 11-9-320) or other statute or rule of law; nor

(b) Acquiesced in the procurement by the bailor or the bailor's nominee of any document of title.

(2) Title to goods based upon an unaccepted delivery order is subject to the rights of anyone to whom a negotiable warehouse receipt or bill of lading covering the goods has been duly negotiated. Such a title may be defeated under Code Section 11-7-504 to the same extent as the rights of the issuer or a transferee from the issuer.

(3) Title to goods based upon a bill of lading issued to a freight forwarder is subject to the rights of anyone to whom a bill issued by the



freight forwarder is duly negotiated; but delivery by the carrier in accordance with Part 4 of this article pursuant to its own bill of lading discharges the carrier's obligation to deliver. (Code 1933, § 109A-7—503, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 2001, p. 362, § 16.)

**The 2001 amendment**, effective July 1, 2001, in subsection (1), substituted “the bailor’s nominee” for “his nominee” in paragraphs (a) and (b) and substituted “Code Section 11-9-320” for “Code Section 11-9-307” in paragraph (a).

JUDICIAL DECISIONS

**Transferees of nonnegotiable documents.** — O.C.G.A. § 11-7-503 does not apply to protect transferees of nonnegotiable documents. *Citizens Bank & Trust Co. v. SLT Whse. Co.*, 368 F. Supp. 1042 (M.D. Ga. 1974), *aff'd*, 515 F.2d 1382 (5th Cir. 1975).

RESEARCH REFERENCES

**Am. Jur. 2d.** — 15A Am. Jur. 2d, Commercial Code, § 63. 69 Am. Jur. 2d, Secured Transactions, § 511. 78 Am. Jur. 2d, Warehouses, §§ 75, 77, 78, 217, 218. **C.J.S.** — 13 C.J.S., Carriers, § 394. 80 C.J.S., Shipping, § 256 et seq. 93 C.J.S., Warehousemen and Safe Depositaries, § 32 et seq. **U.L.A.** — Uniform Commercial Code (U.L.A.) § 7-503.

**11-7-504. Rights acquired in the absence of due negotiation; effect of diversion; seller's stoppage of delivery.**

(1) A transferee of a document, whether negotiable or nonnegotiable, to whom the document has been delivered but not duly negotiated, acquires the title and rights which his transferor had or had actual authority to convey.

(2) In the case of a nonnegotiable document, until but not after the bailee receives notification of the transfer, the rights of the transferee may be defeated:

- (a) By those creditors of the transferor who could treat the sale as void under Code Section 11-2-402; or
- (b) By a buyer from the transferor in ordinary course of business if the bailee has delivered the goods to the buyer or received notification of his rights; or
- (c) As against the bailee by good faith dealings of the bailee with the transferor.

(3) A diversion or other change of shipping instructions by the consignor in a nonnegotiable bill of lading which causes the bailee not to deliver to the consignee defeats the consignee's title to the goods if they have been delivered to a buyer in ordinary course of business and in any event defeats the consignee's rights against the bailee.

(4) Delivery pursuant to a nonnegotiable document may be stopped by a seller under Code Section 11-2-705, and subject to the requirement of due notification there provided. A bailee honoring the seller's instructions is entitled to be indemnified by the seller against any resulting loss or expense. (Code 1933, § 109A-7—504, enacted by Ga. L. 1962, p. 156, § 1.)

### JUDICIAL DECISIONS

**Due negotiation is key to title** to document and title to goods; but only a negotiable document of title can be negotiated or duly negotiated. *Citizens Bank & Trust Co. v. SLT Whse. Co.*, 368 F. Supp. 1042 (M.D. Ga. 1974), aff'd, 515 F.2d 1382 (5th Cir. 1975).

**Extent of rights conveyed by transferor.** — In absence of due negotiation transferor cannot convey greater rights than the transferor personally has, even when negotiation is formally perfect. *Citizens Bank & Trust Co. v. SLT Whse. Co.*, 368 F. Supp. 1042 (M.D. Ga. 1974), aff'd, 515 F.2d 1382 (5th Cir. 1975).

**Defenses to which lender against nonnegotiable receipts takes subject.** — Where lender lends against nonnegotiable receipts, the security is precarious, as a transferee of such receipts takes subject to all possible title

infirmities and defenses to which pledgee of negotiable documents is subject, and also incurs risk of infirmities in the lender's own transferor's title. *Citizens Bank & Trust Co. v. SLT Whse. Co.*, 368 F. Supp. 1042 (M.D. Ga. 1974), aff'd, 515 F.2d 1382 (5th Cir. 1975).

**Risks incurred by field warehouse lender in acquiring nonnegotiable receipts.** — Field warehouse lender who acquires nonnegotiable receipts incurs all risks that lender against negotiable documents incurs, as well as the additional title risks that party acquiring nonnegotiable documents incurs. Generally, so far as debtor's title is defective, so too is lender's title defective. *Citizens Bank & Trust Co. v. SLT Whse. Co.*, 368 F. Supp. 1042 (M.D. Ga. 1974), aff'd, 515 F.2d 1382 (5th Cir. 1975).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 15A Am. Jur. 2d, Commercial Code, §§ 57, 64, 65. 78 Am. Jur. 2d, Warehouses, §§ 65, 69, 81, 108.

**C.J.S.** — 13 C.J.S., Carriers, § 194. 80 C.J.S., Shipping, § 257 et seq. 93 C.J.S., Warehousemen and Safe Depositaries, § 32 et seq.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 7-504.

**ALR.** — Right of surety on warehouseman's bond to be subrogated to rights of owner of property stored as against third person, 4 ALR 518.

### 11-7-505. Indorser not a guarantor for other parties.

The indorsement of a document of title issued by a bailee does not make the indorser liable for any default by the bailee or by previous indorsers. (Code 1933, § 109A-7—505, enacted by Ga. L. 1962, p. 156, § 1.)

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 15A Am. Jur. 2d, Commercial Code, § 70. 78 Am. Jur. 2d, Warehouses, § 71.

**C.J.S.** — 13 C.J.S., Carriers, §§ 398-401. 80 C.J.S., Shipping, § 260 et seq. 93 C.J.S., Warehousemen and Safe Depositaries, § 40.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 7-505.

**ALR.** — Character of bill of lading contemplated by a guaranty of payment of a draft with bill of lading attached, 13 ALR 166.

**11-7-506. Delivery without indorsement; right to compel indorsement.**

The transferee of a negotiable document of title has a specifically enforceable right to have his transferor supply any necessary indorsement but the transfer becomes a negotiation only as of the time the indorsement is supplied. (Code 1933, § 109A-7—506, enacted by Ga. L. 1962, p. 156, § 1.)

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 15A Am. Jur. 2d, Commercial Code, § 57. 78 Am. Jur. 2d, Warehouses, § 65.

**C.J.S.** — 6A C.J.S., Assignments, § 53. 13 C.J.S., Carriers, §§ 398-401. 80 C.J.S., Shipping, § 259. 93 C.J.S., Warehousemen and Safe Depositaries, § 41 et seq.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 7-506.

**ALR.** — Lack of endorsement or irregular endorsement of warehouse receipt or bill of lading as affecting pledge of goods, 18 ALR 588.

**11-7-507. Warranties on negotiation or transfer of receipt or bill.**

Where a person negotiates or transfers a document of title for value otherwise than as a mere intermediary under Code Section 11-7-508, then unless otherwise agreed he warrants to his immediate purchaser only in addition to any warranty made in selling the goods:

(a) That the document is genuine; and

(b) That he has no knowledge of any fact which would impair its validity or worth; and

(c) That his negotiation or transfer is rightful and fully effective with respect to the title to the document and the goods it represents. (Code 1933, § 109A-7—507, enacted by Ga. L. 1962, p. 156, § 1.)

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 15A Am. Jur. 2d, Commercial Code, § 67. 68A Am. Jur. 2d, Secured Transactions, § 109. 78 Am. Jur. 2d, Warehouses, § 71.

**C.J.S.** — 13 C.J.S., Carriers, §§ 398-401.

80 C.J.S., Shipping, § 259. 93 C.J.S., Warehousemen and Safe Depositaries, § 41 et seq.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 7-507.

**11-7-508. Warranties of collecting bank as to documents.**

A collecting bank or other intermediary known to be entrusted with documents on behalf of another or with collection of a draft or other claim against delivery of documents warrants by such delivery of the documents only its own good faith and authority. This rule applies even though the intermediary has purchased or made advances against the claim or draft to



be collected. (Code 1933, § 109A-7—508, enacted by Ga. L. 1962, p. 156, § 1.)

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 15A Am. Jur. 2d, Commercial Code, § 68.

**C.J.S.** — 9 C.J.S., Banks and Banking, § 241.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 7-508.

#### **11-7-509. Receipt or bill: when adequate compliance with commercial contract.**

The question whether a document is adequate to fulfill the obligations of a contract for sale or the conditions of a credit is governed by the articles on sales (Article 2 of this title) and on letters of credit (Article 5 of this title). (Code 1933, § 109A-7—509, enacted by Ga. L. 1962, p. 156, § 1.)

#### RESEARCH REFERENCES

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 7-509.

### PART 6

#### WAREHOUSE RECEIPTS AND BILLS OF LADING: MISCELLANEOUS PROVISIONS

#### **11-7-601. Lost and missing documents.**

(1) If a document has been lost, stolen, or destroyed, a court may order delivery of the goods or issuance of a substitute document and the bailee may without liability to any person comply with such order. If the document was negotiable the claimant must post security approved by the court to indemnify any person who may suffer loss as a result of nonsurrender of the document. If the document was not negotiable, such security may be required at the discretion of the court. The court may also in its discretion order payment of the bailee's reasonable costs and counsel fees.

(2) A bailee who without court order delivers goods to a person claiming under a missing negotiable document is liable to any person injured thereby, and if the delivery is not in good faith becomes liable for conversion. Delivery in good faith is not conversion if made in accordance with a filed classification or tariff or, where no classification or tariff is filed, if the claimant posts security with the bailee in an amount at least double the value of the goods at the time of posting to indemnify any person injured by the delivery who files a notice of claim within one year after the delivery. (Code 1933, § 109A-7—601, enacted by Ga. L. 1962, p. 156, § 1.)

**Cross references.** — Establishment of lost documents generally, Ch. 8, T. 24.

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 13 Am. Jur. 2d, Carriers, § 462. 15A Am. Jur. 2d, Commercial Code, §§ 39, 44, 117. 78 Am. Jur. 2d, Warehouses, § 220.

**C.J.S.** — 54 C.J.S., Lost Instruments, § 3.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 7-601.

### 11-7-602. Attachment of goods covered by a negotiable document.

Except where the document was originally issued upon delivery of the goods by a person who had no power to dispose of them, no lien attaches by virtue of any judicial process to goods in the possession of a bailee for which a negotiable document of title is outstanding unless the document be first surrendered to the bailee or its negotiation enjoined, and the bailee shall not be compelled to deliver the goods pursuant to process until the document is surrendered to him or impounded by the court. One who purchases the document for value without notice of the process or injunction takes free of the lien imposed by judicial process. (Code 1933, § 109A-7—602, enacted by Ga. L. 1962, p. 156, § 1.)

**Cross references.** — Attachment proceedings generally, Ch. 3, T. 18.

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 6 Am. Jur. 2d, Attachment and Garnishment, § 90. 78 Am. Jur. 2d, Warehouses, § 107.

**C.J.S.** — 7 C.J.S., Attachment, § 273 et seq. 33 C.J.S., Executions, §§ 142, 143.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 7-602.

**ALR.** — Character of bill of lading contemplated by a guaranty of payment of a draft with bill of lading attached, 13 ALR 166.

Attachment or garnishment of goods covered by negotiable warehouse receipts, 40 ALR 969.

### 11-7-603. Conflicting claims; interpleader.

If more than one person claims title or possession of the goods, the bailee is excused from delivery until he has had a reasonable time to ascertain the validity of the adverse claims or to bring an action to compel all claimants to interplead and may compel such interpleader, either in defending an action for nondelivery of the goods, or by original action, whichever is appropriate. (Code 1933, § 109A-7—603, enacted by Ga. L. 1962, p. 156, § 1.)

**Cross references.** — Interpleader generally, § 9-11-22.

## JUDICIAL DECISIONS

**Warehouser acted appropriately** under O.C.G.A. § 11-7-603 when it refused to deliver beef in its possession as bailee to appellant-garnishor in light of another claim

filed with it which was adverse to that of appellant. *Northwestern Nat'l Sales, Inc. v. Commercial Cold Storage, Inc.*, 162 Ga. App. 741, 293 S.E.2d 30 (1982).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 817 Am. Jur. 2d, Bailments, § 177. 78 Am. Jur. 2d, Warehouses, § 264.

**C.J.S.** — 48 C.J.S., Interpleader, § 10.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 7-603.

**ALR.** — Right of judgment debtor to interplead, 48 ALR 966.

Allowance of interest on interpleaded or impleaded disputed funds, 15 ALR2d 473.



## INVESTMENT SECURITIES

### ARTICLE 8

#### INVESTMENT SECURITIES

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11-8-501.	Securities account; acquisition of security entitlement from securities intermediary.
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Sec.		Sec.	
	to exercise rights as directed by entitlement holder.	11-8-510.	Rights of purchaser of security entitlement from entitlement holder.
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### Transition Provisions for Revised Article 8 and Conforming Amendments to Articles 1, 3, 4, 5, 9, and 10

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11-8-602.	Repeals.
11-8-603.	Savings clause.

**Cross references.** — Regulation of sale of securities generally, Ch. 5, T. 10. Uniform transfer on death security registration, § 53-5-60 et seq.

**Editor's notes.** — Ga. L. 1992, p. 2626, effective July 1, 1992, repealed the Code sections formerly codified at this article, and enacted the former provisions of this article. The former article consisted of Code Sections 11-8-101 through 11-8-106 (Part 1); 11-8-201 through 11-8-208 (Part 2); 11-8-301 through 11-8-320 (Part 3); and 11-8-401 through 11-8-406 (Part 4) and was based on Ga. L. 1962, p. 156, § 1; Ga. L. 1963, p. 188,

§§ 19-22; Ga. L. 1964, p. 70, § 2, Ga. L. 1966, p. 168, §§ 1-4; Ga. L. 1973, p. 689, § 1; Ga. L. 1981, Ex. Sess., p. 8; and Ga. L. 1982, p. 3, § 11.

Ga. L. 1998, p. 1323, § 1, effective July 1, 1998, repealed the Code sections formerly codified at this article and enacted the current article. The former article consisted of Code Sections 11-8-101 through 11-8-408, relating to the Uniform Commercial Code - Investment Securities, and was based on Code 1981, § 11-8-101 et seq., enacted by Ga. L. 1992, p. 2626, § 3.

### RESEARCH REFERENCES

**ALR.** — What is a “security” under UCC Art. 8, 11 ALR4th 1036.

## PART 1

### SHORT TITLE AND GENERAL MATTERS

#### 11-8-101. Short title.

This article shall be known and may be cited as the “Uniform Commercial Code — Investment Securities.” (Code 1981, § 11-8-101, enacted by Ga. L. 1998, p. 1323, § 1; Ga. L. 1999, p. 81, § 11.)

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 15A Am. Jur. 2d, Commercial Code, § 69.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 8-101.

**11-8-102. Definitions.**

(a) In this article:

(1) “Adverse claim” means a claim that a claimant has a property interest in a financial asset and that it is a violation of the rights of the claimant for another person to hold, transfer, or deal with the financial asset.

(2) “Bearer form,” as applied to a certificated security, means a form in which the security is payable to the bearer of the security certificate according to its terms but not by reason of an indorsement.

(3) “Broker” means a person defined as a broker or dealer under the federal securities laws, but without excluding a bank acting in that capacity.

(4) “Certificated security” means a security that is represented by a certificate.

(5) “Clearing corporation” means:

(i) A person that is registered as a “clearing agency” under the federal securities laws;

(ii) A federal reserve bank; or

(iii) Any other person that provides clearance or settlement services with respect to financial assets that would require it to register as a clearing agency under the federal securities laws but for an exclusion or exemption from the registration requirement, if its activities as a clearing corporation, including promulgation of rules, are subject to regulation by a federal or state governmental authority.

(6) “Communicate” means to:

(i) Send a signed writing; or

(ii) Transmit information by any mechanism agreed upon by the persons transmitting and receiving the information.

(7) “Entitlement holder” means a person identified in the records of a securities intermediary as the person having a security entitlement against the securities intermediary. If a person acquires a security entitlement by virtue of paragraph (2) or (3) of subsection (b) of Code Section 11-8-501, that person is the entitlement holder.

(8) “Entitlement order” means a notification communicated to a securities intermediary directing transfer or redemption of a financial asset to which the entitlement holder has a security entitlement.

(9) “Financial asset,” except as otherwise provided in Code Section 11-8-103, means:

(i) A security;



(ii) An obligation of a person or a share, participation, or other interest in a person or in property or an enterprise of a person, which is, or is of a type, dealt in or traded on financial markets, or which is recognized in any area in which it is issued or dealt in as a medium for investment; or

(iii) Any property that is held by a securities intermediary for another person in a securities account if the securities intermediary has expressly agreed with the other person that the property is to be treated as a financial asset under this article.

As context requires, the term means either the interest itself or the means by which a person's claim to it is evidenced, including a certificated or uncertificated security, a security certificate, or a security entitlement.

(10) "Good faith," for purposes of the obligation of good faith in the performance or enforcement of contracts or duties within this article, means honesty in fact and the observance of reasonable commercial standards of fair dealing.

(11) "Indorsement" means a signature that alone or accompanied by other words is made on a security certificate in registered form or on a separate document for the purpose of assigning, transferring, or redeeming the security or granting a power to assign, transfer, or redeem it.

(12) "Instruction" means a notification communicated to the issuer of an uncertificated security which directs that the transfer of the security be registered or that the security be redeemed.

(13) "Registered form," as applied to a certificated security, means a form in which:

(i) The security certificate specifies a person entitled to the security; and

(ii) A transfer of the security may be registered upon books maintained for that purpose by or on behalf of the issuer, or the security certificate so states.

(14) "Securities intermediary" means:

(i) A clearing corporation; or

(ii) A person, including a bank or broker, that in the ordinary course of its business maintains securities accounts for others and is acting in that capacity.

(15) "Security," except as otherwise provided in Code Section 11-8-103, means an obligation of an issuer or a share, participation, or other interest in an issuer or in property or an enterprise of an issuer:

(i) Which is represented by a security certificate in bearer or registered form, or the transfer of which may be registered upon books maintained for that purpose by or on behalf of the issuer;

(ii) Which is one of a class or series or by its terms is divisible into a class or series of shares, participations, interests, or obligations; and

(iii) Which:

(A) Is, or is of a type, dealt in or traded on securities exchanges or securities markets; or

(B) Is a medium for investment and by its terms expressly provides that it is a security governed by this article.

(16) “Security certificate” means a certificate representing a security.

(17) “Security entitlement” means the rights and property interest of an entitlement holder with respect to a financial asset specified in Part 5 of this article.

(18) “Uncertificated security” means a security that is not represented by a certificate.

(b) Other definitions applying to this article and the Code sections in which they appear are:

“Appropriate person.” Code Section 11-8-107.

“Control.” Code Section 11-8-106.

“Delivery.” Code Section 11-8-301.

“Investment company security.” Code Section 11-8-103.

“Issuer.” Code Section 11-8-201.

“Overissue.” Code Section 11-8-210.

“Protected purchaser.” Code Section 11-8-303.

“Securities account.” Code Section 11-8-501.

(c) In addition, Article 1 of this title contains general definitions and principles of construction and interpretation applicable throughout this article.

(d) The characterization of a person, business, or transaction for purposes of this article does not determine the characterization of the person, business, or transaction for purposes of any other law, regulation, or rule. (Code 1981, § 11-8-102, enacted by Ga. L. 1998, p. 1323, § 1.)

### JUDICIAL DECISIONS

**Editor’s notes.** — In light of the similarity of the issues dealt with, decisions under former Code 1933, § 109A-8-102 are included in the annotations of this section.

**The word security referred to in former § 11-8-317** includes and embraces common

stock in corporations. *Grossman v. Glass*, 239 Ga. 319, 236 S.E.2d 657 (1977) (decided under former Code 1933, § 109A-9-102).

**United States Treasury Bills** are investment securities as defined by subsection (1)(a). *Brannon v. First Nat’l Bank*, 137 Ga.

App. 275, 223 S.E.2d 473 (1976) (decided under former Code 1933, § 109A-9-102).

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 15A Am. Jur. 2d, Commercial Code, § 69 et seq.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 8-102.

**ALR.** — Legal aspects of transactions in securities “when issued” or “when, as and if” issued, 88 ALR 311.

What passes under term “securities” in will, 27 ALR3d 1386.

What are “securities, documents or other written instruments” within terms of bankers’ blanket bond insuring losses from counterfeiting or forgery, 38 ALR3d 1437.

What is a “security” under UCC Art. 8, 11 ALR4th 1036.

### 11-8-103. Rules for determining whether certain obligations and interests are securities or financial assets.

(a) A share or similar equity interest issued by a corporation, business trust, joint stock company, or similar entity is a security.

(b) An “investment company security” is a security. “Investment company security” means a share or similar equity interest issued by an entity that is registered as an investment company under the federal investment company laws, an interest in a unit investment trust that is so registered, or a face-amount certificate issued by a face-amount certificate company that is so registered. Investment company security does not include an insurance policy or endowment policy or annuity contract issued by an insurance company.

(c) An interest in a partnership or limited liability company is not a security unless it is dealt in or traded on securities exchanges or in securities markets, its terms expressly provide that it is a security governed by this article, or it is an investment company security. However, an interest in a partnership or limited liability company is a financial asset if it is held in a securities account.

(d) A writing that is a security certificate is governed by this article and not by Article 3 of this title, even though it also meets the requirements of that article. However, a negotiable instrument governed by Article 3 of this title is a financial asset if it is held in a securities account.

(e) An option or similar obligation issued by a clearing corporation to its participants is not a security, but is a financial asset.

(f) A commodity contract, as defined in subsection (a) of Code Section 11-9-102, is not a security or a financial asset. (Code 1981, § 11-8-103, enacted by Ga. L. 1998, p. 1323, § 1; Ga. L. 2001, p. 362, § 17.)

**The 2001 amendment**, effective July 1, 2001, substituted “subsection (a) of Code Section 11-9-102” for “Code Section 11-9-115” in subsection (f).



RESEARCH REFERENCES

- U.L.A.** — Uniform Commercial Code (U.L.A.) § 8-103.

**ALR.** — Constructive notice to purchaser or pledgee of stock of corporation’s lien thereon, 33 ALR 1272.
- Priority as between lien of corporation and rights of pledgee or bona fide purchaser of corporate stock, 81 ALR 989.

11-8-104. Acquisition of security or financial asset or interest therein.

- (a) A person acquires a security or an interest therein, under this article, if:
- (1) The person is a purchaser to whom a security is delivered pursuant to Code Section 11-8-301; or

(2) The person acquires a security entitlement to the security pursuant to Code Section 11-8-501.
- (b) A person acquires a financial asset, other than a security, or an interest therein, under this article, if the person acquires a security entitlement to the financial asset.
- (c) A person who acquires a security entitlement to a security or other financial asset has the rights specified in Part 5 of this article, but is a purchaser of any security, security entitlement, or other financial asset held by the securities intermediary only to the extent provided in Code Section 11-8-503.
- (d) Unless the context shows that a different meaning is intended, a person who is required by other law, regulation, rule, or agreement to transfer, deliver, present, surrender, exchange, or otherwise put in the possession of another person a security or financial asset satisfies that requirement by causing the other person to acquire an interest in the security or financial asset pursuant to subsection (a) or (b) of this Code section. (Code 1981, § 11-8-104, enacted by Ga. L. 1998, p. 1323, § 1.)

RESEARCH REFERENCES

- U.L.A.** — Uniform Commercial Code (U.L.A.) § 8-104.

**ALR.** — Liability of public corporation for
- money received by it for unlawfully issued instrument of indebtedness, 7 ALR 353.

11-8-105. Notice of adverse claim.

- (a) A person has notice of an adverse claim if:
- (1) The person knows of the adverse claim;

(2) The person is aware of facts sufficient to indicate that there is a significant probability that the adverse claim exists and deliberately avoids information that would establish the existence of the adverse claim; or

(3) The person has a duty, imposed by statute or regulation, to investigate whether an adverse claim exists, and the investigation so required would establish the existence of the adverse claim.

(b) Having knowledge that a financial asset or interest therein is or has been transferred by a representative imposes no duty of inquiry into the rightfulness of a transaction and is not notice of an adverse claim. However, a person who knows that a representative has transferred a financial asset or interest therein in a transaction that is, or whose proceeds are being used, for the individual benefit of the representative or otherwise in breach of duty has notice of an adverse claim.

(c) An act or event that creates a right to immediate performance of the principal obligation represented by a security certificate or sets a date on or after which the certificate is to be presented or surrendered for redemption or exchange does not itself constitute notice of an adverse claim except in the case of a transfer more than:

(1) One year after a date set for presentment or surrender for redemption or exchange; or

(2) Six months after a date set for payment of money against presentation or surrender of the certificate, if money was available for payment on that date.

(d) A purchaser of a certificated security has notice of an adverse claim if the security certificate:

(1) Whether in bearer or registered form, has been indorsed “for collection” or “for surrender” or for some other purpose not involving transfer; or

(2) Is in bearer form and has on it an unambiguous statement that it is the property of a person other than the transferor, but the mere writing of a name on the certificate is not such a statement.

(e) Filing of a financing statement under Article 9 of this title is not notice of an adverse claim to a financial asset. (Code 1981, § 11-8-105, enacted by Ga. L. 1998, p. 1323, § 1.)

### JUDICIAL DECISIONS

**Editor’s notes.** — In light of the similarity of the provisions, decisions under former Code Section 11-8-304 are included in the annotations of this section.

**Endorsements “for collection” and “for surrender.”** — Examples given in former subsection (1)(a) of this section, (for collec-

tion, for surrender), of endorsements not involving transfer are in fact endorsements excluding idea of transfer by sale. *Harris, Upham & Co. v. Harris*, 142 Ga. App. 696, 236 S.E.2d 773 (1977) (decided under former § 11-8-304).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 15A Am. Jur. 2d, Commercial Code, § 98 et seq.

**C.J.S.** — 19 C.J.S., Corporations, § 670. 64A C.J.S., Municipal Corporations, § 1716 et seq. 81A C.J.S., States, § 190.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 8-105.

**ALR.** — Conflict of laws as to title and

transfer of corporate stock, 131 ALR 192.

Right or duty of corporation to refuse to transfer stock on books to one presenting properly endorsed certificate, because of knowledge or suspicion of conflicting rights of registered holder or of third person, 139 ALR 273; 75 ALR2d 746.

**11-8-106. Control.**

(a) A purchaser has “control” of a certificated security in bearer form if the certificated security is delivered to the purchaser.

(b) A purchaser has “control” of a certificated security in registered form if the certificated security is delivered to the purchaser, and:

(1) The certificate is indorsed to the purchaser or in blank by an effective indorsement; or

(2) The certificate is registered in the name of the purchaser, upon original issue or registration of transfer by the issuer.

(c) A purchaser has “control” of an uncertificated security if:

(1) The uncertificated security is delivered to the purchaser; or

(2) The issuer has agreed that it will comply with instructions originated by the purchaser without further consent by the registered owner.

(d) A purchaser has “control” of a security entitlement if:

(1) The purchaser becomes the entitlement holder;

(2) The securities intermediary has agreed that it will comply with entitlement orders originated by the purchaser without further consent by the entitlement holder; or

(3) Another person has control of the security entitlement on behalf of the purchaser or, having previously acquired control of the security entitlement, acknowledges that it has control on behalf of the purchaser.

(e) If an interest in a security entitlement is granted by the entitlement holder to the entitlement holder’s own securities intermediary, the securities intermediary has control.

(f) A purchaser who has satisfied the requirements of subsection (c) or (d) of this Code section has control, even if the registered owner in the case of subsection (c) of this Code section or the entitlement holder in the case of subsection (d) of this Code section retains the right to make substitutions for the uncertificated security or security entitlement, to originate instruc-



tions or entitlement orders to the issuer or securities intermediary, or otherwise to deal with the uncertificated security or security entitlement.

(g) An issuer or a securities intermediary may not enter into an agreement of the kind described in paragraph (2) of subsection (c) of this Code section or paragraph (2) of subsection (d) of this Code section without the consent of the registered owner or entitlement holder, but an issuer or a securities intermediary is not required to enter into such an agreement even though the registered owner or entitlement holder so directs. An issuer or securities intermediary that has entered into such an agreement is not required to confirm the existence of the agreement to another party unless requested to do so by the registered owner or entitlement holder. (Code 1981, § 11-8-106, enacted by Ga. L. 1998, p. 1323, § 1; Ga. L. 2001, p. 362, § 18.)

**The 2001 amendment**, effective July 1, 2001, in subsection (d), deleted “or” at the end of paragraph (1), substituted “; or” for a period at the end of paragraph (2), and added paragraph (3); and, in subsection (f), substituted “the requirements of subsection (c) or (d)” for “the requirements of para-

graph (2) of subsection (c) of this Code section or paragraph (2) of subsection (d)” near the beginning, inserted a comma after “Code section has control”, and deleted “paragraph (2) of” following “in the case of” in two places.

#### RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 8-106.

#### **11-8-107. Whether indorsement, instruction, or entitlement order is effective.**

(a) “Appropriate person” means:

(1) With respect to an indorsement, the person specified by a security certificate or by an effective special indorsement to be entitled to the security;

(2) With respect to an instruction, the registered owner of an uncertificated security;

(3) With respect to an entitlement order, the entitlement holder;

(4) If the person designated in paragraph (1), (2), or (3) of this subsection is deceased, the designated person’s successor taking under other law or the designated person’s personal representative acting for the estate of the decedent; or

(5) If the person designated in paragraph (1), (2), or (3) of this subsection lacks capacity, the designated person’s guardian, conservator, or other similar representative who has power under other law to transfer the security or financial asset.

(b) An indorsement, instruction, or entitlement order is effective if:

(1) It is made by the appropriate person;

(2) It is made by a person who has power under the law of agency to transfer the security or financial asset on behalf of the appropriate person, including, in the case of an instruction or entitlement order, a person who has control under paragraph (2) of subsection (c) of Code Section 11-8-106 or paragraph (2) of subsection (d) of Code Section 11-8-106; or

(3) The appropriate person has ratified it or is otherwise precluded from asserting its ineffectiveness.

(c) An indorsement, instruction, or entitlement order made by a representative is effective even if:

(1) The representative has failed to comply with a controlling instrument or with the law of the state having jurisdiction of the representative relationship, including any law requiring the representative to obtain court approval of the transaction; or

(2) The representative's action in making the indorsement, instruction, or entitlement order or using the proceeds of the transaction is otherwise a breach of duty.

(d) If a security is registered in the name of or specially indorsed to a person described as a representative, or if a securities account is maintained in the name of a person described as a representative, an indorsement, instruction, or entitlement order made by the person is effective even though the person is no longer serving in the described capacity.

(e) Effectiveness of an indorsement, instruction, or entitlement order is determined as of the date the indorsement, instruction, or entitlement order is made, and an indorsement, instruction, or entitlement order does not become ineffective by reason of any later change of circumstances. (Code 1981, § 11-8-107, enacted by Ga. L. 1998, p. 1323, § 1; Ga. L. 2002, p. 415, § 11.)

**The 2002 amendment**, effective April 18, 2002, part of an Act to revise, modernize, and correct the Code, revised capitalization in paragraph (c)(1).

## JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Code Section 11-8-307 are included in the annotations of this section.

**Transfer of legal interest.** — Legal interest in a security is transferred upon the proper indorsement and delivery of the security. *Wheelless v. Gelzer*, 780 F. Supp. 1373 (N.D.

Ga. 1991) (decided under former § 11-8-307).

**Transfer held valid.** — The Stock/Bond Powers pursuant to which stock was transferred which were returned to the bank blank except for the appropriate signature, satisfied the technical requirements of former subsection (1) of this section for

valid transfer. *Wheless v. Gelzer*, 780 F. Supp. 1373 (N.D. Ga. 1991) (decided under former § 11-8-307).

### OPINIONS OF THE ATTORNEY GENERAL

**Transfer of abandoned stock certificates.** — If requested, the commissioner of revenue may, but is not required to, provide the issuing corporation or its transfer agent with a document signed by the commissioner authorizing the transfer of abandoned stock certificates to the commissioner pursuant to the Georgia Unclaimed Property Act, O.C.G.A. Art. 5, Ch. 12, T. 44, and such transfer document would satisfy the requirements of the UCC pertaining to the transfer of stock certificates. 1983 Op. Att'y Gen. No.

83-77 (decided under former § 11-8-308 prior to 1992 repeal of article).

The implicit requirement of the Disposition of Unclaimed Property Act O.C.G.A. Art. 5, Ch. 12, T. 44, that stock certificates be delivered to the commissioner of revenue registered in the commissioner's name takes precedence over the provisions of the UCC pertaining to a separate transfer document signed by an appropriate person. 1983 Op. Att'y Gen. No. 83-77 (decided under former § 11-8-308 prior to 1992 repeal of article).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 15A Am. Jur. 2d, Commercial Code, §§ 84, 100 et seq.

**C.J.S.** — 12 C.J.S., Brokers, §§ 23 et seq.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 8-107.

### 11-8-108. Warranties in direct holding.

(a) A person who transfers a certificated security to a purchaser for value warrants to the purchaser, and an indorser, if the transfer is by indorsement, warrants to any subsequent purchaser, that:

- (1) The certificate is genuine and has not been materially altered;
- (2) The transferor or indorser does not know of any fact that might impair the validity of the security;
- (3) There is no adverse claim to the security;
- (4) The transfer does not violate any restriction on transfer;
- (5) If the transfer is by indorsement, the indorsement is made by an appropriate person, or if the indorsement is by an agent, the agent has actual authority to act on behalf of the appropriate person; and
- (6) The transfer is otherwise effective and rightful.

(b) A person who originates an instruction for registration of transfer of an uncertificated security to a purchaser for value warrants to the purchaser that:

- (1) The instruction is made by an appropriate person, or if the instruction is by an agent, the agent has actual authority to act on behalf of the appropriate person;
- (2) The security is valid;



- (3) There is no adverse claim to the security; and
- (4) At the time the instruction is presented to the issuer:
  - (i) The purchaser will be entitled to the registration of transfer;
  - (ii) The transfer will be registered by the issuer free from all liens, security interests, restrictions, and claims other than those specified in the instruction;
  - (iii) The transfer will not violate any restriction on transfer; and
  - (iv) The requested transfer will otherwise be effective and rightful.
- (c) A person who transfers an uncertificated security to a purchaser for value and does not originate an instruction in connection with the transfer warrants that:
  - (1) The uncertificated security is valid;
  - (2) There is no adverse claim to the security;
  - (3) The transfer does not violate any restriction on transfer; and
  - (4) The transfer is otherwise effective and rightful.
- (d) A person who indorses a security certificate warrants to the issuer that:
  - (1) There is no adverse claim to the security; and
  - (2) The indorsement is effective.
- (e) A person who originates an instruction for registration of transfer of an uncertificated security warrants to the issuer that:
  - (1) The instruction is effective; and
  - (2) At the time the instruction is presented to the issuer the purchaser will be entitled to the registration of transfer.
- (f) A person who presents a certificated security for registration of transfer or for payment or exchange warrants to the issuer that the person is entitled to the registration, payment, or exchange, but a purchaser for value and without notice of adverse claims to whom transfer is registered warrants only that the person has no knowledge of any unauthorized signature in a necessary indorsement.
- (g) If a person acts as agent of another in delivering a certificated security to a purchaser, the identity of the principal was known to the person to whom the certificate was delivered, and the certificate delivered by the agent was received by the agent from the principal or received by the agent from another person at the direction of the principal, the person delivering the security certificate warrants only that the delivering person has author-

ity to act for the principal and does not know of any adverse claim to the certificated security.

(h) A secured party who redelivers a security certificate received, or after payment and on order of the debtor delivers the security certificate to another person, makes only the warranties of an agent under subsection (g) of this Code section.

(i) Except as otherwise provided in subsection (g) of this Code section, a broker acting for a customer makes to the issuer and a purchaser the warranties provided in subsections (a) through (f) of this Code section. A broker that delivers a security certificate to its customer, or causes its customer to be registered as the owner of an uncertificated security, makes to the customer the warranties provided in subsection (a) or (b) of this Code section, and has the rights and privileges of a purchaser under this Code section. The warranties of and in favor of the broker acting as an agent are in addition to applicable warranties given by and in favor of the customer. (Code 1981, § 11-8-108, enacted by Ga. L. 1998, p. 1323, § 1.)

#### RESEARCH REFERENCES

**U.L.A.** — Uniform Commercial Code  
(U.L.A.) § 8-108.

#### **11-8-109. Warranties in indirect holding.**

(a) A person who originates an entitlement order to a securities intermediary warrants to the securities intermediary that:

(1) The entitlement order is made by an appropriate person, or if the entitlement order is by an agent, the agent has actual authority to act on behalf of the appropriate person; and

(2) There is no adverse claim to the security entitlement.

(b) A person who delivers a security certificate to a securities intermediary for credit to a securities account or originates an instruction with respect to an uncertificated security directing that the uncertificated security be credited to a securities account makes to the securities intermediary the warranties specified in subsection (a) or (b) of Code Section 11-8-108.

(c) If a securities intermediary delivers a security certificate to its entitlement holder or causes its entitlement holder to be registered as the owner of an uncertificated security, the securities intermediary makes to the entitlement holder the warranties specified in subsection (a) or (b) of Code Section 11-8-108. (Code 1981, § 11-8-109, enacted by Ga. L. 1998, p. 1323, § 1.)

## RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 8-109.

**11-8-110. Applicability; choice of law.**

(a) The local law of the issuer's jurisdiction, as specified in subsection (d) of this Code section, governs:

- (1) The validity of a security;
- (2) The rights and duties of the issuer with respect to registration of transfer;
- (3) The effectiveness of registration of transfer by the issuer;
- (4) Whether the issuer owes any duties to an adverse claimant to a security; and
- (5) Whether an adverse claim can be asserted against a person to whom transfer of a certificated or uncertificated security is registered or a person who obtains control of an uncertificated security.

(b) The local law of the securities intermediary's jurisdiction, as specified in subsection (e) of this Code section, governs:

- (1) Acquisition of a security entitlement from the securities intermediary;
- (2) The rights and duties of the securities intermediary and entitlement holder arising out of a security entitlement;
- (3) Whether the securities intermediary owes any duties to an adverse claimant to a security entitlement; and
- (4) Whether an adverse claim can be asserted against a person who acquires a security entitlement from the securities intermediary or a person who purchases a security entitlement or interest therein from an entitlement holder.

(c) The local law of the jurisdiction in which a security certificate is located at the time of delivery governs whether an adverse claim can be asserted against a person to whom the security certificate is delivered.

(d) "Issuer's jurisdiction" means the jurisdiction under which the issuer of the security is organized or, if permitted by the law of that jurisdiction, the law of another jurisdiction specified by the issuer. An issuer organized under the law of this state may specify the law of another jurisdiction as the law governing the matters specified in paragraphs (2) through (5) of subsection (a) of this Code section.



(e) The following rules determine a “securities intermediary’s jurisdiction” for purposes of this Code section:

(1) If an agreement between the securities intermediary and its entitlement holder governing the securities account expressly provides that a particular jurisdiction is the securities intermediary’s jurisdiction for purposes of this part, this article, or Article 9 of this title, that jurisdiction is the securities intermediary’s jurisdiction;

(2) If paragraph (1) of this subsection does not apply and an agreement between the securities intermediary and its entitlement holder governing the securities account expressly provides that the agreement is governed by the law of a particular jurisdiction, that jurisdiction is the securities intermediary’s jurisdiction;

(3) If neither paragraph (1) nor paragraph (2) of this subsection applies and an agreement between the securities intermediary and its entitlement holder governing the securities account expressly provides that the securities account is maintained at an office in a particular jurisdiction, that jurisdiction is the securities intermediary’s jurisdiction;

(4) If none of the preceding paragraphs of this subsection applies, the securities intermediary’s jurisdiction is the jurisdiction in which the office identified in an account statement as the office serving the entitlement holder’s account is located; and

(5) If none of the preceding paragraphs of this subsection applies, the securities intermediary’s jurisdiction is the jurisdiction in which the chief executive office of the securities intermediary is located.

(f) A securities intermediary’s jurisdiction is not determined by the physical location of certificates representing financial assets, or by the jurisdiction in which is organized the issuer of the financial asset with respect to which an entitlement holder has a security entitlement, or by the location of facilities for data processing or other record keeping concerning the account. (Code 1981, § 11-8-110, enacted by Ga. L. 1998, p. 1323, § 1; Ga. L. 2001, p. 362, § 19; Ga. L. 2002, p. 415, § 11.)

**The 2001 amendment**, effective July 1, 2001, rewrote subsection (e).

**The 2002 amendment**, effective April 18,

2002, part of an Act to revise, modernize, and correct the Code, revised capitalization in subsection (d).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 15A Am. Jur. 2d, Commercial Code, §§ 11, 75.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 8-110.

**ALR.** — Conflict of laws as to title and transfer of corporate stock, 131 ALR 192.

Federal securities acts as superseding state acts, 145 ALR 1252.

**11-8-111. Clearing corporation rules.**

A rule adopted by a clearing corporation governing rights and obligations among the clearing corporation and its participants in the clearing corporation is effective even if the rule conflicts with this Act and affects another party who does not consent to the rule. (Code 1981, § 11-8-111, enacted by Ga. L. 1998, p. 1323, § 1.)

**RESEARCH REFERENCES**

**U.L.A.** — Uniform Commercial Code  
(U.L.A.) § 8-111.

**11-8-112. Creditor's legal process.**

(a) The interest of a debtor in a certificated security may be reached by a creditor only by actual seizure of the security certificate by the officer making the attachment or levy, except as otherwise provided in subsection (d) of this Code section. However, a certificated security for which the certificate has been surrendered to the issuer may be reached by a creditor by legal process upon the issuer.

(b) The interest of a debtor in an uncertificated security may be reached by a creditor only by legal process upon the issuer at its chief executive office in the United States, except as otherwise provided in subsection (d) of this Code section.

(c) The interest of a debtor in a security entitlement may be reached by a creditor only by legal process upon the securities intermediary with whom the debtor's securities account is maintained, except as otherwise provided in subsection (d) of this Code section.

(d) The interest of a debtor in a certificated security for which the certificate is in the possession of a secured party, or in an uncertificated security registered in the name of a secured party, or a security entitlement maintained in the name of a secured party, may be reached by a creditor by legal process upon the secured party.

(e) A creditor whose debtor is the owner of a certificated security, uncertificated security, or security entitlement is entitled to aid from a court of competent jurisdiction, by injunction or otherwise, in reaching the certificated security, uncertificated security, or security entitlement or in satisfying the claim by means allowed at law or in equity in regard to property that cannot readily be reached by other legal process. (Code 1981, § 11-8-112, enacted by Ga. L. 1998, p. 1323, § 1.)

**RESEARCH REFERENCES**

**U.L.A.** — Uniform Commercial Code  
(U.L.A.) § 8-112.

**11-8-113. Statute of frauds inapplicable.**

A contract or modification of a contract for the sale or purchase of a security is enforceable whether or not there is a writing signed or record authenticated by a party against whom enforcement is sought, even if the contract or modification is not capable of performance within one year of its making. (Code 1981, § 11-8-113, enacted by Ga. L. 1998, p. 1323, § 1.)

**Cross references.** — Statute of frauds generally, § 13-5-30 et seq.

**JUDICIAL DECISIONS**

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Code 1933, § 109A-8-319 and former Code Section 11-8-319 are included in the annotations of this section.

**Writing required to enforce parol contract.** — Some writing is required to enforce a parol contract absent any other factors specified. *Patterson v. Professional Resources, Inc.*, 242 Ga. 459, 249 S.E.2d 248 (1978) (decided under former Code 1933, § 109A-8-319).

If existence of agreement is not reflected in writing, it is unenforceable. *Southeastern Waste Treatment, Inc. v. Chem-Nuclear Sys.*, 506 F. Supp. 944 (N.D. Ga. 1980) (decided under former Code 1933, § 109A-8-319); *Anderson Chem. Co. v. Portals Water Treatment, Inc.*, 768 F. Supp. 1568 (M.D. Ga. 1991), aff'd in part, rev'd in part, 971 F.2d 756 (11th Cir. 1992) (decided under former Code section § 11-8-319).

**Writing as prerequisite for further inquiry by court as to agreement.** — Absent writing to indicate that contract has been made, a court will not inquire further into existence of any agreement. *Southeastern Waste Treatment, Inc. v. Chem-Nuclear Sys.*, 506 F. Supp. 944 (N.D. Ga. 1980) (decided under former Code 1933, § 109A-8-319).

**Unenforceable agreement.** — In the absence of delivery, payment or admission, an alleged agreement for the sale of securities is unenforceable unless its existence is reflected in writing. *Turner v. MCI Telecommunications Corp.*, 203 Ga. App. 71, 416 S.E.2d 370 (1992) (decided under former § 11-8-319).

**Writing required need only indicate existence of a contract.** — It does not suffice to

produce a document which specifies certain terms, for the document must indicate that a contract has been made. However, it is not necessary that the writing itself be the contract, it need only indicate the existence of a contract. *Southeastern Waste Treatment, Inc. v. Chem-Nuclear Sys.*, 506 F. Supp. 944 (N.D. Ga. 1980) (decided under former Code 1933, § 109A-8-319).

**Letters for sale of securities not considered enforceable.** — Neither of the documents considered to be confirmations of an agreement were enforceable for the sale of securities to a potential buyer, where the letters articulated future acts and indefinite terms, thus summary judgment was granted in favor of the proposed seller of the securities. *Turner v. MCI Telecommunications Corp.*, 203 Ga. App. 71, 416 S.E.2d 370 (1992) (decided under former § 11-8-319).

**Divorce decree containing void property settlement.** — Even if property settlement agreement entered by parties were found to be void or unenforceable, a divorce decree incorporating it is binding upon husband in regard to legal rights of wife. *Harper v. Harper*, 231 Ga. 748, 204 S.E.2d 164 (1974) (decided under former Code 1933, § 109A-8-319).

**Oral promise to inform investor of bonds' callable feature.** — An alleged oral promise to notify the buyer of municipal bonds as to the exercise of callable features was collateral to a contract for the sale of securities and therefore was governed by the general statute of frauds contained in O.C.G.A. § 13-5-30. *Fowler v. Essex Co.*, 179 Ga. App. 597, 347 S.E.2d 348 (1986) (decided under former Code Section 11-8-319).

**Oral agreement involving non-monetary consideration.** — An oral agreement by an



employer to transfer corporate stock to an employee for non-monetary consideration is not a "sale" within the meaning of former

UCC § 8-319. *Thompson v. Kohl*, 216 Ga. App. 148, 453 S.E.2d 485 (1995) (decided under former § 11-8-319).

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 15A Am. Jur. 2d, Commercial Code, §§ 89, 94.

**C.J.S.** — 77A C.J.S., Sales, § 68 et seq.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 8-113.

### 11-8-114. Evidentiary rules concerning certificated securities.

The following rules apply in an action on a certificated security against the issuer:

(1) Unless specifically denied in the pleadings, each signature on a security certificate or in a necessary indorsement is admitted.

(2) If the effectiveness of a signature is put in issue, the burden of establishing effectiveness is on the party claiming under the signature, but the signature is presumed to be genuine or authorized.

(3) If signatures on a security certificate are admitted or established, production of the certificate entitles a holder to recover on it unless the defendant establishes a defense or a defect going to the validity of the security.

(4) If it is shown that a defense or defect exists, the plaintiff has the burden of establishing that the plaintiff or some person under whom the plaintiff claims is a person against whom the defense or defect cannot be asserted. (Code 1981, § 11-8-114, enacted by Ga. L. 1998, p. 1323, § 1.)

#### RESEARCH REFERENCES

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 8-114.

**ALR.** — Right or duty of corporation to refuse to transfer stock on presentation of

properly indorsed certificate, because of conflicting rights or claims of one other than transferee, 75 ALR2d 746.

### 11-8-115. Securities intermediary and others not liable to adverse claimant.

A securities intermediary that has transferred a financial asset pursuant to an effective entitlement order, or a broker or other agent or bailee that has dealt with a financial asset at the direction of its customer or principal, is not liable to a person having an adverse claim to the financial asset, unless the securities intermediary, or broker or other agent or bailee:

(1) Took the action after it had been served with an injunction, restraining order, or other legal process enjoining it from doing so, issued by a court of competent jurisdiction, and had a reasonable opportunity to act on the injunction, restraining order, or other legal process; or

(2) Acted in collusion with the wrongdoer in violating the rights of the adverse claimant; or

(3) In the case of a security certificate that has been stolen, acted with notice of the adverse claim. (Code 1981, § 11-8-115, enacted by Ga. L. 1998, p. 1323, § 1.)

#### RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 8-115.

#### 11-8-116. Securities intermediary as purchaser for value.

A securities intermediary that receives a financial asset and establishes a security entitlement to the financial asset in favor of an entitlement holder is a purchaser for value of the financial asset. A securities intermediary that acquires a security entitlement to a financial asset from another securities intermediary acquires the security entitlement for value if the securities intermediary acquiring the security entitlement establishes a security entitlement to the financial asset in favor of an entitlement holder. (Code 1981, § 11-8-116, enacted by Ga. L. 1998, p. 1323, § 1.)

#### RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 8-116.

### PART 2

#### ISSUE AND ISSUER

#### 11-8-201. Issuer.

(a) With respect to an obligation on or a defense to a security, an “issuer” includes a person that:

(1) Places or authorizes the placing of its name on a security certificate, other than as authenticating trustee, registrar, transfer agent, or the like, to evidence a share, participation, or other interest in its property or in an enterprise, or to evidence its duty to perform an obligation represented by the certificate;

(2) Creates a share, participation, or other interest in its property or in an enterprise, or undertakes an obligation, that is an uncertificated security;

(3) Directly or indirectly creates a fractional interest in its rights or property, if the fractional interest is represented by a security certificate; or

(4) Becomes responsible for, or in place of, another person described as an issuer in this section.

(b) With respect to an obligation on or defense to a security, a guarantor is an issuer to the extent of its guaranty, whether or not its obligation is noted on a security certificate.

(c) With respect to a registration of a transfer, issuer means a person on whose behalf transfer books are maintained. (Code 1981, § 11-8-201, enacted by Ga. L. 1998, p. 1323, § 1.)

### JUDICIAL DECISIONS

**Cited in** Neidiger/Tucker/Bruner, Inc. v. SunTrust Bank, 242 Ga. App. 369, 530 S.E.2d 18 (2000).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 15A Am. Jur. 2d, Commercial Code, § 76.

**C.J.S.** — 18 C.J.S., Corporations, § 217. 19 C.J.S., Corporations, §§ 664, 665. 64A C.J.S., Municipal Corporations, § 1701. 81A C.J.S., States, § 186 et seq.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 8-201.

**ALR.** — Legal aspects of transactions in securities “when issued” or “when, as and if” issued, 88 ALR 311.

### 11-8-202. Issuer’s responsibility and defenses; notice of defect or defense.

(a) Even against a purchaser for value and without notice, the terms of a certificated security include terms stated on the certificate and terms made part of the security by reference on the certificate to another instrument, indenture, or document or to a constitution, statute, ordinance, rule, regulation, order, or the like, to the extent the terms referred to do not conflict with terms stated on the certificate. A reference under this subsection does not of itself charge a purchaser for value with notice of a defect going to the validity of the security, even if the certificate expressly states that a person accepting it admits notice. The terms of an uncertificated security include those stated in any instrument, indenture, or document or in a constitution, statute, ordinance, rule, regulation, order, or the like, pursuant to which the security is issued.

(b) The following rules apply if an issuer asserts that a security is not valid:

(1) A security other than one issued by a government or governmental subdivision, agency, or instrumentality, even though issued with a defect going to its validity, is valid in the hands of a purchaser for value and without notice of the particular defect unless the defect involves a violation of a constitutional provision. In that case, the security is valid in the hands of a purchaser for value and without notice of the defect, other than one who takes by original issue.



(2) Paragraph (1) of this subsection applies to an issuer that is a government or governmental subdivision, agency, or instrumentality only if there has been substantial compliance with the legal requirements governing the issue or the issuer has received a substantial consideration for the issue as a whole or for the particular security and a stated purpose of the issue is one for which the issuer has power to borrow money or issue the security.

(c) Except as otherwise provided in Code Section 11-8-205, lack of genuineness of a certificated security is a complete defense, even against a purchaser for value and without notice.

(d) All other defenses of the issuer of a security, including nondelivery and conditional delivery of a certificated security, are ineffective against a purchaser for value who has taken the certificated security without notice of the particular defense.

(e) This Code section does not affect the right of a party to cancel a contract for a security “when, as and if issued” or “when distributed” in the event of a material change in the character of the security that is the subject of the contract or in the plan or arrangement pursuant to which the security is to be issued or distributed.

(f) If a security is held by a securities intermediary against whom an entitlement holder has a security entitlement with respect to the security, the issuer may not assert any defense that the issuer could not assert if the entitlement holder held the security directly. (Code 1981, § 11-8-202, enacted by Ga. L. 1998, p. 1323, § 1.)

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 15A Am. Jur. 2d, Commercial Code, § 73 et seq.

**C.J.S.** — 18 C.J.S., Corporations, § 217. 19 C.J.S., Corporations, §§ 664, 665. 64A C.J.S., Municipal Corporations, §§ 1723, 1724. 81A C.J.S., States, § 190.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 8-202.

**ALR.** — Liability of public corporation for money received by it for unlawfully issued instrument of indebtedness, 7 ALR 353.

Corporate stock without par value, 19 ALR 131; 36 ALR 791; 45 ALR 1501; 65 ALR 1347.

Specific performance of contract for sale

of corporate stock, 22 ALR 1032; 130 ALR 920.

Uniform Stock Transfer Act as applicable to shares in savings and loan associations or building and loan associations, 143 ALR 1152.

Reclassification or split-up of stock as within statute affecting issuance of securities, 170 ALR 690.

Rescission of corporate stock sale or transaction as authorizing court to award recovery of requisite number of shares to party entitled to relief, 14 ALR2d 855.

#### 11-8-203. Staleness as notice of defect or defense.

After an act or event, other than a call that has been revoked, creating a right to immediate performance of the principal obligation represented by a certificated security or setting a date on or after which the security is to be

presented or surrendered for redemption or exchange, a purchaser is charged with notice of any defect in its issue or defense of the issuer, if the act or event:

(1) Requires the payment of money, the delivery of a certificated security, the registration of transfer of an uncertificated security, or any of them on presentation or surrender of the security certificate, the money or security is available on the date set for payment or exchange, and the purchaser takes the security more than one year after that date; or

(2) Is not covered by paragraph (1) of this Code section and the purchaser takes the security more than two years after the date set for surrender or presentation or the date on which performance became due. (Code 1981, § 11-8-203, enacted by Ga. L. 1998, p. 1323, § 1.)

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 15A Am. Jur. 2d, Commercial Code, §§ 82, 83, 99. 18 Am. Jur. 2d, Corporations, § 282.

**C.J.S.** — 19 C.J.S., Corporations, § 694. 64A C.J.S., Municipal Corporations, § 1715. 81A C.J.S., States, § 190.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 8-203.

**ALR.** — Time factor in purchase or sale of corporate stock under contract not fixing a definite time for demand or performance, 144 ALR 895.

### 11-8-204. Effect of issuer's restriction on transfer.

A restriction on transfer of a security imposed by the issuer, even if otherwise lawful, is ineffective against a person without knowledge of the restriction unless:

(1) The security is certificated and the restriction is noted conspicuously on the security certificate; or

(2) The security is uncertificated and the registered owner has been notified of the restriction. (Code 1981, § 11-8-204, enacted by Ga. L. 1998, p. 1323, § 1.)

**Law reviews.** — For article, "Restricting the Transferability of Stock in Georgia Corporations," see 5 Mercer L. Rev. 242 (1954).

### JUDICIAL DECISIONS

**Liability of transfer agent.** — The class of persons for whom information regarding restrictions on the transfer of certificated securities was intended, either directly or indirectly, includes, at a minimum, those who regularly buy and sell such securities and those who regularly accept pledges of such securities as collateral for loans, margin accounts and similar transactions; as a result,

a broker-dealer's complaint stated a cause of action for negligent misrepresentation for a transfer agent's failure to disclose restrictions on the transfer of stock certificates. *Neidiger/Tucker/Bruner, Inc. v. SunTrust Bank*, 242 Ga. App. 369, 530 S.E.2d 18 (2000).

**Construction with § 11-8-401.** — Taken together, O.C.G.A. §§ 11-8-204 and

§ 11-8-401 require the issuer to register a transfer presented in proper form, even if there were secret restrictions, if the purchaser or pledgee was ignorant of the restrictions. *Neidiger/Tucker/Bruner, Inc. v. SunTrust Bank*, 242 Ga. App. 369, 530 S.E.2d 18 (2000).

**Cited in** *Brown v. Momar, Inc.*, 201 Ga. App. 542, 411 S.E.2d 718 (1991) (decided under former § 11-8-204 prior to 1992 repeal).

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 15A Am. Jur. 2d, Commercial Code, § 87. 18 Am. Jur. 2d, Corporations, § 386.

**C.J.S.** — 18 C.J.S., Corporations, §§ 219-225. 19 C.J.S., Corporations, § 664. 64A C.J.S., Municipal Corporations, § 1701 et seq. 81A C.J.S., States, § 186.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 8-204.

**ALR.** — Constructive notice to purchaser or pledgee of stock of corporation's lien thereon, 33 ALR 1272.

Priority as between lien of corporation and rights of pledgee or bona fide purchaser of corporate stock, 81 ALR 989.

Conflict of laws as to title and transfer of corporate stock, 131 ALR 192.

Right or duty of corporation to refuse to transfer stock on books to one presenting properly endorsed certificate, because of knowledge or suspicion of conflicting rights of registered holder or of third person, 139 ALR 273; 75 ALR2d 746.

Uniform Stock Transfer Act as applicable to shares in savings and loan associations or building and loan associations, 143 ALR 1152.

Valuation of property for purposes of estate, succession, or gift tax as affected by contract or bylaw specifying price at which property may or must be sold, purchased, or offered, 5 ALR2d 1122.

Construction and effect of § 15 of Uniform Stock Transfer Act prohibiting restriction on transfer of shares unless such restriction is stated on the certificate, 29 ALR2d 901.

What constitutes waiver of stockholder's or corporation's right to enforce first-option stock purchase agreement, 55 ALR3d 723.

Restrictions on transfer of corporate stock as applicable to testamentary dispositions thereof, 61 ALR3d 1090.

#### 11-8-205. Effect of unauthorized signature on security certificate.

An unauthorized signature placed on a security certificate before or in the course of issue is ineffective, but the signature is effective in favor of a purchaser for value of the certificated security if the purchaser is without notice of the lack of authority and the signing has been done by:

(1) An authenticating trustee, registrar, transfer agent, or other person entrusted by the issuer with the signing of the security certificate or of similar security certificates, or the immediate preparation for signing of any of them; or

(2) An employee of the issuer, or of any of the persons listed in paragraph (1) of this Code section, entrusted with responsible handling of the security certificate. (Code 1981, § 11-8-205, enacted by Ga. L. 1998, p. 1323, § 1.)



## RESEARCH REFERENCES

**Am. Jur. 2d.** — 15A Am. Jur. 2d, Commercial Code, § 83. 18 Am. Jur. 2d, Corporations, § 254.

**C.J.S.** — 19 C.J.S., Corporations, § 667.

64A C.J.S., Municipal Corporations, §§ 1723, 1724. 81A C.J.S., States, § 190.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 8-205.

**11-8-206. Completion or alteration of security certificate.**

(a) If a security certificate contains the signatures necessary to its issue or transfer but is incomplete in any other respect:

(1) Any person may complete it by filling in the blanks as authorized; and

(2) Even if the blanks are incorrectly filled in, the security certificate as completed is enforceable by a purchaser who took it for value and without notice of the incorrectness.

(b) A complete security certificate that has been improperly altered, even if fraudulently, remains enforceable, but only according to its original terms. (Code 1981, § 11-8-206, enacted by Ga. L. 1998, p. 1323, § 1.)

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 4 Am. Jur. 2d, Alteration of Instruments, § 28. 15A Am. Jur. 2d, Commercial Code, §§ 84, 85.

**C.J.S.** — 3A C.J.S., Alteration of Instruments, § 1 et seq. 18 C.J.S., Corporations, § 141. 19 C.J.S., Corporations, § 662. 64A C.J.S., Municipal Corporations, §§ 1723, 1724. 81A C.J.S., States, § 190.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 8-206.

**ALR.** — Burden of proof as to alteration not apparent on face of instrument, 31 ALR 1455.

Uniform Stock Transfer Act as applicable to shares in savings and loan associations or building and loan associations, 143 ALR 1152.

**11-8-207. Rights and duties of issuer with respect to registered owners.**

(a) Before due presentment for registration of transfer of a certificated security in registered form or of an instruction requesting registration of transfer of an uncertificated security, the issuer or indenture trustee may treat the registered owner as the person exclusively entitled to vote, receive notifications, and otherwise exercise all the rights and powers of an owner.

(b) This article does not affect the liability of the registered owner of a security for a call, assessment, or the like. (Code 1981, § 11-8-207, enacted by Ga. L. 1998, p. 1323, § 1.)

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 15A Am. Jur. 2d, Commercial Code, § 86. 18 Am. Jur. 2d, Corporations, § 413. 19 Am. Jur. 2d, Corporations, § 896.

**C.J.S.** — 18 C.J.S., Corporations, § 383.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 8-207.

**ALR.** — Title to securities in possession of broker (or his pledgee) who has purchased them for or sold them to customer, 41 ALR 1254.

Stockholders' statutory liability as assignable or subject to sale, 82 ALR 1285; 159 ALR 1114.

Uniform Stock Transfer Act as applicable to shares in savings and loan associations or building and loan associations, 143 ALR 1152.

Construction and effect of UCC § 8-207(1) allowing issuer of investment security to treat registered owner as entitled to owner's rights until presentment for registration of transfer, 21 ALR4th 879.

### **11-8-208. Effect of signature of authenticating trustee, registrar, or transfer agent.**

(a) A person signing a security certificate as authenticating trustee, registrar, transfer agent, or the like, warrants to a purchaser for value of the certificated security, if the purchaser is without notice of a particular defect, that:

(1) The certificate is genuine;

(2) The person's own participation in the issue of the security is within the person's capacity and within the scope of the authority received by the person from the issuer; and

(3) The person has reasonable grounds to believe that the certificated security is in the form and within the amount the issuer is authorized to issue.

(b) Unless otherwise agreed, a person signing under subsection (a) of this Code section does not assume responsibility for the validity of the security in other respects. (Code 1981, § 11-8-208, enacted by Ga. L. 1998, p. 1323, § 1.)

#### **RESEARCH REFERENCES**

**Am. Jur. 2d.** — 15A Am. Jur. 2d, Commercial Code, §§ 77, 78.

**C.J.S.** — 19 C.J.S., Corporations, § 670.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 8-208.

### **11-8-209. Issuer's lien.**

A lien in favor of an issuer upon a certificated security is valid against a purchaser only if the right of the issuer to the lien is noted conspicuously on the security certificate. (Code 1981, § 11-8-209, enacted by Ga. L. 1998, p. 1323, § 1.)

#### **RESEARCH REFERENCES**

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 8-209.

11-8-210. Overissue.

- (a) In this Code section, “overissue” means the issue of securities in excess of the amount the issuer has corporate power to issue, but an overissue does not occur if appropriate action has cured the overissue.
- (b) Except as otherwise provided in subsections (c) and (d) of this Code section, the provisions of this article which validate a security or compel its issue or reissue do not apply to the extent that validation, issue, or reissue would result in overissue.
- (c) If an identical security not constituting an overissue is reasonably available for purchase, a person entitled to issue or validation may compel the issuer to purchase the security and deliver it if certificated or register its transfer if uncertificated, against surrender of any security certificate the person holds.
- (d) If a security is not reasonably available for purchase, a person entitled to issue or validation may recover from the issuer the price the person or the last purchaser for value paid for it with interest from the date of the person’s demand. (Code 1981, § 11-8-210, enacted by Ga. L. 1998, p. 1323, § 1.)

RESEARCH REFERENCES

**Am. Jur. 2d.** — 15A Am. Jur. 2d, Commercial Code, §§ 78, 117. 18 Am. Jur. 2d, Corporations, §§ 230, 231.

**C.J.S.** — 18 C.J.S., Corporations, § 197 et seq. 64A C.J.S., Municipal Corporations,

§ 1701 et seq. 81A C.J.S., States, § 186 et seq.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 8-210.

PART 3

TRANSFER OF CERTIFICATED AND UNCERTIFICATED SECURITIES

11-8-301. Delivery.

- (a) Delivery of a certificated security to a purchaser occurs when:
- (1) The purchaser acquires possession of the security certificate;
  - (2) Another person, other than a securities intermediary, either acquires possession of the security certificate on behalf of the purchaser or, having previously acquired possession of the certificate, acknowledges that it holds for the purchaser; or
  - (3) A securities intermediary acting on behalf of the purchaser acquires possession of the security certificate, only if the certificate is in registered form and (i) registered in the name of the purchaser, (ii) payable to the order of the purchaser, or (iii) specially indorsed to the



purchaser by an effective indorsement and has not been indorsed to the securities intermediary or in blank.

(b) Delivery of an uncertificated security to a purchaser occurs when:

(1) The issuer registers the purchaser as the registered owner, upon original issue or registration of transfer; or

(2) Another person, other than a securities intermediary, either becomes the registered owner of the uncertificated security on behalf of the purchaser or, having previously become the registered owner, acknowledges that it holds for the purchaser. (Code 1981, § 11-8-301, enacted by Ga. L. 1998, p. 1323, § 1; Ga. L. 2001, p. 362, § 20.)

**The 2001 amendment**, effective July 1, 2001, in paragraph (a)(3), substituted “(i) registered in the name of the purchaser, (ii) payable to the order of the purchaser, or

(iii)” for “has been” near the middle and added “and has not been indorsed to the securities intermediary or in blank” at the end.

### JUDICIAL DECISIONS

**Cited** in *Taylor v. Riverside-Franklin Properties, Inc.*, 228 Bankr. 491 (Bankr. M.D. Ga. 1998).

### RESEARCH REFERENCES

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 8-301.

**ALR.** — Rights of owner and bona fide purchaser of lost or stolen stock certificates, 52 ALR 947.

Respective rights of owner of certificate of stock who intrusts it to a third person and a purchaser from the latter under a forged transfer or endorsement, 54 ALR 353.

Necessity and sufficiency of appropriation to pass title on sale of corporate stock or securities, 78 ALR 1019.

Right of purchaser of stolen bonds, 102 ALR 28.

Right or duty of corporation to refuse to transfer stock on books to one presenting properly endorsed certificate, because of knowledge or suspicion of conflicting rights of registered holder or of third person, 139 ALR 273; 75 ALR2d 746.

Uniform Stock Transfer Act as applicable to shares in savings and loan associations or building and loan associations, 143 ALR 1152.

### 11-8-302. Rights of purchaser.

(a) Except as otherwise provided in subsections (b) and (c) of this Code section, a purchaser of a certificated or uncertificated security acquires all rights in the security that the transferor had or had power to transfer.

(b) A purchaser of a limited interest acquires rights only to the extent of the interest purchased.

(c) A purchaser of a certificated security who as a previous holder had notice of an adverse claim does not improve its position by taking from a protected purchaser. (Code 1981, § 11-8-302, enacted by Ga. L. 1998, p. 1323, § 1; Ga. L. 2001, p. 362, § 21.)

**The 2001 amendment**, effective July 1, 2001, in subsection (a), substituted “a purchaser” for “upon delivery” and deleted “to

a purchaser, the purchaser” following “or uncertificated security”.

### JUDICIAL DECISIONS

**Editor’s notes.** — In light of the similarity of the provisions, decisions under former Code Section 11-8-301 are included in the annotations of this section.

**Transfer of legal interest in a security.** — Legal interest in a security is transferred

upon the proper indorsement and delivery of the security. *Wheless v. Gelzer*, 780 F. Supp. 1373 (N.D. Ga. 1991) (decided under former § 11-8-301).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 15A Am. Jur. 2d, Commercial Code, § 89 et seq.

**C.J.S.** — 19 C.J.S., Corporations, § 670. 64A C.J.S., Municipal Corporations, § 1710 et seq. 81A C.J.S., States, § 186 et seq.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 8-302.

**ALR.** — Rights of owner and bona fide purchaser of lost or stolen stock certificates, 52 ALR 947.

Right or duty of corporation to refuse to

transfer stock on presentation of properly indorsed certificate, because of conflicting rights or claims of one other than transferee, 75 ALR2d 746.

Conditions printed on confirmation slips as binding on customers of stock or commodity broker, 71 ALR2d 1089.

Validity of “consent restraint” on transfer of shares of close corporation, 69 ALR3d 1327.

### 11-8-303. Protected purchaser.

(a) “Protected purchaser” means a purchaser of a certificated or uncertificated security, or of an interest therein, who:

- (1) Gives value;
- (2) Does not have notice of any adverse claim to the security; and
- (3) Obtains control of the certificated or uncertificated security.

(b) In addition to acquiring the rights of a purchaser, a protected purchaser also acquires its interest in the security free of any adverse claim. (Code 1981, § 11-8-303, enacted by Ga. L. 1998, p. 1323, § 1.)

### RESEARCH REFERENCES

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 8-303.

### 11-8-304. Indorsement.

(a) An indorsement may be in blank or special. An indorsement in blank includes an indorsement to bearer. A special indorsement specifies to whom a security is to be transferred or who has power to transfer it. A holder may convert a blank indorsement to a special indorsement.

(b) An indorsement purporting to be only of part of a security certificate representing units intended by the issuer to be separately transferable is effective to the extent of the indorsement.

(c) An indorsement, whether special or in blank, does not constitute a transfer until delivery of the certificate on which it appears or, if the indorsement is on a separate document, until delivery of both the document and the certificate.

(d) If a security certificate in registered form has been delivered to a purchaser without a necessary indorsement, the purchaser may become a protected purchaser only when the indorsement is supplied. However, against a transferor, a transfer is complete upon delivery and the purchaser has a specifically enforceable right to have any necessary indorsement supplied.

(e) An indorsement of a security certificate in bearer form may give notice of an adverse claim to the certificate, but it does not otherwise affect a right to registration that the holder possesses.

(f) Unless otherwise agreed, a person making an indorsement assumes only the obligations provided in Code Section 11-8-108 and not an obligation that the security will be honored by the issuer. (Code 1981, § 11-8-304, enacted by Ga. L. 1998, p. 1323, § 1.)

### JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Code Section 11-8-309 are included in the annotations of this section.

**Transfer of legal interest.** — Legal interest in a security is transferred upon the proper indorsement and delivery of the security.

*Wheless v. Gelzer*, 780 F. Supp. 1373 (N.D. Ga. 1991) (decided under former § 11-8-309):

**Cited in** *Taylor v. Riverside-Franklin Properties, Inc.*, 228 Bankr. 491 (Bankr. M.D. Ga. 1998).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 15A Am. Jur. 2d, Commercial Code, § 106 et seq.

**C.J.S.** — 18 C.J.S., Corporations, §§ 229, 276. 19 C.J.S., Corporations, § 670. 64A C.J.S., Municipal Corporations, § 1703. 81A C.J.S., States, § 186.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 8-304.

**ALR.** — Rights of owner and bona fide purchaser of lost or stolen stock certificates, 52 ALR 947.

### 11-8-305. Instruction.

(a) If an instruction has been originated by an appropriate person but is incomplete in any other respect, any person may complete it as authorized and the issuer may rely on it as completed, even though it has been completed incorrectly.



(b) Unless otherwise agreed, a person initiating an instruction assumes only the obligations imposed by Code Section 11-8-108 and not an obligation that the security will be honored by the issuer. (Code 1981, § 11-8-305, enacted by Ga. L. 1998, p. 1323, § 1.)

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 15A Am. Jur. 2d, Commercial Code, §§ 83, 117. 18 Am. Jur. 2d, Corporations, § 433.

**C.J.S.** — 18 C.J.S., Corporations, §§ 280,

281. 64A C.J.S., Municipal Corporations, § 1707 et seq. 81A C.J.S., States, § 186.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 8-305.

### 11-8-306. Effect of guaranteeing signature, indorsement, or instruction.

(a) A person who guarantees a signature of an indorser of a security certificate warrants that at the time of signing:

(1) The signature was genuine;

(2) The signer was an appropriate person to indorse, or if the signature is by an agent, the agent had actual authority to act on behalf of the appropriate person; and

(3) The signer had legal capacity to sign.

(b) A person who guarantees a signature of the originator of an instruction warrants that at the time of signing:

(1) The signature was genuine;

(2) The signer was an appropriate person to originate the instruction, or if the signature is by an agent, the agent had actual authority to act on behalf of the appropriate person, if the person specified in the instruction as the registered owner was, in fact, the registered owner, as to which fact the signature guarantor does not make a warranty; and

(3) The signer had legal capacity to sign.

(c) A person who specially guarantees the signature of an originator of an instruction makes the warranties of a signature guarantor under subsection (b) of this Code section and also warrants that at the time the instruction is presented to the issuer:

(1) The person specified in the instruction as the registered owner of the uncertificated security will be the registered owner; and

(2) The transfer of the uncertificated security requested in the instruction will be registered by the issuer free from all liens, security interests, restrictions, and claims other than those specified in the instruction.

(d) A guarantor under subsections (a) and (b) of this Code section or a special guarantor under subsection (c) of this Code section does not otherwise warrant the rightfulness of the transfer.

(e) A person who guarantees an indorsement of a security certificate makes the warranties of a signature guarantor under subsection (a) of this Code section and also warrants the rightfulness of the transfer in all respects.

(f) A person who guarantees an instruction requesting the transfer of an uncertificated security makes the warranties of a special signature guarantor under subsection (c) of this Code section and also warrants the rightfulness of the transfer in all respects.

(g) An issuer may not require a special guaranty of signature, a guaranty of indorsement, or a guaranty of instruction as a condition to registration of transfer.

(h) The warranties under this Code section are made to a person taking or dealing with the security in reliance on the guaranty, and the guarantor is liable to the person for loss resulting from their breach. An indorser or originator of an instruction whose signature, indorsement, or instruction has been guaranteed is liable to a guarantor for any loss suffered by the guarantor as a result of breach of the warranties of the guarantor. (Code 1981, § 11-8-306, enacted by Ga. L. 1998, p. 1323, § 1.)

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 15A Am. Jur. 2d, Commercial Code, § 109.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 8-306.

**C.J.S.** — 38 C.J.S., Guaranty, § 52 et seq.

#### 11-8-307. Purchaser's right to requisites for registration of transfer.

Unless otherwise agreed, the transferor of a security on due demand shall supply the purchaser with proof of authority to transfer or with any other requisite necessary to obtain registration of the transfer of the security, but if the transfer is not for value, a transferor need not comply unless the purchaser pays the necessary expenses. If the transferor fails within a reasonable time to comply with the demand, the purchaser may reject or rescind the transfer. (Code 1981, § 11-8-307, enacted by Ga. L. 1998, p. 1323, § 1.)

#### JUDICIAL DECISIONS

**Cited in** Taylor v. Riverside-Franklin Properties, Inc., 228 Bankr. 491 (Bankr. M.D. Ga. 1998).

#### RESEARCH REFERENCES

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 8-307.

refuse to transfer stock on books to one presenting properly endorsed certificate, because of knowledge or suspicion of conflict-

**ALR.** — Right or duty of corporation to

ing rights of registered holder or of third person, 139 ALR 273; 75 ALR2d 746.

## PART 4

### REGISTRATION

#### 11-8-401. Duty of issuer to register transfer.

(a) If a certificated security in registered form is presented to an issuer with a request to register transfer or an instruction is presented to an issuer with a request to register transfer of an uncertificated security, the issuer shall register the transfer as requested if:

(1) Under the terms of the security the person seeking registration of transfer is eligible to have the security registered in its name;

(2) The indorsement or instruction is made by the appropriate person or by an agent who has actual authority to act on behalf of the appropriate person;

(3) Reasonable assurance is given that the indorsement or instruction is genuine and authorized (Code Section 11-8-402);

(4) Any applicable law relating to the collection of taxes has been complied with;

(5) The transfer does not violate any restriction on transfer imposed by the issuer in accordance with Code Section 11-8-204;

(6) A demand that the issuer not register transfer has not become effective under Code Section 11-8-403, or the issuer has complied with subsection (b) of Code Section 11-8-403 but no legal process or indemnity bond is obtained as provided in subsection (d) of Code Section 11-8-403; and

(7) The transfer is in fact rightful or is to a protected purchaser.

(b) If an issuer is under a duty to register a transfer of a security, the issuer is liable to a person presenting a certificated security or an instruction for registration or to the person's principal for loss resulting from unreasonable delay in registration or failure or refusal to register the transfer. (Code 1981, § 11-8-401, enacted by Ga. L. 1998, p. 1323, § 1.)

### JUDICIAL DECISIONS

**Construction with § 11-8-204.** — Taken together, O.C.G.A. §§ 11-8-204 and 11-8-401 require the issuer to register a transfer presented in proper form, even if there were secret restrictions, if the purchaser or

pledgee was ignorant of the restrictions. *Neidiger/Tucker/Bruner, Inc. v. SunTrust Bank*, 242 Ga. App. 369, 530 S.E.2d 18 (2000).



### OPINIONS OF THE ATTORNEY GENERAL

**Transfer of abandoned stock certificates.** — If requested, the commissioner of revenue may, but is not required to, provide the issuing corporation or its transfer agent with a document signed by the commissioner authorizing the transfer of abandoned stock certificates to the commissioner pursuant to the Georgia Unclaimed Property Act, O.C.G.A. Art. 5, Ch. 12, T. 44, and such transfer document would satisfy the requirements of the UCC pertaining to the transfer of stock certificates. 1983 Op. Att'y Gen. No.

83-77. (decided under former § 11-8-401 prior to 1992 repeal)

The implicit requirement of the Disposition of Unclaimed Property Act that stock certificates be delivered to the commissioner of revenue registered in the commissioner's name takes precedence over the provisions of the UCC pertaining to a separate transfer document signed by an appropriate person. 1983 Op. Att'y Gen. No. 83-77. (decided under former § 11-8-401 prior to 1992 repeal)

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 15A Am. Jur. 2d, Commercial Code, §§ 78, 114. 18 Am. Jur. 2d, Corporations, § 425.

**C.J.S.** — 11 C.J.S., Bonds, § 15. 18 C.J.S., Corporations, §§ 272-275. 64A C.J.S., Municipal Corporations, § 1700. 81A C.J.S., States, § 186.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 8-401.

**ALR.** — Failure to enter transfer of stock

on corporate books as affecting liability of transferee for calls or assessments, 60 ALR 112.

Right of corporation to refuse to register transfer of stock because of stockholder's indebtedness to it, where transfer is by operation of law, 65 ALR 220.

Remedy for refusal of corporation or its agent to register or effectuate transfer of stock, 22 ALR2d 12.

### 11-8-402. Assurance that indorsement or instruction is effective.

(a) An issuer may require the following assurance that each necessary indorsement or each instruction is genuine and authorized:

(1) In all cases, a guaranty of the signature of the person making an indorsement or originating an instruction including, in the case of an instruction, reasonable assurance of identity;

(2) If the indorsement is made or the instruction is originated by an agent, appropriate assurance of actual authority to sign;

(3) If the indorsement is made or the instruction is originated by a fiduciary pursuant to paragraph (4) or (5) of subsection (a) of Code Section 11-8-107, appropriate evidence of appointment or incumbency;

(4) If there is more than one fiduciary, reasonable assurance that all who are required to sign have done so; and

(5) If the indorsement is made or the instruction is originated by a person not covered by another provision of this subsection, assurance appropriate to the case corresponding as nearly as may be to the provisions of this subsection.

(b) An issuer may elect to require reasonable assurance beyond that specified in this Code section.

(c) In this Code section:

(1) “Guaranty of the signature” means a guaranty signed by or on behalf of a person reasonably believed by the issuer to be responsible. An issuer may adopt standards with respect to responsibility if they are not manifestly unreasonable.

(2) “Appropriate evidence of appointment or incumbency” means:

(i) In the case of a fiduciary appointed or qualified by a court, a certificate issued by or under the direction or supervision of the court or an officer thereof and dated within 60 days before the date of presentation for transfer; or

(ii) In any other case, a copy of a document showing the appointment or a certificate issued by or on behalf of a person reasonably believed by an issuer to be responsible or, in the absence of that document or certificate, other evidence the issuer reasonably considers appropriate. (Code 1981, § 11-8-402, enacted by Ga. L. 1998, p. 1323, § 1.)

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 15A Am. Jur. 2d, Commercial Code, § 115.

**C.J.S.** — 18 C.J.S., Corporations, § 275.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 8-402.

**ALR.** — Rights, duties, and liability of corporation in connection with transfer of stock of infant or incompetent, 3 ALR2d 881.

#### **11-8-403. Demand that issuer not register transfer.**

(a) A person who is an appropriate person to make an indorsement or originate an instruction may demand that the issuer not register transfer of a security by communicating to the issuer a notification that identifies the registered owner and the issue of which the security is a part and provides an address for communications directed to the person making the demand. The demand is effective only if it is received by the issuer at a time and in a manner affording the issuer reasonable opportunity to act on it.

(b) If a certificated security in registered form is presented to an issuer with a request to register transfer or an instruction is presented to an issuer with a request to register transfer of an uncertificated security after a demand that the issuer not register transfer has become effective, the issuer shall promptly communicate to (i) the person who initiated the demand at the address provided in the demand and (ii) the person who presented the security for registration of transfer or initiated the instruction requesting registration of transfer a notification stating that:

(1) The certificated security has been presented for registration of

transfer or the instruction for registration of transfer of the uncertificated security has been received;

(2) A demand that the issuer not register transfer had previously been received; and

(3) The issuer will withhold registration of transfer for a period of time stated in the notification in order to provide the person who initiated the demand an opportunity to obtain legal process or an indemnity bond.

(c) The period described in paragraph (3) of subsection (b) of this Code section may not exceed 30 days after the date of communication of the notification. A shorter period may be specified by the issuer if it is not manifestly unreasonable.

(d) An issuer is not liable to a person who initiated a demand that the issuer not register transfer for any loss the person suffers as a result of registration of a transfer pursuant to an effective indorsement or instruction if the person who initiated the demand does not, within the time stated in the issuer's communication, either:

(1) Obtain an appropriate restraining order, injunction, or other process from a court of competent jurisdiction enjoining the issuer from registering the transfer; or

(2) File with the issuer an indemnity bond, sufficient in the issuer's judgment to protect the issuer and any transfer agent, registrar, or other agent of the issuer involved from any loss it or they may suffer by refusing to register the transfer.

(e) This Code section does not relieve an issuer from liability for registering transfer pursuant to an indorsement or instruction that was not effective. (Code 1981, § 11-8-403, enacted by Ga. L. 1998, p. 1323, § 1.)

#### RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 8-403.

#### 11-8-404. Wrongful registration.

(a) Except as otherwise provided in Code Section 11-8-406, an issuer is liable for wrongful registration of transfer if the issuer has registered a transfer of a security to a person not entitled to it, and the transfer was registered:

(1) Pursuant to an ineffective indorsement or instruction;

(2) After a demand that the issuer not register transfer became effective under subsection (a) of Code Section 11-8-403 and the issuer did not comply with subsection (b) of Code Section 11-8-403;



(3) After the issuer had been served with an injunction, restraining order, or other legal process enjoining it from registering the transfer, issued by a court of competent jurisdiction, and the issuer had a reasonable opportunity to act on the injunction, restraining order, or other legal process; or

(4) By an issuer acting in collusion with the wrongdoer.

(b) An issuer that is liable for wrongful registration of transfer under subsection (a) of this Code section on demand shall provide the person entitled to the security with a like certificated or uncertificated security, and any payments or distributions that the person did not receive as a result of the wrongful registration. If an overissue would result, the issuer's liability to provide the person with a like security is governed by Code Section 11-8-210.

(c) Except as otherwise provided in subsection (a) of this Code section or in a law relating to the collection of taxes, an issuer is not liable to an owner or other person suffering loss as a result of the registration of a transfer of a security if registration was made pursuant to an effective indorsement or instruction. (Code 1981, § 11-8-404, enacted by Ga. L. 1998, p. 1323, § 1.)

#### RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 8-404.

#### **11-8-405. Replacement of lost, destroyed, or wrongfully taken security certificate.**

(a) If an owner of a certificated security, whether in registered or bearer form, claims that the certificate has been lost, destroyed, or wrongfully taken, the issuer shall issue a new certificate if the owner:

(1) So requests before the issuer has notice that the certificate has been acquired by a protected purchaser;

(2) Files with the issuer a sufficient indemnity bond; and

(3) Satisfies other reasonable requirements imposed by the issuer.

(b) If, after the issue of a new security certificate, a protected purchaser of the original certificate presents it for registration of transfer, the issuer shall register the transfer unless an overissue would result. In that case, the issuer's liability is governed by Code Section 11-8-210. In addition to any rights on the indemnity bond, an issuer may recover the new certificate from a person to whom it was issued or any person taking under that person, except a protected purchaser. (Code 1981, § 11-8-405, enacted by Ga. L. 1998, p. 1323, § 1.)

**Cross references.** — Establishment of lost documents generally, T. 24, Ch. 8.

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 15A Am. Jur. 2d, Commercial Code, §§ 115, 116. 18 Am. Jur. 2d, Corporations, §§ 270, 274.

**C.J.S.** — 18 C.J.S., Corporations, §§ 278, 279. 54 C.J.S., Lost Instruments, § 2.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 8-405.

**ALR.** — Burden of proof as to alteration not apparent on face of instrument, 31 ALR 1455.

Rights of owner and bona fide purchaser of lost or stolen stock certificates, 52 ALR 947.

### 11-8-406. Obligation to notify issuer of lost, destroyed, or wrongfully taken security certificate.

If a security certificate has been lost, apparently destroyed, or wrongfully taken, and the owner fails to notify the issuer of that fact within a reasonable time after the owner has notice of it and the issuer registers a transfer of the security before receiving notification, the owner may not assert against the issuer a claim for registering the transfer under Code Section 11-8-404 or a claim to a new security certificate under Code Section 11-8-405. (Code 1981, § 11-8-406, enacted by Ga. L. 1998, p. 1323, § 1.)

#### RESEARCH REFERENCES

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 8-406.

### 11-8-407. Authenticating trustee, transfer agent, and registrar.

A person acting as authenticating trustee, transfer agent, registrar, or other agent for an issuer in the registration of a transfer of its securities, in the issue of new security certificates or uncertificated securities, or in the cancellation of surrendered security certificates has the same obligation to the holder or owner of a certificated or uncertificated security with regard to the particular functions performed as the issuer has in regard to those functions. (Code 1981, § 11-8-407, enacted by Ga. L. 1998, p. 1323, § 1.)

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 15A Am. Jur. 2d, Commercial Code, § 116.

**C.J.S.** — 2A C.J.S., Agency, § 155 et seq. 18 C.J.S., Corporations, §§ 278, 279. 90

C.J.S., Trusts, § 310 et seq.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 8-407.

## PART 5

## SECURITY ENTITLEMENTS

**11-8-501. Securities account; acquisition of security entitlement from securities intermediary.**

(a) “Securities account” means an account to which a financial asset is or may be credited in accordance with an agreement under which the person maintaining the account undertakes to treat the person for whom the account is maintained as entitled to exercise the rights that comprise the financial asset.

(b) Except as otherwise provided in subsections (d) and (e) of this Code section, a person acquires a security entitlement if a securities intermediary:

(1) Indicates by book entry that a financial asset has been credited to the person’s securities account;

(2) Receives a financial asset from the person or acquires a financial asset for the person and, in either case, accepts it for credit to the person’s securities account; or

(3) Becomes obligated under other law, regulation, or rule to credit a financial asset to the person’s securities account.

(c) If a condition of subsection (b) of this Code section has been met, a person has a security entitlement even though the securities intermediary does not itself hold the financial asset.

(d) If a securities intermediary holds a financial asset for another person, and the financial asset is registered in the name of, payable to the order of, or specially indorsed to the other person, and has not been indorsed to the securities intermediary or in blank, the other person is treated as holding the financial asset directly rather than as having a security entitlement with respect to the financial asset.

(e) Issuance of a security is not establishment of a security entitlement. (Code 1981, § 11-8-501, enacted by Ga. L. 1998, p. 1323, § 1.)

**RESEARCH REFERENCES**

**U.L.A.** — Uniform Commercial Code  
(U.L.A.) § 8-501.

**11-8-502. Assertion of adverse claim against entitlement holder.**

An action based on an adverse claim to a financial asset, whether framed in conversion, replevin, constructive trust, equitable lien, or other theory, may not be asserted against a person who acquires a security entitlement



under Code Section 11-8-501 for value and without notice of the adverse claim. (Code 1981, § 11-8-502, enacted by Ga. L. 1998, p. 1323, § 1.)

#### RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 8-502.

#### **11-8-503. Property interest of entitlement holder in financial asset held by securities intermediary.**

(a) To the extent necessary for a securities intermediary to satisfy all security entitlements with respect to a particular financial asset, all interests in that financial asset held by the securities intermediary are held by the securities intermediary for the entitlement holders, are not property of the securities intermediary, and are not subject to claims of creditors of the securities intermediary, except as otherwise provided in Code Section 11-8-511.

(b) An entitlement holder's property interest with respect to a particular financial asset under subsection (a) of this Code section is a pro rata property interest in all interests in that financial asset held by the securities intermediary, without regard to the time the entitlement holder acquired the security entitlement or the time the securities intermediary acquired the interest in that financial asset.

(c) An entitlement holder's property interest with respect to a particular financial asset under subsection (a) of this Code section may be enforced against the securities intermediary only by exercise of the entitlement holder's rights under Code Sections 11-8-505 through 11-8-508.

(d) An entitlement holder's property interest with respect to a particular financial asset under subsection (a) of this Code section may be enforced against a purchaser of the financial asset or interest therein only if:

(1) Insolvency proceedings have been initiated by or against the securities intermediary;

(2) The securities intermediary does not have sufficient interests in the financial asset to satisfy the security entitlements of all of its entitlement holders to that financial asset;

(3) The securities intermediary violated its obligations under Code Section 11-8-504 by transferring the financial asset or interest therein to the purchaser; and

(4) The purchaser is not protected under subsection (e) of this Code section. The trustee or other liquidator, acting on behalf of all entitlement holders having security entitlements with respect to a particular

financial asset, may recover the financial asset, or interest therein, from the purchaser. If the trustee or other liquidator elects not to pursue that right, an entitlement holder whose security entitlement remains unsatisfied has the right to recover its interest in the financial asset from the purchaser.

(e) An action based on the entitlement holder's property interest with respect to a particular financial asset under subsection (a) of this Code section, whether framed in conversion, replevin, constructive trust, equitable lien, or other theory, may not be asserted against any purchaser of a financial asset or interest therein who gives value, obtains control, and does not act in collusion with the securities intermediary in violating the securities intermediary's obligations under Code Section 11-8-504. (Code 1981, § 11-8-503, enacted by Ga. L. 1998, p. 1323, § 1.)

#### RESEARCH REFERENCES

**U.L.A.** — Uniform Commercial Code  
(U.L.A.) § 8-503.

#### **11-8-504. Duty of securities intermediary to maintain financial asset.**

(a) A securities intermediary shall promptly obtain and thereafter maintain a financial asset in a quantity corresponding to the aggregate of all security entitlements it has established in favor of its entitlement holders with respect to that financial asset. The securities intermediary may maintain those financial assets directly or through one or more other securities intermediaries.

(b) Except to the extent otherwise agreed by its entitlement holder, a securities intermediary may not grant any security interests in a financial asset it is obligated to maintain pursuant to subsection (a) of this Code section.

(c) A securities intermediary satisfies the duty in subsection (a) of this Code section if:

(1) The securities intermediary acts with respect to the duty as agreed upon by the entitlement holder and the securities intermediary; or

(2) In the absence of agreement, the securities intermediary exercises due care in accordance with reasonable commercial standards to obtain and maintain the financial asset.

(d) This Code section does not apply to a clearing corporation that is itself the obligor of an option or similar obligation to which its entitlement holders have security entitlements. (Code 1981, § 11-8-504, enacted by Ga. L. 1998, p. 1323, § 1.)

**RESEARCH REFERENCES**

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 8-504.

**11-8-505. Duty of securities intermediary with respect to payments and distributions.**

(a) A securities intermediary shall take action to obtain a payment or distribution made by the issuer of a financial asset. A securities intermediary satisfies the duty if:

(1) The securities intermediary acts with respect to the duty as agreed upon by the entitlement holder and the securities intermediary; or

(2) In the absence of agreement, the securities intermediary exercises due care in accordance with reasonable commercial standards to attempt to obtain the payment or distribution.

(b) A securities intermediary is obligated to its entitlement holder for a payment or distribution made by the issuer of a financial asset if the payment or distribution is received by the securities intermediary. (Code 1981, § 11-8-505, enacted by Ga. L. 1998, p. 1323, § 1.)

**RESEARCH REFERENCES**

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 8-505.

**11-8-506. Duty of securities intermediary to exercise rights as directed by entitlement holder.**

A securities intermediary shall exercise rights with respect to a financial asset if directed to do so by an entitlement holder. A securities intermediary satisfies the duty if:

(1) The securities intermediary acts with respect to the duty as agreed upon by the entitlement holder and the securities intermediary; or

(2) In the absence of agreement, the securities intermediary either places the entitlement holder in a position to exercise the rights directly or exercises due care in accordance with reasonable commercial standards to follow the direction of the entitlement holder. (Code 1981, § 11-8-506, enacted by Ga. L. 1998, p. 1323, § 1.)

**RESEARCH REFERENCES**

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 8-506.



**11-8-507. Duty of securities intermediary to comply with entitlement order.**

(a) A securities intermediary shall comply with an entitlement order if the entitlement order is originated by the appropriate person, the securities intermediary has had reasonable opportunity to assure itself that the entitlement order is genuine and authorized, and the securities intermediary has had reasonable opportunity to comply with the entitlement order. A securities intermediary satisfies the duty if:

(1) The securities intermediary acts with respect to the duty as agreed upon by the entitlement holder and the securities intermediary; or

(2) In the absence of agreement, the securities intermediary exercises due care in accordance with reasonable commercial standards to comply with the entitlement order.

(b) If a securities intermediary transfers a financial asset pursuant to an ineffective entitlement order, the securities intermediary shall reestablish a security entitlement in favor of the person entitled to it, and pay or credit any payments or distributions that the person did not receive as a result of the wrongful transfer. If the securities intermediary does not reestablish a security entitlement, the securities intermediary is liable to the entitlement holder for damages. (Code 1981, § 11-8-507, enacted by Ga. L. 1998, p. 1323, § 1.)

**RESEARCH REFERENCES**

**U.L.A.** — Uniform Commercial Code  
(U.L.A.) § 8-507.

**11-8-508. Duty of securities intermediary to change entitlement holder's position to other form of security holding.**

A securities intermediary shall act at the direction of an entitlement holder to change a security entitlement into another available form of holding for which the entitlement holder is eligible, or to cause the financial asset to be transferred to a securities account of the entitlement holder with another securities intermediary. A securities intermediary satisfies the duty if:

(1) The securities intermediary acts as agreed upon by the entitlement holder and the securities intermediary; or

(2) In the absence of agreement, the securities intermediary exercises due care in accordance with reasonable commercial standards to follow the direction of the entitlement holder. (Code 1981, § 11-8-508, enacted by Ga. L. 1998, p. 1323, § 1.)

**RESEARCH REFERENCES**

**U.L.A.** — Uniform Commercial Code  
(U.L.A.) § 8-508.

**11-8-509. Specification of duties of securities intermediary by other statute or regulation; manner of performance of duties of securities intermediary and exercise of rights of entitlement holder.**

(a) If the substance of a duty imposed upon a securities intermediary by Code Sections 11-8-504 through 11-8-508 is the subject of other statute, regulation, or rule, compliance with that statute, regulation, or rule satisfies the duty.

(b) To the extent that specific standards for the performance of the duties of a securities intermediary or the exercise of the rights of an entitlement holder are not specified by other statute, regulation, or rule or by agreement between the securities intermediary and entitlement holder, the securities intermediary shall perform its duties and the entitlement holder shall exercise its rights in a commercially reasonable manner.

(c) The obligation of a securities intermediary to perform the duties imposed by Code Sections 11-8-504 through 11-8-508 is subject to:

(1) Rights of the securities intermediary arising out of a security interest under a security agreement with the entitlement holder or otherwise; and

(2) Rights of the securities intermediary under other law, regulation, rule, or agreement to withhold performance of its duties as a result of unfulfilled obligations of the entitlement holder to the securities intermediary.

(d) Code Sections 11-8-504 through 11-8-508 do not require a securities intermediary to take any action that is prohibited by other statute, regulation, or rule. (Code 1981, § 11-8-509, enacted by Ga. L. 1998, p. 1323, § 1.)

**RESEARCH REFERENCES**

**U.L.A.** — Uniform Commercial Code  
(U.L.A.) § 8-509.

**11-8-510. Rights of purchaser of security entitlement from entitlement holder.**

(a) In a case not covered by the priority rules in Article 9 of this title or the rules stated in subsection (c) of this Code section, an action based on an adverse claim to a financial asset or security entitlement, whether framed in conversion, replevin, constructive trust, equitable lien, or other theory,

may not be asserted against a person who purchases a security entitlement, or an interest therein, from an entitlement holder if the purchaser gives value, does not have notice of the adverse claim, and obtains control.

(b) If an adverse claim could not have been asserted against an entitlement holder under Code Section 11-8-502, the adverse claim cannot be asserted against a person who purchases a security entitlement, or an interest therein, from the entitlement holder.

(c) In a case not covered by the priority rules in Article 9 of this title, a purchaser for value of a security entitlement, or an interest therein, who obtains control has priority over a purchaser of a security entitlement, or an interest therein, who does not obtain control. Except as otherwise provided in subsection (d) of this Code section, purchasers who have control rank according to priority in time of:

(1) The purchaser's becoming the person for whom the securities account, in which the security entitlement is carried, is maintained, if the purchaser obtained control under paragraph (1) of subsection (d) of Code Section 11-8-106;

(2) The securities intermediary's agreement to comply with the purchaser's entitlement orders with respect to security entitlements carried or to be carried in the securities account in which the security entitlement is carried, if the purchaser obtained control under paragraph (2) of subsection (d) of Code Section 11-8-106; or

(3) If the purchaser obtained control through another person under paragraph (3) of subsection (d) of Code Section 11-8-106, the time on which priority would be based under this subsection if the other person were the secured party.

(d) A securities intermediary as purchaser has priority over a conflicting purchaser who has control unless otherwise agreed by the securities intermediary. (Code 1981, § 11-8-510, enacted by Ga. L. 1998, p. 1323, § 1; Ga. L. 2001, p. 362, § 22.)

**The 2001 amendment**, effective July 1, 2001, in subsection (a), substituted "In a case not covered by the priority rules in Article 9 of this title or the rules stated in subsection (c) of this Code section, an" for

"An" at the beginning; rewrote subsection (c); designated subsection (d); and added "A securities" at the beginning of subsection (d).

#### RESEARCH REFERENCES

**U.L.A.** — Uniform Commercial Code  
(U.L.A.) § 8-510.



**11-8-511. Priority among security interests and entitlement holders.**

(a) Except as otherwise provided in subsections (b) and (c) of this Code section, if a securities intermediary does not have sufficient interests in a particular financial asset to satisfy both its obligations to entitlement holders who have security entitlements to that financial asset and its obligation to a creditor of the securities intermediary who has a security interest in that financial asset, the claims of entitlement holders, other than the creditor, have priority over the claim of the creditor.

(b) A claim of a creditor of a securities intermediary who has a security interest in a financial asset held by a securities intermediary has priority over claims of the securities intermediary's entitlement holders who have security entitlements with respect to that financial asset if the creditor has control over the financial asset.

(c) If a clearing corporation does not have sufficient financial assets to satisfy both its obligations to entitlement holders who have security entitlements with respect to a financial asset and its obligation to a creditor of the clearing corporation who has a security interest in that financial asset, the claim of the creditor has priority over the claims of entitlement holders. (Code 1981, § 11-8-511, enacted by Ga. L. 1998, p. 1323, § 1.)

**RESEARCH REFERENCES**

**U.L.A.** — Uniform Commercial Code  
(U.L.A.) § 8-511.

**PART 6****TRANSITION PROVISIONS FOR REVISED ARTICLE 8 AND  
CONFORMING AMENDMENTS TO ARTICLES 1, 3, 4, 5, 9, AND 10****11-8-601. Effective date.**

This Act takes effect July 1, 1998. (Code 1981, § 11-8-601, enacted by Ga. L. 1998, p. 1323, § 1.)

**RESEARCH REFERENCES**

**U.L.A.** — Uniform Commercial Code  
(U.L.A.) § 8-601.

**11-8-602. Repeals.**

This Act repeals Article 15 of Chapter 12 of Title 53, known as the "Uniform Act for Simplification of Fiduciary Security Transfers," including Code Section 53-12-320, relating to the short title; Code Section 53-12-321,

relating to definitions; Code Section 53-12-322, relating to registration in the fiduciary's name, inquiry, and assumption of continued fiduciary capacity; Code Section 53-12-323, relating to transfer pursuant to assignment by the fiduciary and authorized assumptions; Code Section 53-12-324, relating to evidence of appointment or incumbency when the fiduciary is not the registered owner; Code Section 53-12-325, relating to claims adverse to transfer, written notice of claims, notice of presentation of security for transfer, time for transfer, and liability of corporation or transfer agency; Code Section 53-12-326, relating to nonliability of corporation and transfer agent; Code Section 53-12-327, relating to liability of participants in acquisition, disposition, assignment, or transfer of security; Code Section 53-12-328, relating to the effect of the article on tax obligations; Code Section 53-12-329, relating to applicability of the law of the jurisdiction where a corporation was organized and applicability of article; and Code Section 53-12-330, relating to uniformity of interpretation, and inserts in lieu thereof the following:

#### ARTICLE 15

Reserved.

(Code 1981, § 11-8-602, enacted by Ga. L. 1998, p. 1323, § 1.)

#### RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 8-602.

#### 11-8-603. Savings clause.

(a) This Act does not affect an action or proceeding commenced before this Act takes effect.

(b) If a security interest in a security is perfected at the date this Act takes effect, and the action by which the security interest was perfected would suffice to perfect a security interest under this Act, no further action is required to continue perfection. If a security interest in a security is perfected at the date this Act takes effect but the action by which the security interest was perfected would not suffice to perfect a security interest under this Act, the security interest remains perfected for a period of four months after the effective date and continues perfected thereafter if appropriate action to perfect under this Act is taken within that period. If a security interest is perfected at the date this Act takes effect and the security interest can be perfected by filing under this Act, a financing statement signed by the secured party instead of the debtor may be filed within that period to continue perfection or thereafter to perfect. (Code 1981, § 11-8-603, enacted by Ga. L. 1998, p. 1323, § 1.)

**RESEARCH REFERENCES**

**U.L.A.** — Uniform Commercial Code  
(U.L.A.) § 8-603.



## SECURED TRANSACTIONS

### ARTICLE 9

## SECURED TRANSACTIONS

#### Part 1

##### General Provisions

##### Subpart 1

##### Short Title, Definitions, and General Concepts

Sec.	
11-9-101.	Short title.
11-9-102.	Definitions and index of definitions.
11-9-103.	Purchase money security interest; application of payments; burden of establishing.
11-9-104.	Control of deposit account.
11-9-105.	Control of electronic chattel paper.
11-9-106.	Control of investment property.
11-9-107.	Control of letter of credit right.
11-9-108.	Sufficiency of description.

##### Subpart 2

##### Applicability of Article

11-9-109.	Scope.
11-9-110.	Security interests arising under Article 2 or 2A of this title.
11-9-111.	Applicability of bulk transfer laws.

#### Part 2

##### Effectiveness of Security Agreement; Attachment of Security Interest; Rights of Parties to Security Agreement

##### Subpart 1

##### Effectiveness and Attachment

11-9-201.	General effectiveness of security agreement.
11-9-202.	Title to collateral immaterial.
11-9-203.	Attachment and enforceability of security interest; proceeds; supporting obligations; formal requisites.
11-9-204.	After acquired property; future advances.
11-9-205.	Use or disposition of collateral permissible.
11-9-206.	Security interest arising in pur-

#### Sec.

chase or delivery of financial asset.

##### Subpart 2

##### Rights and Duties

11-9-207.	Rights and duties of secured party having possession or control of collateral.
11-9-208.	Additional duties of secured party having control of collateral.
11-9-209.	Duties of secured party if account debtor has been notified of assignment.
11-9-210.	Request for accounting; request regarding list of collateral or statement of account.

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##### Perfection and Priority

##### Subpart 1

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11-9-301.	Law governing perfection and priority of security interests.
11-9-302.	Law governing perfection and priority of agricultural liens.
11-9-303.	Law governing perfection and priority of security interests in goods covered by a certificate of title.
11-9-304.	Law governing perfection and priority of security interests in deposit accounts.
11-9-305.	Law governing perfection and priority of security interests in investment property.
11-9-306.	Law governing perfection and priority of security interests in letter of credit rights.
11-9-307.	Location of debtor.

##### Subpart 2

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11-9-308.	When security interest or agricultural lien is perfected; continuity of perfection.
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Sec.		Sec.	
11-9-309.	Security interest perfected upon attachment.	11-9-323.	Future advances.
11-9-310.	When filing required to perfect security interest or agricultural lien; security interests and agricultural liens to which filing provisions do not apply.	11-9-324.	Priority of purchase money security interests.
11-9-311.	Perfection of security interests in property subject to certain statutes, regulations, and treaties.	11-9-325.	Priority of security interests in transferred collateral.
11-9-312.	Perfection of security interests in chattel paper, deposit accounts, documents, goods covered by documents, instruments, investment property, letter of credit rights, and money; perfection by permissive filing; temporary perfection without filing or transfer of possession.	11-9-326.	Priority of security interests created by new debtor.
11-9-313.	When possession by or delivery to secured party perfects security interest without filing.	11-9-327.	Priority of security interests in deposit account.
11-9-314.	Perfection by control.	11-9-328.	Priority of security interests in investment property.
11-9-315.	Secured party's rights on disposition of collateral and in proceeds.	11-9-329.	Priority of security interests in letter of credit right.
11-9-316.	Continued perfection of security interest following change in governing law.	11-9-330.	Priority of purchaser of chattel paper or instrument.
Subpart 3 Priority		11-9-331.	Priority of rights of purchasers of instruments, documents, and securities under other articles; priority of interests in financial assets and security entitlements under Article 8 of this title.
		11-9-332.	Transfer of money; transfer of funds from deposit account.
11-9-317.	Interests that take priority over or take free of security interest or agricultural lien.	11-9-333.	Priority of certain liens.
11-9-318.	No interest retained in right to payment that is sold; rights and title of seller of account or chattel paper with respect to creditors and purchasers.	11-9-334.	Priority of security interests in fixtures and crops.
11-9-319.	Rights and title of consignee with respect to creditors and purchasers.	11-9-335.	Accessions.
11-9-320.	Buyer of goods.	11-9-336.	Commingled goods.
11-9-321.	Licensee of general intangible and lessee of goods in ordinary course of business.	11-9-337.	Priority of security interests in goods covered by certificate of title.
11-9-322.	Priorities among conflicting security interests in and agricultural liens on same collateral.	11-9-338.	Priority of security interest or agricultural lien perfected by filed financing statement providing certain incorrect information.
11-9-322.1.	Crops produced with new value.	11-9-339.	Priority subject to subordination.
		Subpart 4 Rights of Bank	
		11-9-340.	Effectiveness of right of recoupment or set-off against deposit account.
		11-9-341.	Bank's rights and duties with respect to deposit account.
		11-9-342.	Bank's right to refuse to enter into or disclose existence of control agreement.
		Part 4 Rights of Third Parties	
		11-9-401.	Alienability of debtor's rights.

## SECURED TRANSACTIONS

Sec.		Sec.	
11-9-402.	Secured party not obligated on contract of debtor or in tort.	11-9-508.	Effectiveness of financing statement if new debtor becomes bound by security agreement.
11-9-403.	Agreement not to assert defenses against assignee.	11-9-509.	Persons entitled to file a record.
11-9-404.	Rights acquired by assignee; claims and defenses against assignee.	11-9-510.	Effectiveness of filed record.
11-9-405.	Modification of assigned contract.	11-9-511.	Secured party of record.
11-9-406.	Discharge of account debtor; notification of assignment; identification and proof of assignment; restrictions on assignment of accounts, chattel paper, payment intangibles, and promissory notes ineffective.	11-9-512.	Amendment of financing statement.
11-9-407.	Restrictions on creation or enforcement of security interest in leasehold interest or in lessor's residual interest.	11-9-513.	Termination statement.
11-9-408.	Restrictions on assignment of promissory notes, health care insurance receivables, and certain general intangibles ineffective.	11-9-514.	Assignment of powers of secured party of record.
11-9-409.	Restrictions on assignment of letter of credit rights ineffective.	11-9-515.	Duration and effectiveness of financing statement; effect of lapsed financing statement.
		11-9-516.	What constitutes filing; effectiveness of filing.
		11-9-517.	Effect of indexing errors.
		11-9-518.	Inaccurate or wrongfully filed record.
			Subpart 2
			Duties and Operation of Filing Office and Central Indexing System
		11-9-519.	Numbering, maintaining, and indexing records; communicating information provided in records.
		11-9-520.	Acceptance and refusal to accept record.
		11-9-521.	Uniform form of written financing statement and amendment; authority may prescribe forms.
		11-9-522.	Maintenance and destruction of records.
		11-9-523.	Information from filing office and central indexing system; sale or license of records.
		11-9-524.	Delay by filing office or authority.
		11-9-525.	Fees.
		11-9-526.	Rules.
			Part 6
			Default
			Subpart 1
			Default and Enforcement of Security Interest
		11-9-601.	Rights after default; judicial enforcement; consignor or buyer of accounts, chattel paper, pay-

### Part 5

#### Filing

##### Subpart 1

#### Filing Office; Contents and Effectiveness of Financing Statement

- 11-9-501. Filing office.
- 11-9-502. Contents of financing statement; real estate mortgages as fixture filings; time of filing financing statement.
- 11-9-503. Name of debtor and secured party.
- 11-9-504. Indication of collateral.
- 11-9-505. Filing and compliance with other statutes and treaties for consignments, leases, other bailments, and other transactions.
- 11-9-506. Effect of errors or omissions.
- 11-9-507. Effect of certain events on effectiveness of financing statement.



# COMMERCIAL CODE

Sec.		Sec.	
	ment intangibles, or promissory notes.		or partial satisfaction of obligation; compulsory disposition of collateral.
11-9-602.	Waiver and variance of rights and duties.	11-9-621.	Notification of proposal to accept collateral.
11-9-603.	Agreement on standards concerning rights and duties.	11-9-622.	Effect of acceptance of collateral.
11-9-604.	Procedure if security agreement covers real property or fixtures.	11-9-623.	Right to redeem collateral.
11-9-605.	Unknown debtor or secondary obligor.	11-9-624.	Waiver.
11-9-606.	Time of default for agricultural lien.	Subpart 2	
11-9-607.	Collection and enforcement by secured party.	Noncompliance with Article	
11-9-608.	Application of proceeds of collection or enforcement; liability for deficiency and right to surplus.	11-9-625.	Remedies for secured party's failure to comply with article.
11-9-609.	Secured party's right to take possession after default.	11-9-626.	Action in which deficiency or surplus is in issue.
11-9-610.	Disposition of collateral after default.	11-9-627.	Determination of whether conduct was commercially reasonable.
11-9-611.	Notification before disposition of collateral.	11-9-628.	Nonliability and limitation on liability of secured party; liability of secondary obligor.
11-9-612.	Timeliness of notification before disposition of collateral.	Part 7	
11-9-613.	Contents and form of notification before disposition of collateral; general.	Transition	
11-9-614.	Contents and form of notification before disposition of collateral; consumer goods transaction.	11-9-701.	Effective date.
11-9-615.	Application of proceeds of disposition; liability for deficiency and right to surplus.	11-9-702.	Savings clause.
11-9-616.	Explanation of calculation of surplus or deficiency.	11-9-703.	Security interest perfected before effective date.
11-9-617.	Rights of transferee of collateral.	11-9-704.	Security interest unperfected before effective date.
11-9-618.	Rights and duties of certain secondary obligors.	11-9-705.	Effectiveness of action taken before effective date.
11-9-619.	Transfer of record or legal title.	11-9-706.	When initial financing statement suffices to continue effectiveness of financing statement.
11-9-620.	Acceptance of collateral in full	11-9-707.	Amendment of pre-effective date financing statement.
		11-9-708.	Persons entitled to file initial financing statement or continuation statement.
		11-9-709.	Priority.
		11-9-710.	Exculpation.

**Effective date.** — This article became effective July 1, 2001.

**Cross references.** — Effect of transfer of note secured by mortgage, etc., § 10-3-1. Making of secured transactions and other dispositions of corporate property and assets

not requiring shareholder approval, § 14-2-1201. Criminal penalty for destruction, removal, concealment, etc., of property subject to security interests, § 16-9-51. Perfection and validity of security interests in motor vehicles, § 40-3-50 et seq. Mortgages,

conveyances to secure debt, etc., § 44-14-1 et seq.

**Editor’s notes.** — Ga. L. 2001, p. 362, § 1, effective July 1, 2001, repealed the Code sections formerly codified as this article and enacted the current article. The former article consisted of Code Sections 11-9-101 through 11-9-116 (Part 1), 11-9-201 through 11-9-208 (Part 2), 11-9-301 through 11-9-318 (Part 3), 11-9-401 through 11-9-409 (Part 4), and 11-9-501 through 11-9-507 (Part 5), relating to secured transactions, sales of accounts and chattel paper, and was based on Code 1933, §§ 109A-9-101 through 109A-9-114; Code 1933 §§ 109A-9-201 through 109A-9-208; Code 1933 §§ 109A-9-301 through 109A-9-318; Code 1933, §§ 109A-9-401 through 109A-9-409; Code 1933, §§ 109A-9-501 through 109A-9-507; Ga. L. 1962, p. 156, § 1; Ga. L.

1963, p. 188, §§ 23 through 36; Ga. L. 1964, p. 70, §§ 1, 3 through 7; Ga. L. 1968, p. 1151, § 1; Ga. L. 1969, p. 149, § 1; Ga. L. 1970, p. 604, § 1; Ga. L. 1978, p. 1081, § 1; Ga. L. 1979, p. 626, § 1; Ga. L. 1980, p. 443, §§ 2 through 6; Ga. L. 1980, p. 1134, §§ 1 through 3; Ga. L. 1981, p. 1396, §§ 9 through 14; Ga. L. 1982, p. 3, § 11; Ga. L. 1985, p. 1107, § 1; Ga. L. 1985, p. 1517, §§ 1 through 4; Ga. L. 1986, p. 357, §§ 1 through 2; Ga. L. 1986, p. 1002, §§ 5 through 8; Ga. L. 1988, p. 13, § 11; Ga. L. 1991, p. 94, § 11; Ga. L. 1992, p. 1028, § 1; Ga. L. 1992, p. 2626, §§ 4 through 11; Ga. L. 1993, p. 576, § 1; Ga. L. 1993, p. 633, § 4; Ga. L. 1993, p. 1550, §§ 1 through 6; Ga. L. 1994, p. 1693, §§ 1 through 12; Ga. L. 1997, p. 143, § 11; Ga. L. 1997, p. 970, § 3; Ga. L. 1998, p. 128, § 11; Ga. L. 1998, p. 1323, § 2 through 14.

Table of Comparable Provisions for Title 11, Article 9  
Former Code Sections to Revised Code Sections

This table lists each section in the version of Article 9 of the Uniform Commercial Code in effect prior to July 1, 2001, and provides the comparable provisions for Article 9 in effect on and after July 1, 2001. It is intended to assist the user who is familiar with the former title to find comparable new provisions.

		<u>FORMER CODE</u>	<u>REVISED CODE</u>
		11-9-116	11-9-206
		<u>Part Two</u>	
		11-9-201	11-9-201
		11-9-202	11-9-202
		11-9-203	11-9-203
		11-9-204	11-9-204
		11-9-205	11-9-205
		11-9-206	11-9-403
		11-9-207	11-9-207
		11-9-208	11-9-210
		<u>Part Three</u>	
		11-9-301	11-9-102, 11-9-317
		11-9-302	11-9-310
		11-9-303	11-9-308
		11-9-304	11-9-312
		11-9-305	11-9-313
		11-9-306	11-9-102, 11-9-315
		11-9-307	11-9-320
		11-9-308	11-9-330
		11-9-309	11-9-331
		11-9-310	11-9-333
		11-9-311	11-9-401
		11-9-312	11-9-322, 11-9-322.1, 11-9-324
		11-9-313	11-9-334
<u>FORMER CODE</u>	<u>REVISED CODE</u>		
<u>Part One</u>			
11-9-101	11-9-101		
11-9-102	11-9-109		
11-9-103	11-9-301, 11-9-303, 11-9-305		
11-9-104	11-9-109		
11-9-105	11-9-102		
11-9-106	11-9-102		
11-9-107	11-9-103		
11-9-108	repealed		
11-9-109	11-9-102		
11-9-110	11-9-108		
11-9-111	11-9-111		
11-9-112	repealed		
11-9-113	11-9-110		
11-9-114	11-9-319		
11-9-115	11-9-102, 11-9-106, 11-9-301		

<u>FORMER CODE</u>	<u>REVISED CODE</u>	<u>FORMER CODE</u>	<u>REVISED CODE</u>
11-9-314	11-9-335	11-9-406	11-9-525
11-9-315	11-9-336	11-9-407	11-9-519, 11-9-523, 11-9-526
11-9-316	11-9-339	11-9-408	11-9-505
11-9-317	11-9-402	11-9-409	repealed
11-9-318	11-9-404, 11-9-405		
<u>Part Four</u>		<u>Part Five</u>	
11-9-401	11-9-501	11-9-501	11-9-601, 11-9-602
11-9-402	11-9-502, 11-9-503, 11-9-504, 11-9-506	11-9-502	11-9-607
11-9-403	11-9-510, 11-9-511, 11-9-515, 11-9-516	11-9-503	11-9-609
11-9-404	11-9-513	11-9-504	11-9-610—11-9-614
11-9-405	11-9-514, 11-9-525	11-9-505	11-9-620, 11-9-622
		11-9-506	11-9-623
		11-9-507	11-9-625

Revised Code Sections to Former Code Sections

This table lists each section in the version of Article 9 of the Uniform Commercial Code in effect on and after July 1, 2001, and provides the comparable provisions for Article 9 in effect prior to July 1, 2001. It is intended to assist the user who is familiar with the new title to find comparable former provisions.

<u>REVISED CODE</u>	<u>FORMER CODE</u>	<u>REVISED CODE</u>	<u>FORMER CODE</u>
<u>Part One, Subpart One</u>		11-9-203	11-9-203
11-9-101	11-9-101	11-9-204	11-9-204
11-9-102	11-9-105, 11-9-106, 11-9-109, 11-9-115, 11-9-301, 11-9-306	11-9-205	11-9-205
11-9-103	11-9-107	11-9-206	11-9-116
11-9-104	none	<u>Subpart Two</u>	
11-9-105	none	11-9-207	11-9-207
11-9-106	11-9-115	11-9-208	none
11-9-107	none	11-9-209	none
11-9-108	11-9-110	11-9-210	11-9-208
<u>Subpart Two</u>		<u>Part Three, Subpart One</u>	
11-9-109	11-9-104	11-9-301	11-9-103, 11-9-115
11-9-110	11-9-113	11-9-302	none
11-9-111	11-9-111	11-9-303	11-9-103
<u>Part Two, Subpart One</u>		11-9-304	none
11-9-201	11-9-201	11-9-305	11-9-103
11-9-202	11-9-202	11-9-306	none
		11-9-307	none
		<u>Subpart Two</u>	
		11-9-308	11-9-303
		11-9-309	none
		11-9-310	11-9-302
		11-9-311	none
		11-9-312	11-9-304
		11-9-313	11-9-305
		11-9-314	none
		11-9-315	11-9-306
		11-9-316	none



<u>REVISED CODE</u>	<u>FORMER CODE</u>	<u>REVISED CODE</u>	<u>FORMER CODE</u>
<u>Subpart Three</u>		11-9-509	none
11-9-317	11-9-301	11-9-510	11-9-403
11-9-318	none	11-9-511	11-9-403
11-9-319	11-9-114	11-9-512	none
11-9-320	11-9-307	11-9-513	11-9-404
11-9-321	none	11-9-514	11-9-405
11-9-322	11-9-312	11-9-515	11-9-403
11-9-322.1	11-9-312	11-9-516	11-9-403
11-9-323	none	11-9-517	none
11-9-324	11-9-312	11-9-518	none
11-9-325	none		
11-9-326	none	<u>Subpart Two</u>	
11-9-327	none	11-9-519	11-9-407
11-9-328	none	11-9-520	none
11-9-329	none	11-9-521	none
11-9-330	11-9-308	11-9-522	none
11-9-331	11-9-309	11-9-523	11-9-407
11-9-332	none	11-9-524	none
11-9-333	11-9-310	11-9-525	11-9-405, 11-9-406
11-9-334	11-9-313	11-9-526	11-9-407
11-9-335	11-9-314		
11-9-336	11-9-315	<u>Part Six, Subpart One</u>	
11-9-337	none	11-9-601	11-9-501
11-9-338	none	11-9-602	11-9-501
11-9-339	11-9-316	11-9-603	none
		11-9-604	none
<u>Subpart Four</u>		11-9-605	none
11-9-340	none	11-9-606	none
11-9-341	none	11-9-607	11-9-502
11-9-342	none	11-9-608	none
		11-9-609	11-9-503
<u>Part Four</u>		11-9-610	11-9-504
11-9-401	11-9-311	11-9-611	11-9-504
11-9-402	11-9-317	11-9-612	11-9-504
11-9-403	11-9-206	11-9-613	11-9-504
11-9-404	11-9-318	11-9-614	11-9-504
11-9-405	11-9-318	11-9-615	none
11-9-406	none	11-9-616	none
11-9-407	none	11-9-617	none
11-9-408	none	11-9-618	none
11-9-409	none	11-9-619	none
		11-9-620	11-9-505
<u>Part Five, Subpart One</u>		11-9-621	none
11-9-501	11-9-401	11-9-622	11-9-505
11-9-502	11-9-402	11-9-623	11-9-506
11-9-503	11-9-402	11-9-624	none
11-9-504	11-9-402		
11-9-505	11-9-408	<u>Subpart Two</u>	
11-9-506	11-9-402	11-9-625	11-9-507
11-9-507	none	11-9-626	11-9-504
11-9-508	none	11-9-627	11-9-504

<u>REVISED CODE</u>	<u>FORMER CODE</u>
11-9-628	none
<u>Part Seven</u>	
11-9-701	none
11-9-702	none
11-9-703	none
11-9-703	none
11-9-705	none
11-9-706	none
11-9-707	none
11-9-708	none
11-9-709	none
11-9-710	none

**Law reviews.** — For article discussing the effect of the Uniform Commercial Code upon the statutory lien provision of section 67(c) of the Bankruptcy Act, see 1 Ga. L. Rev. 149 (1967). For article discussing federal truth in lending provisions and their relation to state laws, see 6 Ga. St. B.J. 19 (1969). For article discussing secured lending, and offering some practical guidelines, see 28 Mercer L. Rev. 699 (1977). For article

discussing fifth circuit bankruptcy cases in 1977, see 29 Mercer L. Rev. 937 (1978). For article surveying Georgia cases dealing with commercial law from June 1977 through May 1978, see 30 Mercer L. Rev. 15 (1978). For article discussing possible impact of new Bankruptcy Code on Article 9 of the Uniform Commercial Code, see 14 Ga. L. Rev. 153 (1980). For article "The Good Faith Purchase Idea and the Uniform Commercial Code," see 15 Ga. L. Rev. 605 (1981). For article, "State Administrative Agency Contested Case Hearings," see 24 Ga. St. B.J. 193 (1988). For article, "Contribution Arguments in Commercial Law," see 42 Emory L.J. 897 (1993). For annual survey article discussing developments in commercial law, see 51 Mercer L. Rev. 165 (1999).

For case note, "Midlantic National Bank v. New Jersey Department of Environmental Protection: The Problem of Hazardous Wastes and the Bankrupt Firm," see 38 Mercer L. Rev. 693 (1987).

For comment on *Maley v. National Acceptance Co.*, 250 F. Supp. 841 (N.D. Ga. 1966), see 3 Ga. St. B.J. 248 (1966).

### JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Article 9 are included in the annotations for this Code section. For a table of comparable provisions, see the table at the beginning of the Article.

**Purpose.** — Concept and intention of this article is to provide method whereby all security interests can be perfected. In some instances, filing is required, and in others, possession of collateral is only means available or permitted whereby creditor can perfect security interest. In re Atlanta Times, Inc., 259 F. Supp. 820 (N.D. Ga. 1966), aff'd sub nom. Sanders v. National Acceptance Co. of Am., 383 F.2d 606 (5th Cir. 1967).

**Applicability.** — This article applies to security transactions in broad spectrum of tangible and intangible personal property. Williams v. Western Pac. Fin. Corp., 643 F.2d 331 (5th Cir. 1981).

**Conflicts with Installment Sales Act.** — Parties may contract to create security interest which will then be governed by provisions of Uniform Commercial Code unless those provisions conflict with specific terms

in Installment Sales Act. Brown v. Jenkins, 135 Ga. App. 694, 218 S.E.2d 690 (1975).

**Priorities between secured interests and setoff rights.** — This article applies to resolving priority disputes between Article 9 secured interests and contractual setoff rights, as distinguished from the creation of the right of setoff. Credit Alliance Corp. v. National Bank, 718 F. Supp. 954 (N.D. Ga. 1989).

**A valid maritime lien is superior** to a perfected nonmaritime UCC security interest in the same collateral. Ambassador Factors v. First Am. Bulk Carrier Corp. (In re Topgallant Lines), 125 Bankr. 682 (Bankr. S.D. Ga. 1991), aff'd sub nom. McAllister Towing v. Ambassador Factors (In re Topgallant Lines), 154 Bankr. 368 (S.D. Ga. 1993).

**Perfection gives notice.** — Perfection of security interests under T. 40, Ch. 3, Art. 3, as under T. 11, Art. 9, serves purpose of giving notice to subsequent creditors. In re Firth, 363 F. Supp. 369 (M.D. Ga. 1973).

**Conversion of property subject to security interest.** — Where property is subject to

security interest, exercise of dominion or control over property which is inconsistent with rights of secured party, constitutes, as to the secured party, conversion of the property; and there may be conversion by secured party where the party acts are in defiance of rights of others in the property. *Trust Co. v. Associated Grocers Co-Op.*, 152 Ga. App. 701, 263 S.E.2d 676 (1979).

Where a sale of collateral is, with respect to the secured party, a conversion of the collateral, there is a conversion on the part of the one who sells, as well as on the part of the one who purchases, and the purchaser may be liable regardless of intent, and regardless of the purchaser's lack of actual knowledge of the rights of the secured party. *Trust Co. v. Associated Grocers Co-Op.*, 152 Ga. App. 701, 263 S.E.2d 676 (1979).

**Where lease provisions retained title in the lessor** and the leased machine was to be returned to the lessor at the termination of the lease with no residual interest therein to the lessee, the lease was not a security instrument and this article does not apply. *Capital Assocs. v. Zabel*, 172 Ga. App. 19, 322 S.E.2d 67 (1984).

Where there was no agreement or intent by either party that the lessee would purchase leased equipment, the fact that the contract obligated the lessee to pay taxes, insurance, and expenses of repairs, and allowed the lessor to retain the equipment after it was returned, did not make the contract a security agreement rather than a lease. *City Food Mart, Inc. v. Bell Atl. Tricon Leasing Corp.*, 218 Ga. App. 57, 460 S.E.2d 525 (1995).

**Transfer of part of security interest.** — There is no Georgia law that requires the simultaneous transfer of an underlying promissory note with the transfer of the security interest. Instead, the Georgia Com-

mercial Code anticipates and allows a secured party's assignment of all or part of its security interest. *Tidwell v. Slocumb (In re Ga. Steel, Inc.)*, 71 Bankr. 903 (Bankr. M.D. Ga. 1987).

**Retention of certificate of origin for mobile home.** — Where manufacturer retained certificate of origin for mobile home which was "on consignment" and not yet included in a retailer's floor-plan arrangement, it was nonetheless in the retailer's inventory and available for sale to its retail customers, and the rights of the parties were determined under the Uniform Commercial Code rather than the Motor Vehicle Certificate of Title Act, O.C.G.A. § 40-3-1 et seq. *GECC v. Catalina Homes, Inc.*, 178 Ga. App. 319, 342 S.E.2d 734 (1986).

**Perfection of security interest in automobile.** — When bank financed purchase of car by car leasing business, the correct avenue for perfecting of its security interest in the car was through procedure set forth in the Motor Vehicle Certificate of Title Act (O.C.G.A. § 40-3-1 et seq.) as opposed to filing of its financial statement under procedures established by the U.C.C. *United Carolina Bank v. Capital Auto. Co.*, 163 Ga. App. 796, 294 S.E.2d 661 (1982).

**Limited partnership agreement.** — Where limited partners acquired their interest in a partnership by paying cash and giving a promissory note, and the limited partnership agreement provided that if the note were not paid by a date certain the limited partners' interest in the partnership would be automatically reduced by the fraction of the principal remaining unpaid, the agreement did not constitute a security agreement governed by Article 9. *Consolidated Equities Corp. v. Bird*, 195 Ga. App. 45, 392 S.E.2d 276 (1990).

## OPINIONS OF THE ATTORNEY GENERAL

**Editor's notes.** — In the light of the similarity of the provisions, opinions under former Article 9 are included in the annotations for this Code section. For a table of comparable provisions, see the table at the beginning of the Article.

**Definition of "security interest."** — "Security interest" means an interest in personal property or fixtures which secures

payment or performance of an obligation; retention or reservation of title by seller of goods notwithstanding shipment or delivery to buyer is limited in effect to reservation of "security interest"; this term also includes any interest of a buyer of accounts, chattel paper or contract rights. 1963-65 Op. Att'y Gen. p. 162.



## RESEARCH REFERENCES

**Am. Jur. 2d.** — 68A Am. Jur. 2d, Secured Transactions, § 1 et seq.

**C.J.S.** — 79 C.J.S., Secured Transactions, § 1 et seq.

**ALR.** — Liability for assault or trespass in forcibly retaking property sold conditionally, 9 ALR 1180; 105 ALR 926; 99 ALR2d 358.

Bankruptcy: effect of filing secured debt as an unsecured claim, 46 ALR 922.

Rights of parties to conditional sale as affected by breach of warranty, 48 ALR 969, 130 ALR 753.

Construction and effect of UCC Article 9, dealing with secured transactions, sales of accounts, contract rights, and chattel paper, 30 ALR3d 9; 67 ALR3d 308; 69 ALR3d 1162; 76 ALR3d 11; 99 ALR3d 807; 99 ALR3d 1080; 100 ALR3d 10; 100 ALR3d 940; 7 ALR4th 308; 11 ALR4th 241; 25 ALR5th 696.

Effect of UCC article 9 upon conflict, as to funds in debtor's bank account, between

secured creditor and bank claiming right of setoff, 3 ALR4th 998.

Security interests in liquor licenses, 56 ALR4th 1131.

Applicability of Article 9 of Uniform Commercial Code to assignment of rights under real-estate sales contract, lease agreement, or mortgage as collateral for separate transaction, 76 ALR4th 765.

Construction and effect of "future advances" clauses under UCC Article 9, 90 ALR4th 859.

Equitable estoppel of secured party's right to assert prior, perfected security interest against other secured creditor or subsequent purchaser under Article 9 of Uniform Commercial Code, 9 ALR5th 708.

Liability of secured creditor under Uniform Commercial Code to third party on ground of unjust enrichment, 27 ALR5th 719.

## PART 1

## GENERAL PROVISIONS

## RESEARCH REFERENCES

**C.J.S.** — 79 C.J.S., Secured Transactions, § 1 et seq.

## Subpart 1

## Short Title, Definitions, and General Concepts

## 11-9-101. Short title.

This article may be cited as "Uniform Commercial Code — Secured Transactions." (Code 1981, § 11-9-101, enacted by Ga. L. 2001, p. 362, § 1.)

**Law reviews.** — For comment, "Electronic Self-Help Repossession and You: A Computer Software Vendor's Guide to Staying Out of Jail," see 48 Emory L.J. 1477 (1999).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 68A Am. Jur. 2d, Secured Transactions, § 123 et seq.

**C.J.S.** — 6A C.J.S., Assignments, §§ 82, 87. 8 C.J.S., Bailments, § 42. 14 C.J.S., Chattel Mortgages, §§ 2, 311 et seq. 35 C.J.S., Fac-

tors, § 46 et seq. 53 C.J.S., Liens, § 2 et seq. 72 C.J.S., Pledges, §§ 5, 43 et seq.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 9-101.

**ALR.** — What constitutes Truth in Lend-

ing Act violation which “was not intentional and resulted from bona fide error not withstanding maintenance of procedures reasonably adapted to avoid any such error” within meaning of § 130(c) of Act (15 USCA § 1640(c)), 153 ALR Fed. 193.

### 11-9-102. Definitions and index of definitions.

(a) *Article 9 definitions.* As used in this article, the term:

(1) “Accession” means goods that are physically united with other goods in such a manner that the identity of the original goods is not lost.

(2) “Account,” except as used in “account for,” means a right to payment of a monetary obligation, whether or not earned by performance, (i) for property that has been or is to be sold, leased, licensed, assigned, or otherwise disposed of, (ii) for services rendered or to be rendered, (iii) for a policy of insurance issued or to be issued, (iv) for a secondary obligation incurred or to be incurred, (v) for energy provided or to be provided, (vi) for the use or hire of a vessel under a charter or other contract, (vii) arising out of the use of a credit or charge card or information contained on or for use with the card, or (viii) as winnings in a lottery or other game of chance operated or sponsored by a state, governmental unit of a state, or person licensed or authorized to operate the game by a state or governmental unit of a state. The term includes health care insurance receivables. The term does not include (i) rights to payment evidenced by chattel paper or an instrument, (ii) commercial tort claims, (iii) deposit accounts, (iv) investment property, (v) letter of credit rights or letters of credit, or (vi) rights to payment for money or funds advanced or sold, other than rights arising out of the use of a credit or charge card or information contained on or for use with the card.

(3) “Account debtor” means a person obligated on an account, chattel paper, or general intangible. The term does not include persons obligated to pay a negotiable instrument, even if the instrument constitutes part of chattel paper.

(4) “Accounting,” except as used in “accounting for,” means a record:

(A) Authenticated by a secured party;

(B) Indicating the aggregate unpaid secured obligations as of a date not more than 35 days earlier or 35 days later than the date of the record; and

(C) Identifying the components of the obligations in reasonable detail.

(5) “Agricultural lien” means an interest in farm products:

(A) Which secures payment or performance of an obligation for:

(i) Goods or services furnished in connection with a debtor’s farming operation; or

(ii) Rent on real property leased by a debtor in connection with its farming operation;

(B) Which is created by statute in favor of a person that:

(i) In the ordinary course of its business furnished goods or services to a debtor in connection with a debtor's farming operation; or

(ii) Leased real property to a debtor in connection with the debtor's farming operation; and

(C) Whose effectiveness does not depend on the person's possession of the personal property.

(6) "As-extracted collateral" means:

(A) Oil, gas, or other minerals that are subject to a security interest that:

(i) Is created by a debtor having an interest in the minerals before extraction; and

(ii) Attaches to the minerals as extracted; or

(B) Accounts arising out of the sale at the wellhead or minehead of oil, gas, or other minerals in which the debtor had an interest before extraction.

(7) "Authenticate" means:

(A) To sign; or

(B) To execute or otherwise adopt a symbol, or encrypt or similarly process a record in whole or in part, with the present intent of the authenticating person to identify the person and adopt or accept a record.

(8) "Authority" means the Georgia Superior Court Clerks' Cooperative Authority.

(9) "Bank" means an organization that is engaged in the business of banking. The term includes savings banks, savings and loan associations, credit unions, and trust companies. .

(10) "Cash proceeds" means proceeds that are money, checks, deposit accounts, or the like.

(11) "Certificate of title" means a certificate of title with respect to which a statute provides for the security interest in question to be indicated on the certificate as a condition or result of the security interest's obtaining priority over the rights of a lien creditor with respect to the collateral.



(12) “Chattel paper” means a record or records that evidence both a monetary obligation and a security interest in specific goods, a security interest in specific goods and software used in the goods, a lease of specific goods, or a lease of specific goods and license of software used in the goods. As used in this paragraph, “monetary obligation” means a monetary obligation secured by the goods or owed under a lease of the goods and includes a monetary obligation with respect to software used in the goods. The term does not include:

(A) Charters or other contracts involving the use or hire of a vessel;  
or

(B) Records that evidence a right to payment arising out of the use of a credit or charge card or information contained on or for use with the card.

If a transaction is evidenced by records that include an instrument or series of instruments, the group of records taken together constitutes chattel paper.

(13) “Collateral” means the property subject to a security interest or agricultural lien. The term includes:

(A) Proceeds to which a security interest attaches;

(B) Accounts, chattel paper, payment intangibles, and promissory notes that have been sold; and

(C) Goods that are the subject of a consignment.

(14) “Commercial tort claim” means a claim arising in tort with respect to which:

(A) The claimant is an organization; or

(B) The claimant is an individual and the claim:

(i) Arose in the course of the claimant’s business or profession;  
and

(ii) Does not include damages arising out of personal injury to or the death of an individual.

(15) “Commodity account” means an account maintained by a commodity intermediary in which a commodity contract is carried for a commodity customer.

(16) “Commodity contract” means a commodity futures contract, an option on a commodity futures contract, a commodity option, or another contract if the contract or option is:

(A) Traded on or subject to the rules of a board of trade that has been designated as a contract market for such a contract pursuant to federal commodities laws; or

(B) Traded on a foreign commodity board of trade, exchange, or market and is carried on the books of a commodity intermediary for a commodity customer.

(17) "Commodity customer" means a person for which a commodity intermediary carries a commodity contract on its books.

(18) "Commodity intermediary" means a person that:

(A) Is registered as a futures commission merchant under federal commodities law; or

(B) In the ordinary course of its business provides clearance or settlement services for a board of trade that has been designated as a contract market pursuant to federal commodities law.

(19) "Communicate" means:

(A) To send a written or other tangible record;

(B) To transmit a record by any means agreed upon by the persons sending and receiving the record; or

(C) In the case of transmission of a record to or by a filing office or the authority, to transmit a record by any means prescribed by filing office rule.

(20) "Consignee" means a merchant to which goods are delivered in a consignment.

(21) "Consignment" means a transaction, regardless of its form, in which a person delivers goods to a merchant for the purpose of sale and:

(A) The merchant:

(i) Deals in goods of that kind under a name other than the name of the person making delivery;

(ii) Is not an auctioneer; and

(iii) Is not generally known by its creditors to be substantially engaged in selling the goods of others;

(B) With respect to each delivery, the aggregate value of the goods is \$1,000.00 or more at the time of delivery;

(C) The goods are not consumer goods immediately before delivery; and

(D) The transaction does not create a security interest that secures an obligation.

(22) "Consignor" means a person that delivers goods to a consignee in a consignment.

(23) “Consumer debtor” means a debtor in a consumer transaction.

(24) “Consumer goods” means goods that are used or bought for use primarily for personal, family, or household purposes.

(25) “Consumer goods transaction” means a consumer transaction in which:

(A) An individual incurs an obligation primarily for personal, family, or household purposes; and

(B) A security interest in consumer goods secures the obligation.

(26) “Consumer obligor” means an obligor who is an individual and who incurred the obligation as part of a transaction entered into primarily for personal, family, or household purposes.

(27) “Consumer transaction” means a transaction in which (i) an individual incurs an obligation primarily for personal, family, or household purposes, (ii) a security interest secures the obligation, and (iii) the collateral is held or acquired primarily for personal, family, or household purposes. The term includes consumer goods transactions.

(28) “Continuation statement” means an amendment of a financing statement which:

(A) Identifies, by its file number, the initial financing statement to which it relates; and

(B) Indicates that it is a continuation statement for, or that it is filed to continue the effectiveness of, the identified financing statement.

(29) “Debtor” means:

(A) A person having an interest, other than a security interest or other lien, in the collateral, whether or not the person is an obligor;

(B) A seller of accounts, chattel paper, payment intangibles, or promissory notes; or

(C) A consignee.

(30) “Deposit account” means a demand, time, savings, passbook, or similar account maintained with a bank. The term does not include investment property or accounts evidenced by an instrument.

(31) “Document” means a document of title or a receipt of the type described in subsection (2) of Code Section 11-7-201.

(32) “Electronic chattel paper” means chattel paper evidenced by a record or records consisting of information stored in an electronic medium.

(33) “Encumbrance” means a right, other than an ownership interest, in real property. The term includes mortgages and other liens on real property.



(34) "Equipment" means goods other than inventory, farm products, or consumer goods.

(35) "Farm products" means goods, other than standing timber, with respect to which the debtor is engaged in a farming operation and which are:

(A) Crops grown, growing, or to be grown, including:

(i) Crops produced on trees, vines, and bushes; and

(ii) Aquatic goods produced in aquacultural operations;

(B) Livestock, born or unborn, including aquatic goods produced in aquacultural operations;

(C) Supplies used or produced in a farming operation; or

(D) Products of crops or livestock in their unmanufactured states.

(36) "Farming operation" means raising, cultivating, propagating, fattening, grazing, or any other farming, livestock, or aquacultural operation.

(37) "File number" means the number assigned to an initial financing statement pursuant to subsection (a) of Code Section 11-9-519.

(38) "Filing office" means an office designated in Code Section 11-9-501 as the place to file a financing statement.

(39) "Filing office rule" means a rule adopted pursuant to Code Section 11-9-526.

(40) "Financing statement" means a record or records composed of an initial financing statement and any filed record relating to the initial financing statement.

(41) "Fixture filing" means the filing of a financing statement covering goods that are or are to become fixtures and satisfying subsections (a) and (b) of Code Section 11-9-502. The term includes the filing of a financing statement covering goods of a transmitting utility which are or are to become fixtures.

(42) "Fixtures" means goods that have become so related to particular real property that an interest in them arises under real property law.

(43) "General intangible" means any personal property, including things in action, other than accounts, chattel paper, commercial tort claims, deposit accounts, documents, goods, instruments, investment property, letter of credit rights, letters of credit, money, and oil, gas, or other minerals before extraction. The term includes payment intangibles and software.

(44) “Good faith” means honesty in fact and the observance of reasonable commercial standards of fair dealing.

(45) “Goods” means all things that are movable when a security interest attaches. The term includes (i) fixtures, (ii) standing timber that is to be cut and removed under a conveyance or contract for sale, (iii) the unborn young of animals, and (iv) crops grown, growing, or to be grown, even if the crops are produced on trees, vines, or bushes. The term also includes a computer program embedded in goods and any supporting information provided in connection with a transaction relating to the program if (i) the program is associated with the goods in such a manner that it customarily is considered part of the goods, or (ii) by becoming the owner of the goods, a person acquires a right to use the program in connection with the goods. The term does not include a computer program embedded in goods that consist solely of the medium in which the program is embedded. The term also does not include accounts, chattel paper, commercial tort claims, deposit accounts, documents, general intangibles, instruments, investment property, letter of credit rights, letters of credit, money, or oil, gas, or other minerals before extraction.

(46) “Governmental unit” means a subdivision, agency, department, county, parish, municipality, or other unit of the government of the United States, a state, or a foreign country. The term includes an organization having a separate corporate existence if the organization is eligible to issue debt on which interest is exempt from income taxation under the laws of the United States.

(47) “Health care insurance receivable” means an interest in or claim under a policy of insurance which is a right to payment of a monetary obligation for health care goods or services provided or to be provided.

(48) “Instrument” means a negotiable instrument or any other writing that evidences a right to the payment of a monetary obligation, is not itself a security agreement or lease, and is of a type that in ordinary course of business is transferred by delivery with any necessary indorsement or assignment. The term does not include (i) investment property, (ii) letters of credit, or (iii) writings that evidence a right to payment arising out of the use of a credit or charge card or information contained on or for use with the card.

(49) “Inventory” means goods, other than farm products, which:

(A) Are leased by a person as lessor;

(B) Are held by a person for sale or lease or to be furnished under a contract of service;

(C) Are furnished by a person under a contract of service; or

(D) Consist of raw materials, work in process, or materials used or consumed in a business.

(50) "Investment property" means a security, whether certificated or uncertificated, security entitlement, securities account, commodity contract, or commodity account.

(51) "Jurisdiction of organization," with respect to a registered organization, means the jurisdiction under whose law the organization is organized.

(52) "Letter of credit right" means a right to payment or performance under a letter of credit, whether or not the beneficiary has demanded or is at the time entitled to demand payment or performance. The term does not include the right of a beneficiary to demand payment or performance under a letter of credit.

(53) "Lien creditor" means:

(A) A creditor that has acquired a lien on the property involved by attachment, levy, or the like;

(B) An assignee for benefit of creditors from the time of assignment;

(C) A trustee in bankruptcy from the date of the filing of the petition; or

(D) A receiver in equity from the time of appointment.

(54) "Mortgage" means a consensual interest in real property, including fixtures, which secures payment or performance of an obligation. The term includes a deed to secure debt.

(55) "New debtor" means a person that becomes bound as debtor under subsection (d) of Code Section 11-9-203 by a security agreement previously entered into by another person.

(56) "New value" means (i) money, (ii) money's worth in property, services, or new credit, or (iii) release by a transferee of an interest in property previously transferred to the transferee. The term does not include an obligation substituted for another obligation.

(57) "Noncash proceeds" means proceeds other than cash proceeds.

(58) "Obligor" means a person that, with respect to an obligation secured by a security interest in or an agricultural lien on the collateral, (i) owes payment or other performance of the obligation, (ii) has provided property other than the collateral to secure payment or other performance of the obligation, or (iii) is otherwise accountable in whole or in part for payment or other performance of the obligation. The term does not include issuers or nominated persons under a letter of credit.

(59) "Original debtor," except as used in subsection (c) of Code Section 11-9-310, means a person that, as debtor, entered into a security



agreement to which a new debtor has become bound under subsection (d) of Code Section 11-9-203.

(60) "Payment intangible" means a general intangible under which the account debtor's principal obligation is a monetary obligation.

(61) "Person related to," with respect to an individual, means:

- (A) The spouse of the individual;
- (B) A brother, brother-in-law, sister, or sister-in-law of the individual;
- (C) An ancestor or lineal descendant of the individual or the individual's spouse; or
- (D) Any other relative, by blood or marriage, of the individual or the individual's spouse who shares the same home with the individual.

(62) "Person related to," with respect to an organization, means:

- (A) A person directly or indirectly controlling, controlled by, or under common control with the organization;
- (B) An officer or director of, or a person performing similar functions with respect to, the organization;
- (C) An officer or director of, or a person performing similar functions with respect to, a person described in subparagraph (A) of this paragraph;
- (D) The spouse of an individual described in subparagraph (A), (B), or (C) of this paragraph; or
- (E) An individual who is related by blood or marriage to an individual described in subparagraph (A), (B), (C), or (D) of this paragraph and shares the same home with the individual.

(63) "Proceeds," except as used in subsection (d) of Code Section 11-9-609, means the following property:

- (A) Whatever is acquired upon the sale, lease, license, exchange, or other disposition of collateral;
- (B) Whatever is collected on, or distributed on account of, collateral;
- (C) Rights arising out of collateral;
- (D) To the extent of the value of collateral, claims arising out of the loss, nonconformity, or interference with the use of, defects or infringement of rights in, or damage to the collateral; or
- (E) To the extent of the value of collateral and to the extent payable to the debtor or the secured party, insurance payable by reason of the

loss or nonconformity of, defects or infringement of rights in, or damage to the collateral.

(64) “Promissory note” means an instrument that evidences a promise to pay a monetary obligation, does not evidence an order to pay, and does not contain an acknowledgment by a bank that the bank has received for deposit a sum of money or funds.

(65) “Proposal” means a record authenticated by a secured party which includes the terms on which the secured party is willing to accept collateral in full or partial satisfaction of the obligation it secures pursuant to Code Sections 11-9-620, 11-9-621, and 11-9-622.

(66) “Public finance transaction” means a secured transaction in connection with which:

(A) Debt securities are issued;

(B) All or a portion of the securities issued have an initial stated maturity of at least five years; and

(C) The debtor, obligor, secured party, account debtor or other person obligated on collateral, assignor or assignee of a secured obligation, or assignor or assignee of a security interest is a state or a governmental unit of a state.

(67) “Pursuant to commitment,” with respect to an advance made or other value given by a secured party, means pursuant to the secured party’s obligation, whether or not a subsequent event of default or other event not within the secured party’s control has relieved or may relieve the secured party from its obligation.

(68) “Record,” except as used in “for record,” “of record,” “record or legal title,” and “record owner,” means information that is inscribed on a tangible medium or which is stored in an electronic or other medium and is retrievable in perceivable form.

(69) “Registered organization” means an organization organized solely under the law of a single state or the United States and as to which the state or the United States must maintain a public record showing the organization to have been organized.

(70) “Secondary obligor” means an obligor to the extent that:

(A) The obligor’s obligation is secondary; or

(B) The obligor has a right of recourse with respect to an obligation secured by collateral against the debtor, another obligor, or property of either.

(71) “Secured party” means:

(A) A person in whose favor a security interest is created or provided for under a security agreement, whether or not any obligation to be secured is outstanding;

(B) A person that holds an agricultural lien;

(C) A consignor;

(D) A person to which accounts, chattel paper, payment intangibles, or promissory notes have been sold;

(E) A trustee, indenture trustee, agent, collateral agent, or other representative in whose favor a security interest or agricultural lien is created or provided for; or

(F) A person that holds a security interest arising under Code Section 11-2-401, 11-2-505, or subsection (3) of Code Section 11-2-711, subsection (5) of Code Section 11-2A-508, Code Section 11-4-210, or Code Section 11-5-118.

(72) "Security agreement" means an agreement that creates or provides for a security interest.

(73) "Send," in connection with a record or notification, means:

(A) To deposit in the mail, deliver for transmission, or transmit by any other usual means of communication, with postage or cost of transmission provided for, addressed to any address reasonable under the circumstances; or

(B) To cause the record or notification to be received within the time that it would have been received if properly sent under subparagraph (A) of this paragraph.

(74) "Software" means a computer program and any supporting information provided in connection with a transaction relating to the program. The term does not include a computer program that is included in the definition of goods.

(75) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

(76) "Supporting obligation" means a letter of credit right or secondary obligation that supports the payment or performance of an account, chattel paper, a document, a general intangible, an instrument, or investment property.

(77) "Tangible chattel paper" means chattel paper evidenced by a record or records consisting of information that is inscribed on a tangible medium.

(78) "Termination statement" means an amendment of a financing statement which:

(A) Identifies, by its file number, the initial financing statement to which it relates; and



(B) Indicates either that it is a termination statement or that the identified financing statement is no longer effective.

(79) "Transmitting utility" means a person primarily engaged in the business of:

(A) Operating a railroad, subway, street railway, or trolley bus;

(B) Transmitting communications electrically, electromagnetically, or by light;

(C) Transmitting goods by pipeline or sewer; or

(D) Transmitting or producing and transmitting electricity, steam, gas, or water.

(b) *Definitions in other articles.* Other definitions applying to this article and the Code sections in which they appear are:

"Applicant." Code Section 11-5-102.

"Beneficiary." Code Section 11-5-102.

"Broker." Code Section 11-8-102.

"Certificated security." Code Section 11-8-102.

"Check." Code Section 11-3-104.

"Clearing corporation." Code Section 11-8-102.

"Contract for sale." Code Section 11-2-106.

"Customer." Code Section 11-4-104.

"Entitlement holder." Code Section 11-8-102.

"Financial asset." Code Section 11-8-102.

"Holder in due course." Code Section 11-3-302.

"Issuer" (with respect to a letter of credit or letter of credit right). Code Section 11-5-102.

"Issuer" (with respect to a security). Code Section 11-8-201.

"Lease." Code Section 11-2A-103.

"Lease agreement." Code Section 11-2A-103.

"Lease contract." Code Section 11-2A-103.

"Leasehold interest." Code Section 11-2A-103.

"Lessee." Code Section 11-2A-103.

"Lessee in ordinary course of business." Code Section 11-2A-103.

"Lessor." Code Section 11-2A-103.

- “Lessor’s residual interest.” Code Section 11-2A-103.
- “Letter of credit.” Code Section 11-5-102.
- “Merchant.” Code Section 11-2-104.
- “Negotiable instrument.” Code Section 11-3-104.
- “Nominated person.” Code Section 11-5-102.
- “Note.” Code Section 11-3-104.
- “Proceeds of a letter of credit.” Code Section 11-5-114.
- “Prove.” Code Section 11-3-103.
- “Sale.” Code Section 11-2-106.
- “Securities account.” Code Section 11-8-501.
- “Securities intermediary.” Code Section 11-8-102.
- “Security.” Code Section 11-8-102.
- “Security certificate.” Code Section 11-8-102.
- “Security entitlement.” Code Section 11-8-102.
- “Uncertificated security.” Code Section 11-8-102.

(c) *Article 1 definitions and principles.* Article 1 of this title contains general definitions and principles of construction and interpretation applicable throughout this article. (Code 1981, § 11-9-102, enacted by Ga. L. 2001, p. 362, § 1; Ga. L. 2002, p. 995, § 3.)

**The 2002 amendment,** effective July 1, 2002, in subsection (a), deleted “, other than a security interest,” in paragraph (5) and added “or to be provided” at the end of paragraph (47).

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 2001, “Code Section” was inserted preceding “11-5-118” at the end of subparagraph (a)(71)(F).

**Editor’s notes.** — Ga. L. 2002, p. 995, § 8, not codified by the General Assembly, provides that: “This Act shall become effective July 1, 2002, and shall apply to a letter of credit that is issued on or after July 1, 2002. This Act does not apply to a transaction, event, obligation, or duty arising out of or associated with a letter of credit that was issued before July 1, 2002.”

**Law reviews.** — For article discussing the resolution of conflicting claims to goods between an unsecured seller of goods and a creditor of a buyer claiming under an after-acquired property clause, see 28 Mer-

cer L. Rev. 625 (1977). For article, “The Revisions to Article IX of the Uniform Commercial Code,” see 15 Ga. St. B.J. 120 (1977). For article, “The Good Faith Purchase Idea and the Uniform Commercial Code,” see 15 Ga. L. Rev. 605 (1981). For article discussing the classification of a continuing security interest in changing collateral as an unenforceable preference under Section 60a of the Bankruptcy Act, see 1 Ga. L. Rev. 257 (1967). For article, “Preparing the Georgia Farmer (or Other Smaller Entrepreneur) for Bankruptcy,” see 22 Ga. State Bar J. 186 (1986). For annual survey article on commercial law, see 50 Mercer L. Rev. 193 (1998). For article surveying developments in Georgia commercial law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 33 (1981). For article, “Leveraged Buyouts in Bankruptcy,” see 20 Ga. L. Rev. 73 (1985). For annual survey of commercial law, see 43 Mercer L. Rev. 119 (1991).

For note discussing creditor’s remedy of

direct collection of accounts and instruments owed to the defaulting debtor, see 3 Ga. L. Rev. 198 (1968).

For comment on *Maley v. National Acceptance Co.*, 250 F. Supp. 841 (N.D. Ga. 1966),

see 3 Ga. St. B.J. 248 (1966). For comment on *Sherrock v. Commercial Credit Corp.*, 290 A.2d 648 (Del. S. Ct. 1972), see 10 Ga. St. B.J. 110 (1973).

## JUDICIAL DECISIONS

### ANALYSIS

#### GENERAL CONSIDERATION

##### DEBTOR

##### DEPOSIT ACCOUNTS

##### INSTRUMENT

##### SECURITY AGREEMENT

##### SECURED PARTY

### General Consideration

**Editor's notes.** — In the light of the similarity of the provisions, decisions under former Article 9 are included in the annotations for this Code section. For a table of comparable provisions, see the table at the beginning of the Article.

**This section defines "account" in the sense of collateral.** *Metter Banking Co. v. Fisher Foods, Inc.*, 183 Ga. App. 441, 359 S.E.2d 145, cert. denied, 183 Ga. App. 906, 359 S.E.2d 145 (1987) (decided under former Code Section 11-9-102).

**Construction.** — This statute is in derogation of common law and must be strictly construed and followed. *Citizens & S. Nat'l Bank v. Weyerhaeuser Co.*, 152 Ga. App. 176, 262 S.E.2d 485 (1979) (decided under former Code Section 11-9-102).

**Proceeds of accounts receivable.** — A bankruptcy debtor's unearned postpetition income under a contract for employment did not constitute proceeds of the creditor's prepetition interest in accounts receivable. *In re Rumker*, 184 Bankr. 621 (Bankr. S.D. Ga. 1995) (decided under former Code Section 11-9-102).

**Trademark, trade name, and goodwill.** — In addition to a trademark, a trade name, along with the goodwill it represents, may be the subject of an Article 9 security interest and may be reacquired along with other secured property on foreclosure. *Reis v. Ralls*, 250 Ga. 721, 301 S.E.2d 40 (1983) (decided under former Code Section 11-9-102).

**Computer information and programming** recorded on magnetic tape were "general

intangibles" which are not included in the types of collateral in which security interests can be perfected by possession under former § 11-9-305 (see now O.C.G.A. § 11-9-313), and a security interest therein could therefore only be perfected by filing a financing statement. *Dabney v. Information Exch., Inc.*, 98 Bankr. 603 (Bankr. N.D. Ga. 1989) (decided under former Code Section 11-9-102).

**Post bankruptcy milk diversion program payments.** — The Farmers Home Administration, which had a pre-petition security agreement extending to the bankruptcy debtors' "farm products," including milk, had a lien which attached to milk proceeds created post bankruptcy. Post-petition milk diversion program payments, therefore, were substitutes for post-petition milk and proceeds, to which the lien attached, and were not "general intangibles." *United States v. Hollie*, 42 Bankr. 111 (Bankr. M.D. Ga. 1984) (decided under former Code Section 11-9-102).

**Property listed in financing statements** need not be specific but must only reasonably identify same, giving dates leases and amount of same, "secured by" equipment listed in leases and its location. *Stephens v. Bank of Camilla*, 133 Ga. App. 210, 210 S.E.2d 358 (1974), aff'd, 234 Ga. 293, 216 S.E.2d 71 (1975) (decided under former Code Section 11-9-102).

**Classification of goods.** — Goods are classified as consumer goods, equipment, farm products, and inventory. *Williams v. Western Pac. Fin. Corp.*, 643 F.2d 331 (5th Cir. 1981) (decided under former Code Section 11-9-102).



**Effect of filing.** — Filing of financing statement can perfect only those interests acquired through security agreements. *Tri-County Livestock Auction Co. v. Bank of Madison*, 228 Ga. 325, 185 S.E.2d 393 (1971) (decided under former Code Section 11-9-102).

**Unsecured interest in marital property.** — Where evidence supports trial court's holding that wife is entitled to a special lien, wife's lien is superior to any interest of bank in marital property, as the bank was an unsecured creditor whose lien was based on an invalid handwritten note. *First Nat'l Bank v. Blackburn*, 254 Ga. 379, 329 S.E.2d 897 (1985) (decided under former Code Section 11-9-102).

**Applying Canadian law** to the facts of the case, a remote purchaser could not prevail over a creditor who had perfected its purchase money security interest in a truck within the time specified by Canadian law. *Paccar Fin. Servs., Ltd. v. Johnson*, 195 Ga. App. 412, 393 S.E.2d 685 (1990) (decided under former Code Section 11-9-102).

**"Debtor."** — Word "debtor" in former subsection (4) includes transferees who hold proceeds which are validly claimed by secured parties of debtor who initially granted a lien on property which gave rise to the proceeds. *Moister v. National Bank (In re Guaranteed Muffler Supply Co.)*, 1 Bankr. 324 (Bankr. N.D. Ga. 1979) (decided under former Code Section 11-9-102).

**Insurance benefits considered "proceeds" and subject to lender's security interest.** — Insurance benefits payable from a third-party tortfeasor's insurer upon the destruction of a vehicle became "proceeds," subject to a lender's security interest, before payment to the victims. *JCS Enter., Inc. v. Vanliner Ins.*, 227 Ga. App. 371, 489 S.E.2d 95 (1997) (decided under former Code Section 11-9-102).

### Debtor

**Debtor construed.** — A debtor may be construed as anyone who owes payment. *Allis-Chalmers Corp. v. Barbree*, 162 Ga. App. 512, 291 S.E.2d 453, rev'd on other grounds, 250 Ga. 409, 297 S.E.2d 465 (1982) (decided under former Code Section 11-9-102).

One who is a seller of chattel paper, whether or not that one is the owner of the

underlying collateral, with full recourse against the seller in the event of a deficiency is a debtor entitled to notice of the post-default proceedings disposing of the collateral. *Barbree v. Allis-Chalmers Corp.*, 250 Ga. 409, 297 S.E.2d 465 (1982) (decided under former Code Section 11-9-102).

**Owner of collateral.** — Because former § 11-9-504(3) dealt with disposition of collateral after default, "debtor" in that section meant owner of collateral. *Allis-Chalmers Corp. v. Barbree*, 162 Ga. App. 512, 291 S.E.2d 453, rev'd on other grounds, 250 Ga. 409, 297 S.E.2d 465 (1982) (decided under former Code Section 11-9-102).

**When status of "debtor" attaches.** — Buyer of cows who had milked and cared for the cows for several weeks prior to obtaining a loan for their purchase, but who did not finally decide to purchase the cows until after buyer obtained the loan was not a "debtor," and did not take possession until the loan was closed. *United States v. Hooks*, 40 Bankr. 715 (Bankr. M.D. Ga. 1984) (decided under former Code Section 11-9-102).

### Deposit Accounts

**Inapplicability of former article to deposit accounts.** — Since former § 11-9-104(j) clearly provided that former Article 9 did not apply to a transfer of an interest in any deposit account, inasmuch as a depositor's commercial checking account is a "deposit account", the structures of that article were not applicable to the bank's appropriation of the account under its right of set-off. *Design Spectrum, Inc. v. First Nat'l Bank*, 182 Ga. App. 418, 355 S.E.2d 733 (1987) (decided under former Code Section 11-9-102).

### Instrument

**Money** came within the definition of "instrument". In *re Atlanta Times, Inc.*, 259 F. Supp. 820 (N.D. Ga. 1966), aff'd sub nom. *Sanders v. National Acceptance Co. of Am.*, 383 F.2d 606 (5th Cir. 1967) (decided under former Code Section 11-9-102).

### Security Agreement

**Intent to create a security interest is sole requisite** for security agreement. *Barton v. Chemical Bank*, 577 F.2d 1329 (5th Cir.

**Security Agreement (Cont'd)**

1978) (decided under former Code Section 11-9-102).

**Financing statement alone cannot serve as "security agreement,"** however, financing statement accompanied by other documents or circumstances may suffice as valid "security agreement." In re Carmichael Enters., Inc., 334 F. Supp. 94 (N.D. Ga. 1971), aff'd, 460 F.2d 1405 (5th Cir. 1972) (decided under former Code Section 11-9-102).

**Writing signed by debtor, describing collateral and including "security agreement".** — For security interest to be enforceable, there must be a writing, signed by debtor, which includes "security agreement" as that term is defined, and which describes collateral. In re Carmichael Enters., Inc., 334 F. Supp. 94 (N.D. Ga. 1971), aff'd, 460 F.2d 1405 (5th Cir. 1972) (decided under former Code Section 11-9-102).

**Letter agreeing to execute financing statement for stated consideration together with financing statement.** — Letter agreeing to execute and return financing statement in consideration of creditor's acceptance of debtor's notes to cover its indebtedness and financing statement, taken together, meet requirements for creation of security agreement; which requires that debtor sign security agreement which contains description of collateral. In re Carmichael Enters., Inc., 334 F. Supp. 94 (N.D. Ga. 1971), aff'd, 460 F.2d 1405 (5th Cir. 1972) (decided under former Code Section 11-9-102).

**Three-year "lease agreement contract,"** by which "lessee" would make monthly payments and, at the end of the three years, without any additional payments, would own the leased equipment, was a security agree-

ment and not a lease. National Traveler, Inc. v. Paccom Leasing Corp., 110 Bankr. 619 (Bankr. M.D. Ga. 1990) (decided under former Code Section 11-9-102).

**Agreement which did not stipulate a purchase price** but indicated an intent to negotiate a purchase price was a true lease, and not a conditional sale. Chapman v. Avco Fin. Servs. Leasing Co., 193 Ga. App. 147, 387 S.E.2d 391 (1989) (decided under former Code Section 11-9-102).

**Farmers Home Administration.** — Despite the fact that the form executed by the debtors did not contain a clause that "granted" a security interest to the Farmers Home Administration (FmHA), considering other language in the form, including a heading "Security Agreement (chattels and crops)," a reference to the FmHA as the "Secured Party," and a provision which read: "It is the purpose and intent of this instrument that ... this instrument shall secure payment of the note," the debtors did grant the FmHA a security interest in crops, livestock and offspring, farm equipment, and farm products. United States v. Hollie, 42 Bankr. 111 (Bankr. M.D. Ga. 1984) (decided under former Code Section 11-9-102).

**Secured Party**

**Automobile lessor** did not, merely by initiating a foreclosure action in regard to the vehicle, thereby acquire any status as a secured party for purposes of obtaining a priority over the holder of a prior validly perfected mechanic's lien. First Nat'l Bank v. Strother Ford, Inc., 188 Ga. App. 749, 374 S.E.2d 203, rev'd on other grounds, 258 Ga. 319, 368 S.E.2d 489 (1988) (decided under former Code Section 11-9-102).

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 68A Am. Jur. 2d, Secured Transactions, §§ 31-110, 121, 291-293, 471, 474-475, 482-486, 527, 550-554, 777, 780-835, 931-934, 962-982.

**C.J.S.** — 72 C.J.S., Pledges, §§ 20, 23, 28, 36. 82 C.J.S., Statutes, § 309.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 9-102.

**ALR.** — Realization on security deposited as collateral as interrupting the statute of limitations, 25 ALR 58; 165 ALR 1400.

Note or bond purporting to be given as collateral security for obligation of third person as guaranty or unconditional obligation, 43 ALR 185.

Creditor levying upon subject of unfiled conditional sale contract under prior judgment, 55 ALR 1137.

Interest of vendee under conditional sales contract as subject to attachment, garnishment, or execution, 61 ALR 781.

Lien which attaches under chattel mort-

gage of livestock to offspring subsequently born, as surviving period of suitable nurture, 144 ALR 330.

What constitutes "accounts receivable" under contract selling, assigning, pledging, or reserving such items, 41 ALR2d 1395.

Rights and duties of parties to conditional sales contract as to resale of repossessed property, 49 ALR2d 15.

Consignment transactions under the Uniform Commercial Code, 40 ALR3d 1078.

Uniform Commercial Code: Burden of proof as to commercially reasonable disposition of collateral, 59 ALR3d 369.

Effectiveness of original financing statement under UCC Article 9 after change in debtor's name, identity, or business structure, 99 ALR3d 1194.

Secured transactions: What constitutes "consumer goods" under UCC § 9-109(1), 77 ALR3d 1225.

Secured Transactions: What constitutes

"inventory" under UCC § 9-109(4), 77 ALR3d 1266.

Effect of UCC Article 9 upon conflict, as to funds in debtor's bank account, between secured creditor and bank claiming right of setoff, 3 ALR4th 998.

What is "commercially reasonable" disposition of collateral required by UCC § 9-504(3), 7 ALR4th 308.

What constitutes secured party's authorization to transfer collateral free of lien under UCC § 9-306(2), 37 ALR4th 787.

Secured transactions: government agricultural program payments as "proceeds" of agricultural products under UCC § 9-306, 79 ALR4th 903.

Conveyance of land as including mature but unharvested crops, 51 ALR4th 1263.

Construction mortgagee-lender's duty to protect interest of subordinated purchase-money mortgagee, 13 ALR5th 684.

### **11-9-103. Purchase money security interest; application of payments; burden of establishing.**

(a) *Definitions.* As used in this Code section, the term:

(1) "Purchase money collateral" means goods or software that secures a purchase money obligation incurred with respect to that collateral.

(2) "Purchase money obligation" means an obligation of an obligor incurred as all or part of the price of the collateral or for value given to enable the debtor to acquire rights in or the use of the collateral if the value is in fact so used.

(b) *Purchase money security interest in goods.* A security interest in goods is a purchase money security interest:

(1) To the extent that the goods are purchase money collateral with respect to that security interest;

(2) If the security interest is in inventory that is or was purchase money collateral, also to the extent that the security interest secures a purchase money obligation incurred with respect to other inventory in which the secured party holds or held a purchase money security interest; and

(3) Also to the extent that the security interest secures a purchase money obligation incurred with respect to software in which the secured party holds or held a purchase money security interest.

(c) *Purchase money security interest in software.* A security interest in software is a purchase money security interest to the extent that the security interest



also secures a purchase money obligation incurred with respect to goods in which the secured party holds or held a purchase money security interest if:

(1) The debtor acquired its interest in the software in an integrated transaction in which it acquired an interest in the goods; and

(2) The debtor acquired its interest in the software for the principal purpose of using the software in the goods.

(d) *Consignor's inventory purchase money security interest.* The security interest of a consignor in goods that are the subject of a consignment is a purchase money security interest in inventory.

(e) *Application of payment in nonconsumer goods transaction.* In a transaction other than a consumer goods transaction, if the extent to which a security interest is a purchase money security interest depends on the application of a payment to a particular obligation, the payment must be applied:

(1) In accordance with any reasonable method of application to which the parties agree;

(2) In the absence of the parties' agreement to a reasonable method, in accordance with any intention of the obligor manifested at or before the time of payment; or

(3) In the absence of an agreement to a reasonable method and a timely manifestation of the obligor's intention, in the following order:

(A) To obligations that are not secured; and

(B) If more than one obligation is secured, to obligations secured by purchase money security interests in the order in which those obligations were incurred.

(f) *No loss of status of purchase money security interest in nonconsumer goods transaction.* In a transaction other than a consumer goods transaction, a purchase money security interest does not lose its status as such, even if:

(1) The purchase money collateral also secures an obligation that is not a purchase money obligation;

(2) Collateral that is not purchase money collateral also secures the purchase money obligation; or

(3) The purchase money obligation has been renewed, refinanced, consolidated, or restructured.

(g) *Burden of proof in nonconsumer goods transaction.* In a transaction other than a consumer goods transaction, a secured party claiming a purchase money security interest has the burden of establishing the extent to which the security interest is a purchase money security interest.

(h) *Nonconsumer goods transactions; no inference.* The limitation of the rules in subsections (e), (f), and (g) of this Code section to transactions other

than consumer goods transactions is intended to leave to the court the determination of the applicable rules in consumer goods transactions. The court may not infer from that limitation the nature of the applicable rule in consumer goods transactions and may continue to apply established approaches. (Code 1981, § 11-9-103, enacted by Ga. L. 2001, p. 362, § 1.)

### JUDICIAL DECISIONS

**Editor's notes.** — In the light of the similarity of the provisions, decisions under former Article 9 are included in the annotations for this Code section. For a table of comparable provisions, see the table at the beginning of the Article.

**Enforceable title-retention agreement** constitutes purchase money security interest within definition of that term. *Food Serv. Equip. Co. v. First Nat'l Bank*, 121 Ga. App. 421, 174 S.E.2d 216 (1970) (decided under former Code Section 11-9-107).

**Security interest to secure preexisting account balance.** — Security interest taken by the creditor, not to secure all or part of the purchase price of the collateral, but rather to secure the preexisting balance of the debtor's account with the creditor, did not fall within the definition of a purchase money security interest. *In re Carter*, 169 Bankr. 227 (Bankr. M.D. Ga. 1993) (decided under former Code Section 11-9-107).

**Purchase money security interest in collateral purchased with loan proceeds.** — One who is a "lender," may acquire purchase money security interest in collateral to be purchased with proceeds of loan provided proceeds are in fact so used. *Continental Oil Co. Agrico Chem. Co. Div. v. Sutton*, 126 Ga. App. 78, 189 S.E.2d 925 (1972) (decided under former Code Section 11-9-107).

**Unexercised future advances clause.** — Where seller, rather than lender, claims purchase-money security interest, unexercised future advances clause is immaterial. *Meadows v. Household Retail Servs., Inc. (In re Griffin)*, 9 Bankr. 880 (N.D. Ga. 1988) (decided under former Code Section 11-9-107).

**Bank financing sales price of mobile home.** — Where seller sold mobile home for cash sales price and bank financed loan for cash sales price, proceeds of which were then paid to seller, the bank, not seller, had purchase money security interest in the mobile home, and actual sale was not a retail

installment transaction under O.C.G.A. § 10-1-31(a)(9). *Massey v. Stephens*, 155 Ga. App. 243, 270 S.E.2d 796 (1980) (decided under former Code Section 11-9-107).

**Price limitation on security interest.** — Purchase money security interest must be in the item purchased, and if vendor of consumer goods is to be protected despite absence of filing, security interest cannot exceed price of item purchased in transaction out of which it arose. *Roberts Furn. Co. v. Pierce*, 507 F.2d 990 (5th Cir. 1975) (decided under former Code Section 11-9-107).

**Transfer and assignment of a purchase money note and security agreement to a third party** did not destroy the purchase money character of the security interest, where the assignment did not refinance, renew, or modify the debtor's purchase money debt. *Brooks v. First Franklin Fin. Corp.*, 74 Bankr. 418 (Bankr. N.D. Ga. 1987) (decided under former Code Section 11-9-107).

**Refinancing or consolidation of loans.** — Refinancing or consolidating loans by paying off an old loan and extending a new one extinguishes the purchase money character of the original loan because the proceeds of the new loan are not used to acquire rights in the collateral. *Franklin v. ITT Fin. Servs.*, 75 Bankr. 268 (Bankr. M.D. Ga. 1986) (decided under former Code Section 11-9-107).

Under Georgia law, the refinancing of a promissory note destroys the purchase money nature of the security interest. *Hipps v. Landmark Fin. Servs.*, 89 Bankr. 264 (Bankr. N.D. Ga. 1988) (decided under former Code Section 11-9-107).

Where the debt secured contained both purchase money and nonpurchase money components, including the refinancing of prior obligations, the security interest of the creditor could not retain purchase money status, as it secured more than the "price" of the collateral. *Lee v. Davis/McGraw, Inc.*, 169 Bankr. 790 (Bankr. S.D. Ga. 1994) (decided under former Code Section 11-9-107).

**Distribution of loan proceeds subsequent to closing of loan.** — Lender obtained a purchase-money security interest in cows sold by a third party to the debtor although the debtor took care of the cows for the purpose of inspecting and milking several weeks before the loan was closed and legal

ownership passed, and although the money was disbursed almost two weeks after the loan was closed, since the loan and its disbursement were closely allied to the sale. *United States v. Hooks*, 40 Bankr. 715 (Bankr. M.D. Ga. 1984) (decided under former Code Section 11-9-107).

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 68A Am. Jur. 2d, Secured Transactions, §§ 75-84, 841.

**C.J.S.** — 82 C.J.S., Statutes, § 309.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 9-103.

**ALR.** — Personal liability for mortgage debt of real owner who procures mortgage to be executed by another, 25 ALR 1486.

Priority as between mechanic's lien and purchase-money mortgage, 73 ALR2d 1407.

### 11-9-104. Control of deposit account.

(a) *Requirements for control.* A secured party has control of a deposit account if:

(1) The secured party is the bank with which the deposit account is maintained;

(2) The debtor, secured party, and bank have agreed in an authenticated record that the bank will comply with instructions originated by the secured party directing disposition of the funds in the deposit account without further consent by the debtor; or

(3) The secured party becomes the bank's customer with respect to the deposit account.

(b) *Debtor's right to direct disposition.* A secured party that has satisfied subsection (a) of this Code section has control, even if the debtor retains the right to direct the disposition of funds from the deposit account. (Code 1981, § 11-9-104, enacted by Ga. L. 2001, p. 362, § 1.)

#### RESEARCH REFERENCES

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 9-104.

### 11-9-105. Control of electronic chattel paper.

A secured party has control of electronic chattel paper if the record or records comprising the chattel paper are created, stored, and assigned in such a manner that:

(1) A single authoritative copy of the record or records exists which is unique, identifiable, and, except as otherwise provided in paragraphs (4), (5), and (6) of this Code section, unalterable;



(2) The authoritative copy identifies the secured party as the assignee of the record or records;

(3) The authoritative copy is communicated to and maintained by the secured party or its designated custodian;

(4) Copies or revisions that add or change an identified assignee of the authoritative copy can be made only with the participation of the secured party;

(5) Each copy of the authoritative copy and any copy of a copy is readily identifiable as a copy that is not the authoritative copy; and

(6) Any revision of the authoritative copy is readily identifiable as an authorized or unauthorized revision. (Code 1981, § 11-9-105, enacted by Ga. L. 2001, p. 362, § 1.)

#### RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 9-105.

#### 11-9-106. Control of investment property.

(a) *Control under Code Section 11-8-106.* A person has control of a certificated security, uncertificated security, or security entitlement as provided in Code Section 11-8-106.

(b) *Control of commodity contract.* A secured party has control of a commodity contract if:

(1) The secured party is the commodity intermediary with which the commodity contract is carried; or

(2) The commodity customer, secured party, and commodity intermediary have agreed that the commodity intermediary will apply any value distributed on account of the commodity contract as directed by the secured party without further consent by the commodity customer.

(c) *Effect of control of securities account or commodity account.* A secured party having control of all security entitlements or commodity contracts carried in a securities account or commodity account has control over the securities account or commodity account. (Code 1981, § 11-9-106, enacted by Ga. L. 2001, p. 362, § 1.)

#### RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 9-106.

**11-9-107. Control of letter of credit right.**

A secured party has control of a letter of credit right to the extent of any right to payment or performance by the issuer or any nominated person if the issuer or nominated person has consented to an assignment of proceeds of the letter of credit under subsection (c) of Code Section 11-5-114 or otherwise applicable law or practice. (Code 1981, § 11-9-107, enacted by Ga. L. 2001, p. 362, § 1.)

**RESEARCH REFERENCES**

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 9-107.

**11-9-108. Sufficiency of description.**

(a) *Sufficiency of description.* Except as otherwise provided in subsections (c), (d), and (e) of this Code section, a description of personal or real property is sufficient, whether or not it is specific, if it reasonably identifies what is described.

(b) *Examples of reasonable identification.* Except as otherwise provided in subsection (d) of this Code section, a description of collateral reasonably identifies the collateral if it identifies the collateral by:

(1) Specific listing;

(2) Category;

(3) Except as otherwise provided in subsection (e) of this Code section, a type of collateral defined in this title;

(4) Quantity;

(5) Computational or allocational formula or procedure; or

(6) Except as otherwise provided in subsection (c) of this Code section, any other method, if the identity of the collateral is objectively determinable.

(c) *Supergeneric description not sufficient.* A description of collateral as “all the debtor’s assets” or “all the debtor’s personal property” or using words of similar import does not reasonably identify the collateral.

(d) *Investment property.* Except as otherwise provided in subsection (e) of this Code section, a description of a security entitlement, securities account, or commodity account is sufficient if it describes:

(1) The collateral by those terms or as investment property; or

(2) The underlying financial asset or commodity contract.

(e) *When description by type insufficient.* A description only by type of collateral defined in this title is an insufficient description of:

(1) A commercial tort claim; or

(2) In a consumer transaction, consumer goods, a security entitlement, a securities account, or a commodity account. (Code 1981, § 11-9-108, enacted by Ga. L. 2001, p. 362, § 1.)

**Law reviews.** — For article discussing the classification of a continuing security interest in changing collateral as an unenforceable preference under Section 60a of the Bankruptcy Act, see 1 Ga. L. Rev. 257 (1967). For article discussing the U.C.C. provisions regarding the sufficiency of “The Description of Collateral in Security Agreements and Financing Statements,” see 28 Mercer

L. Rev. 611 (1977). For article surveying developments in Georgia commercial law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 33 (1981).

For comment on *United States v. Crittenden*, 563 F.2d 678 (5th Cir. 1977), appearing below, see 12 Ga. L. Rev. 692 (1977).

### JUDICIAL DECISIONS

**Editor’s notes.** — In the light of the similarity of the provisions, decisions under former Article 9 are included in the annotations for this Code section. For a table of comparable provisions, see the table at the beginning of the Article.

**Sufficiency in financing statements.** — Property listed in financing statements need not be specific but must only reasonably identify same, giving dated leases and amount of same, “secured by” equipment listed in leases and its location. *Stephens v. Bank of Camilla*, 133 Ga. App. 210, 210 S.E.2d 358 (1974), *aff’d*, 234 Ga. 293, 216 S.E.2d 71 (1975) (decided under former Code Section 11-9-110).

Physical description in financing statement need not be sufficient in itself to identify the property. It is sufficient if description provides such key to identity of property as would enable a person of ordinary business prudence, upon inquiry, to discover actual identity of property described. *Abney v. ITT Diversified Credit Corp.* (In re Environmental Elec. Sys.), 11 Bankr. 965 (Bankr. N.D. Ga. 1981) (decided under former Code Section 11-9-110).

**Description need not be of exact or detailed nature.** — Courts should refuse to follow holdings, often found in older chattel mortgage cases, that descriptions are insufficient unless they are of exact and detailed nature, i.e., so-called “serial number” test. *BVA Credit Corp. v. Mullins*, 552 F.2d 1145

(5th Cir. 1977) (decided under former Code Section 11-9-110).

**Sufficient description enables one to identify thing described.** — Test of the sufficiency of a description is that the description do the job assigned to it, that it make possible identification of thing described. *Personal Thrift Plan of Perry, Inc. v. Georgia Power Co.*, 242 Ga. 388, 249 S.E.2d 72 (1978) (decided under former Code Section 11-9-110).

**Sufficiency of description is question of law, while identity is question of fact.** — Question of sufficiency of description of property is one of law, for the court; that of identity of property is one of fact, to be decided by jury. *Bank of Cumming v. Chapman*, 245 Ga. 261, 264 S.E.2d 201 (1980).

**Description of collateral in security agreements.** — Purchase money security agreements on consumer goods are not required to be filed, and purpose of description of collateral in such agreements is not to give notice, as a financing statement, but is to provide identification of collateral so as to avoid disputes over its identity. *Personal Thrift Plan of Perry, Inc. v. Georgia Power Co.*, 242 Ga. 388, 249 S.E.2d 72 (1978) (decided under former Code Section 11-9-110).

Requirement that identification of collateral indicate type of collateral is applicable to financing statements, not security agree-



ments. *Personal Thrift Plan of Perry, Inc. v. Georgia Power Co.*, 242 Ga. 388, 249 S.E.2d 72 (1978) (decided under former Code Section 11-9-110).

**Description by model and serial number.** — Description of collateral in a purchase money security agreement by model and serial number alone meets requirements of former §§ 11-9-203(1)(b) and 11-9-110, where secured party named is manufacturer or dealer in specialty appliances sold under trade name. *Personal Thrift Plan of Perry, Inc. v. Georgia Power Co.*, 242 Ga. 388, 249 S.E.2d 72 (1978) (decided under former Code Section 11-9-110).

**Merely stating incorrect serial number** will not vitiate contract if key is there. *Thomas Ford Tractor, Inc. v. North Ga. Prod. Credit Ass'n*, 153 Ga. App. 820, 266 S.E.2d 571 (1980) (decided under former Code Section 11-9-110).

**Description of land or crops.** — Description in security instrument of land or crops must raise warning flag, providing key to identity of property. *United States v. Big Z Whse.*, 311 F. Supp. 283 (S.D. Ga. 1970) (decided under former Code Section 11-9-110).

Crop need not be described as tobacco crop when all crops on land are collateral for debt. The description that reasonably identifies what is described is adequate. *United States v. Big Z Whse.*, 311 F. Supp. 283 (S.D. Ga. 1970) (decided under former Code Section 11-9-110).

**Determining whether record gives sufficient notice.** — Whether record gives sufficient notice depends not only on language appearing in mortgage, but also upon what a person of ordinary business prudence would have ascertained from pursuing such lines of inquiry as data given in mortgage would naturally suggest to the reasonable person's mind; and, additionally, any further information actually possessed by claimants at time of transaction, which would have led an ordinary man to believe that dealings were with mortgaged property, or would ordinarily have led the reasonable man to further inquiry, may be taken into consideration in determining whether they had notice of lien, or were legally chargeable with notice. *Yancey Bros. Co. v. Dehco, Inc.*, 108 Ga. App. 875, 134 S.E.2d 828 (1964) (decided under former Code Section 11-9-110).

**Valid security interest in airplane established.** — While description of bank's collateral as "67 #402 Cessna" could be ambiguous to one who is unaware that a "Cessna" is an airplane, the note and documents obtained by the bank from the borrower when it made the loan removed all doubt that the bank did have a valid security interest in the plane. *F & M Bank v. State*, 167 Ga. App. 77, 306 S.E.2d 11 (1983) (decided under former Code Section 11-9-110).

## OPINIONS OF THE ATTORNEY GENERAL

**Duty of superior court clerks.** — Clerks of superior court are not required to determine that property subject to a U.C.C. fi-

nancing statement is properly described before recording the statement. 1982 Op. Att'y Gen. No. U82-38.

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 68A Am. Jur. 2d, Secured Transactions, § 351.

**C.J.S.** — 72 C.J.S., Pledges, § 10.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 9-108.

**ALR.** — Sufficiency of description of property in mortgage on animals, 124 ALR 944.

Sufficiency of description in chattel mortgage as covering all property of a particular kind, 2 ALR3d 839; 30 ALR3d 9; 25 ALR5th 696.

Sufficiency of description of crops under UCC §§ 9-203(1)(b) and 9-402(1), 67 ALR3d 308; 100 ALR3d 10; 100 ALR3d 940.

Equipment leases as security interest within Uniform Commercial Code sec. 1-201(37), 76 ALR3d 11.

Sufficiency of address of debtor in financing statement required by UCC sec. 9-402(1), 99 ALR3d 807.

Sufficiency of address of secured party in financing statement required under UCC

sec. 9-402(1), 99 ALR3d 1080.

What is “commercially reasonable” disposition of collateral required by UCC sec. 9-504(3), 7 ALR4th 308.

Sufficiency of secured party’s notification of sale or other intended disposition of

collateral under UCC sec. 9-504(3), 11 ALR4th 241.

Construction and effect of “future advances” clauses under UCC Article 9, 90 ALR4th 859.

## Subpart 2

### Applicability of Article

#### 11-9-109. Scope.

(a) *General scope of article.* Except as otherwise provided in subsections (c) and (d) of this Code section, this article applies to:

- (1) A transaction, regardless of its form, that creates a security interest in personal property or fixtures by contract;
- (2) An agricultural lien;
- (3) A sale of accounts, chattel paper, payment intangibles, or promissory notes;
- (4) A consignment;
- (5) A security interest arising under Code Section 11-2-401, Code Section 11-2-505, subsection (3) of Code Section 11-2-711, or subsection (5) of Code Section 11-2A-508, as provided in Code Section 11-9-110; and
- (6) A security interest arising under Code Section 11-4-210 or 11-5-118.

(b) *Security interest in secured obligation.* The application of this article to a security interest in a secured obligation is not affected by the fact that the obligation is itself secured by a transaction or interest to which this article does not apply.

(c) *Extent to which article does not apply.* This article does not apply to the extent that:

- (1) A statute, regulation, or treaty of the United States preempts this article;
- (2) Another statute of this state expressly governs the creation, perfection, or priority;
- (3) A statute of another state, a foreign country, or a governmental unit of another state or a foreign country, other than a statute generally applicable to security interests, expressly governs creation, perfection, priority, or enforcement of a security interest created by the state, country, or governmental unit; or
- (4) The rights of a transferee beneficiary or nominated person under a letter of credit are independent and superior under Code Section 11-5-114.

(d) *Inapplicability of article.* This article does not apply to:

- (1) A landlord's lien, other than an agricultural lien;
- (2) A lien, other than an agricultural lien, given by statute or other rule of law for services or materials, but Code Section 11-9-333 applies with respect to priority of the lien;
- (3) An assignment of a claim for wages, salary, or other compensation of an employee;
- (4) A sale of accounts, chattel paper, payment intangibles, or promissory notes as part of a sale of the business out of which they arose;
- (5) An assignment of accounts, chattel paper, payment intangibles, or promissory notes which is for the purpose of collection only;
- (6) An assignment of a right to payment under a contract to an assignee that is also obligated to perform under the contract;
- (7) An assignment of a single account, payment intangible, or promissory note to an assignee in full or partial satisfaction of a preexisting indebtedness;
- (8) A transfer of an interest in or an assignment of a claim under a policy of insurance, other than an assignment by or to a health care provider of a health care insurance receivable and any subsequent assignment of the right to payment, but Code Sections 11-9-315 and 11-9-322 apply with respect to proceeds and priorities in proceeds;
- (9) An assignment of a right represented by a judgment, other than a judgment taken on a right to payment that was collateral;
- (10) A right of recoupment or setoff, but:
  - (A) Code Section 11-9-340 applies with respect to the effectiveness of rights of recoupment or setoff against deposit accounts; and
  - (B) Code Section 11-9-404 applies with respect to defenses or claims of an account debtor;
- (11) The creation or transfer of an interest in or lien on real property, including a lease or usufruct or rents thereunder, except to the extent that provision is made for:
  - (A) Liens on real property in Code Sections 11-9-203 and 11-9-308;
  - (B) Fixtures in Code Section 11-9-334;
  - (C) Fixture filings in Code Sections 11-9-501, 11-9-502, 11-9-512, 11-9-516, and 11-9-519; and
  - (D) Security agreements covering personal and real property in Code Section 11-9-604;



(12) An assignment of a claim arising in tort, other than a commercial tort claim, but Code Sections 11-9-315 and 11-9-322 apply with respect to proceeds and priorities in proceeds;

(13) An assignment of a deposit account in a consumer transaction, but Code Sections 11-9-315 and 11-9-322 apply with respect to proceeds and priorities in proceeds;

(14) An assignment of a lottery prize payable by this state or any instrumentality of this state;

(15) An assignment of a claim or right to receive payment as described in and to the extent limited by the provisions of Code Section 34-9-84 or by Article 4 of Chapter 12 of Title 51; or

(16) A security interest created by or affecting property of this state or any governmental unit of this state in any public finance transaction, other than a security interest created by:

(A) An authority activated under Chapter 62 of Title 36, the “Development Authorities Law”; or

(B) A local authority having as its principal function the stimulation of industrial growth and the reduction of unemployment. (Code 1981, § 11-9-109, enacted by Ga. L. 2001, p. 362, § 1.)

**Law reviews.** — For article, “The Revisions to Article IX of the Uniform Commercial Code,” see 15 Ga. St. B.J. 120 (1977).

For article on choice-of-law of contracts in Georgia, see 21 Mercer L. Rev. 389 (1970).

## JUDICIAL DECISIONS

**Editor’s notes.** — In the light of the similarity of the provisions, decisions under former Article 9 are included in the annotations for this Code section. For a table of comparable provisions, see the table at the beginning of the Article.

**Federal statutory preemption of article.** — Where a bank, based on its prior perfected security interest, sued a cattle-raiser for cattle in possession, the trial court correctly ruled that the Federal Security Act (7 U.S.C.A. § 1631), which controlled the transaction, preempted this article and properly awarded summary judgment to cattle-raiser. *Ashburn Bank v. Farr*, 206 Ga. App. 517, 426 S.E.2d 63 (1992) (decided under former Code Section 11-9-104).

**Maritime liens.** — Creditor-holder of a properly perfected UCC security interest in debtor’s freights did not take priority over holders of valid maritime liens. While freights fall within the literal terms of the

definitions in former § 11-9-106, their inclusion therein does not subject maritime lien claimants to UCC priority rules. First, former subsection (a) of this section excludes security interests arising under federal statutes from the ambit of the UCC; unlike former subsection (b). Its state law counterpart, former subsection (a) does not specifically subject federal liens to UCC priority provisions. Second, former § 11-9-102 excludes non-consensual transactions from the UCC. Maritime liens by nature arise without intent or consent. Finally, maritime liens take priority over UCC security interests under pre-or post-UCC cases. *McAllister Towing v. Ambassador Factors*, (In re Topgallant Lines), 154 Bankr. 368 (S.D. Ga. 1993), aff’d, 20 F.3d 1175 (11th Cir. 1994) (decided under former Code Section 11-9-104).

**Priority over bank’s right of setoff.** — The Code’s priority rules require that a perfected security interest will prevail over a bank’s

right of setoff. *Continental Am. Life Ins. Co. v. Griffin*, 251 Ga. 412, 306 S.E.2d 285 (1983) (decided under former Code Section 11-9-104).

**Former paragraph (c) did not include remuneration payable to an independent contractor.** *Perry v. Freeman*, 163 Ga. App. 186, 293 S.E.2d 381 (1982) (decided under former Code Section 11-9-104).

**Debtor's assignment to bank of specific amounts from future proceeds from debtor's business** was not exempted from former Article 9 and was required to be perfected by the filing of a financing statement. *Bank of Cave Spring v. Gold Kist, Inc.*, 173 Ga. App. 679, 327 S.E.2d 800 (1985) (decided under former Code Section 11-9-104).

**Transfer and assignment of note and security deed not interest in real estate.** — Even though a debtor gave possession of a note and security deed and executed a transfer and assignment of the instruments to the creditor as collateral for a loan, the instruments never vested in the creditor and the transaction was not the creation or transfer of an interest in real estate under former subsection (h); thus, where the creditor did not comply with the notice requirement of former § 11-9-305(2), the debtor was entitled to recover either damages for conversion of the collateral after default or damages prescribed by former § 11-9-507. *Chen v. Profit Sharing Plan*, 216 Ga. App. 878, 456 S.E.2d 237 (1995) (decided under former Code Section 11-9-104).

**Security interest in proceeds from sale of debtor's residence.** — Execution of guaranty, although ineffective to create security interest in debtor's residence, since real property is excluded from operation of Article 9, was effective to create a security interest in cash proceeds from sale of debtor's residence. *United States v. Wood*, 28 Bankr. 383 (N.D. Ga. 1983) (decided under former Code Section 11-9-104).

**Inapplicability of article to deposit accounts.** — Since former subsection (j) clearly provided that former Article 9 did not apply to a transfer of an interest in any deposit account, inasmuch as a depositor's commercial checking account is a "deposit account" as that term was defined in former § 11-9-105(1)(e), the strictures of this former article were not applicable to the bank's appropriation of the account under

its right of set-off. *Design Spectrum, Inc. v. First Nat'l Bank*, 182 Ga. App. 418, 355 S.E.2d 733 (1987) (decided under former Code Section 11-9-104).

**A security agreement covering the creditor's interest in unearned insurance premiums** did not come within the ambit of the Uniform Commercial Code. *Paulsen Street Investors v. EBCO Gen. Agencies*, 224 Ga. App. 507, 481 S.E.2d 246 (1997) (decided under former Code Section 11-9-104).

**Repossession of collateral located in Georgia.** — Absent agreement that law of another state shall govern, Georgia law applies to repossession, resale, and right to deficiency judgment where collateral was located in Georgia at time of repossession and resale. *Lewis v. First Nat'l Bank*, 134 Ga. App. 798, 216 S.E.2d 347 (1975).

**Credit transaction pursuant to revolving account.** — Security interest can be created in credit transaction pursuant to revolving account. *Brown v. Jenkins*, 135 Ga. App. 694, 218 S.E.2d 690 (1975).

**Effect on subrogation.** — The Uniform Commercial Code does not abrogate, modify, affect, or abridge equitable doctrine of subrogation. *Argonaut Ins. Co. v. C & S Bank*, 140 Ga. App. 807, 232 S.E.2d 135 (1976).

Surety is "secured" by its right of subrogation, which relates back to issuance of bond, to defeat intervening creditors. Uniform Commercial Code does not abrogate, modify, affect or abridge equitable doctrine of subrogation, and a surety is not required to file under the Code to preserve priority under equitable right of subrogation. *Pembroke State Bank v. Balboa Ins. Co.*, 144 Ga. App. 609, 241 S.E.2d 483 (1978).

**Sale-leaseback agreement.** — The former provisions of this section applied to sale-leaseback agreement which constitutes secured transaction. *United Counties Trust Co. v. Mac Lum, Inc.*, 643 F.2d 1140 (5th Cir. 1981).

**Whether lease is intended as security is to be determined by facts of each case.** *Ford Motor Credit Co. v. Dowdy*, 159 Ga. App. 666, 284 S.E.2d 679 (1981), overruled on other grounds, *Adams v. D & D Leasing Co.*, 191 Ga. App. 121, 381 S.E.2d 94 (1989).

**Name which parties give to transaction is not conclusive.** *Ford Motor Credit Co. v.*



Dowdy, 159 Ga. App. 666, 284 S.E.2d 679 (1981), overruled on other grounds, *Adams v. D & D Leasing Co.*, 191 Ga. App. 121, 381 S.E.2d 94 (1989).

**Mere holding of title insufficient.** — Mere holding of title as a lessor of a leased motor vehicle does not give rise to a security interest therein, unless the interest arose under a lease intended as security. *First Nat'l Bank v. Strother Ford, Inc.*, 188 Ga. App. 749, 374 S.E.2d 203 (1988).

**Factors tending to establish that a "lease" transaction is a conditional sale** are: lessor's purchase of equipment from supplier; requirement that lessee be responsible for payment of all taxes, insurance and expenses for repairs, an initial downpayment, and additional payment of security deposit. *Ford Motor Credit Co. v. Dowdy*, 159 Ga. App. 666, 284 S.E.2d 679 (1981), overruled on other grounds, *Adams v. D & D Leasing Co.*, 191 Ga. App. 121, 381 S.E.2d 94 (1989).

**"Installment-service agreement" not "lease ... intended as security"**. — Where nowhere within an "installation-service agreement" could it be construed that the parties contemplated a sale, an option to purchase, or creation of a security interest, the agreement was not a "lease ... intended as security" and thus former Article 9 did not apply. *Ford v. Rollins Protective Servs. Co.*, 171 Ga. App. 882, 322 S.E.2d 62 (1984).

**Agreement which did not stipulate a purchase price** but indicated an intent to negotiate a purchase price was a true lease, and not a conditional sale. *Chapman v. Avco Fin. Servs. Leasing Co.*, 193 Ga. App. 147, 387 S.E.2d 391 (1989).

**Trademark, trade name, and goodwill subject to security interests.** — In addition to a

trademark, a trade name, along with the goodwill it represents, may be the subject of an Article 9 security interest and may be reacquired along with other secured property on foreclosure. *Reis v. Ralls*, 250 Ga. 721, 301 S.E.2d 40 (1983).

**Radio tower as equipment.** — Where a radio tower which had been determined to be personal property was used and bought for use primarily in debtor's business and defendants did not allege that the radio tower constituted inventory, farm products, or consumer goods, the radio tower was equipment. *Tidwell v. Slocumb (In re Ga. Steel, Inc.)*, 71 Bankr. 903 (Bankr. M.D. Ga. 1987).

**Commercial reasonableness standard inapplicable to realty transactions.** — The UCC, along with its standard of commercial reasonableness, does not apply to transactions involving realty. *B & W Pipeline, Inc. v. Newton County Bank*, 181 Ga. App. 684, 353 S.E.2d 829 (1987).

**Security interest in proceeds from sale of debtor's residence.** — Execution of guaranty, although ineffective to create security interest in debtor's residence, since real property is excluded from operation of Article 9, was effective to create a security interest in cash proceeds from sale of debtor's residence. *United States v. Wood*, 28 Bankr. 383 (N.D. Ga. 1983).

**Article 9 applied to transaction.** — See *Trust Co. Bank v. Walker*, 35 Bankr. 237 (Bankr. N.D. Ga. 1983).

**Cited in** *Delta Air Lines v. Clayton County Bd. of Tax Assessors*, 246 Ga. App. 225, 539 S.E.2d 905 (2000).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 6 Am. Jur. 2d, Assignments, §§ 78, 79. 54A Am. Jur. 2d, Mortgages, §§ 5, 8. 68A Am. Jur. 2d, Secured Transactions, §§ 2, 3, 129-154.

**C.J.S.** — 6A C.J.S., Assignments, §§ 82, 87. 72 C.J.S., Pledges, §§ 6, 41 et seq.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 9-109.

**ALR.** — Taking note for price as waiver of reservation of title under conditional sale, 13 ALR 1044; 55 ALR 1160.

Effect of repledge by one who at time

holds property under tentative agreement for pledge which is subsequently consummated, 24 ALR 433.

Trust receipt, or instrument purporting to be such, as a chattel mortgage within filing statutes, 25 ALR 332; 49 ALR 309; 87 ALR 316; 101 ALR 463; 168 ALR 378.

Right to setoff deposit in insolvent bank against indebtedness to bank, 25 ALR 938; 82 ALR 665; 97 ALR 588.

Personal liability for mortgage debt of real owner who procures mortgage to be exe-



cuted by another, 25 ALR 1486.

Rights as between holder of "trust receipt" and purchaser of goods from one who gave it, 31 ALR 937.

Effect of assignment of a conditional-sale contract as collateral, 36 ALR 759.

Pledge as covering pledgor's contingent liability as secondary obligor, 43 ALR 1069.

Trust receipts, 49 ALR 282; 87 ALR 302; 101 ALR 453; 168 ALR 359.

Rights of holders of different notes in respect of collateral securing them, 52 ALR 1391.

Validity as to creditors of the buyer or consignee of reservation of title to goods delivered under implied or express authority to resell, 63 ALR 355.

Conditional sale as within statute providing for penalty for failure to satisfy lien, 65 ALR 1316.

Validity of assignment of future book accounts, 72 ALR 856.

Duty of broker or banker as regards pledged security on bankruptcy of customers, 79 ALR 389.

What amounts to conditional sale, 92 ALR 304; 175 ALR 1366.

Assignability of contemplated debt before execution of agreement by which it is to be created, 116 ALR 955.

Valuation of notes and accounts receivable in determining question of insolvency or bankruptcy, 133 ALR 1274.

Necessity that mortgage covering oil and gas lease be recorded as real-estate mortgage, and/or filed or recorded as chattel mortgage, 34 ALR2d 902.

Rights and duties of parties to conditional sales contract as to resale of repossessed property, 49 ALR2d 15.

Liability of pawnbroker or pledgee for theft by third person of pawned or pledged property, 68 ALR2d 1259.

Necessity and sufficiency of notice or statement prescribed by factor's lien law, 96 ALR2d 727.

Effect of UCC Article 9 upon conflict, as to funds in debtor's bank account, between secured creditor and bank claiming right of setoff, 3 ALR4th 998.

Who is "creditor" within meaning of § 103(f) of Truth in Lending Act (15 USCA § 1602(f)), 157 ALR Fed. 419.

### 11-9-110. Security interests arising under Article 2 or 2A of this title.

A security interest arising under Code Section 11-2-401 or 11-2-505, subsection (3) of Code Section 11-2-711, or subsection (5) of Code Section 11-2A-508 is subject to this article. However, until the debtor obtains possession of the goods:

(1) The security interest is enforceable, even if paragraph (3) of subsection (b) of Code Section 11-9-203 has not been satisfied;

(2) Filing is not required to perfect the security interest;

(3) The rights of the secured party after default by the debtor are governed by Article 2 or 2A of this title; and

(4) The security interest has priority over a conflicting security interest created by the debtor. (Code 1981, § 11-9-110, enacted by Ga. L. 2001, p. 362, § 1.)

### RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 9-110.

**11-9-111. Applicability of bulk transfer laws.**

The creation of a security interest is not a bulk transfer under Article 6 of this title (see Code Section 11-6-103). (Code 1981, § 11-9-111, enacted by Ga. L. 2001, p. 362, § 1.)

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 68A Am. Jur. 2d, Secured Transactions, § 17.

**C.J.S.** — 37 C.J.S., Fraudulent Conveyances, §§ 277, 279.

**PART 2****EFFECTIVENESS OF SECURITY AGREEMENT;  
ATTACHMENT OF SECURITY INTEREST;  
RIGHTS OF PARTIES TO SECURITY AGREEMENT****RESEARCH REFERENCES**

**C.J.S.** — 79 C.J.S., Secured Transactions, §§ 20, 34, 62 et seq., 81 et seq., 111 et seq.

improper sale, removal, concealment, or disposal of property subject to security interest under UCC, 48 ALR4th 819.

**ALR.** — Elements and proof of crime of

**Subpart 1****Effectiveness and Attachment****11-9-201. General effectiveness of security agreement.**

(a) *General effectiveness.* Except as otherwise provided in this title, a security agreement is effective according to its terms between the parties, against purchasers of the collateral, and against creditors.

(b) *Applicable consumer laws and other law.* A transaction subject to this article is subject to any applicable rule of law which establishes a different rule for consumers and is subject to Chapter 3 of Title 7; Chapter 4 of Title 7; and Article 1 of Chapter 1 of Title 10.

(c) *Other applicable law controls.* In case of conflict between this article and a rule of law, statute, or regulation described in subsection (b) of this Code section, the rule of law, statute, or regulation controls. Failure to comply with a statute or regulation described in subsection (b) of this Code section has only the effect the statute or regulation specifies.

(d) *Further deference to other applicable law.* This article does not:

(1) Validate any rate, charge, agreement, or practice that violates a rule of law, statute, or regulation described in subsection (b) of this Code section; or

(2) Extend the application of the rule of law, statute, or regulation to a transaction not otherwise subject to it. (Code 1981, § 11-9-201, enacted by Ga. L. 2001, p. 362, § 1.)

### JUDICIAL DECISIONS

**Editor's notes.** — In the light of the similarity of the provisions, decisions under former Article 9 are included in the annotations for this Code section. For a table of comparable provisions, see the table at the beginning of the Article.

**Effect of section on priority.** — The effect of this section is to give the UCC Article 9

secured party, upon a debtor's default, priority over "anyone, anywhere, anyhow" except as otherwise provided by the remaining Code priority rules. *Continental Am. Life Ins. Co. v. Griffin*, 251 Ga. 412, 306 S.E.2d 285 (1983) (decided under former Code Section 11-9-201).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 68A Am. Jur. 2d, Secured Transactions, § 155 et seq.

**C.J.S.** — 72 C.J.S., Pledges, §§ 19, 31.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 9-201.

**ALR.** — Provision in land contract against removal of buildings as affecting rights of third person under chattel mortgage or conditional sale, 30 ALR 542.

Rights and remedies of one to whom bank agrees to furnish collateral security, where

bank fails before doing so, 122 ALR 266.

Conditional sale as affecting provision in insurance policy against change of title, interest, or possession, 133 ALR 785.

Usury as affecting conditional sale contract, 152 ALR 598.

Effect of UCC Article 9 upon conflict, as to funds in debtor's bank account, between secured creditor and bank claiming right of setoff, 3 ALR4th 998.

### 11-9-202. Title to collateral immaterial.

Except as otherwise provided with respect to consignments or sales of accounts, chattel paper, payment intangibles, or promissory notes, the provisions of this article with regard to rights and obligations apply whether title to collateral is in the secured party or the debtor. (Code 1981, § 11-9-202, enacted by Ga. L. 2001, p. 362, § 1.)

**Law reviews.** — For article discussing the resolution of conflicting claims to goods between an unsecured seller of goods and a

creditor of a buyer claiming under an after-acquired property clause, see 28 Mercer L. Rev. 625 (1977).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 68A Am. Jur. 2d, Secured Transactions, § 192 et seq.

**C.J.S.** — 72 C.J.S., Pledges, § 21.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 9-202.

**ALR.** — Forfeiture by innocent vendor of article sold conditionally and used by vendee in violation of law, 2 ALR 1596.

Personal liability for mortgage debt of real owner who procures mortgage to be executed by another, 25 ALR 1486.

Claim of lien by conditional vendor as waiver of title, 45 ALR 185.

Rights and duties of parties to conditional sales contract as to resale of repossessed property, 49 ALR2d 15.



**11-9-203. Attachment and enforceability of security interest; proceeds; supporting obligations; formal requisites.**

(a) *Attachment.* A security interest attaches to collateral when it becomes enforceable against the debtor with respect to the collateral, unless an agreement expressly postpones the time of attachment.

(b) *Enforceability.* Except as otherwise provided in subsections (c) through (i) of this Code section, a security interest is enforceable against the debtor and third parties with respect to the collateral only if:

(1) Value has been given;

(2) The debtor has rights in the collateral or the power to transfer rights in the collateral to a secured party; and

(3) One of the following conditions is met:

(A) The debtor has authenticated a security agreement that provides a description of the collateral and, if the security interest covers timber to be cut, a description of the land concerned;

(B) The collateral is not a certificated security and is in the possession of the secured party under Code Section 11-9-313 pursuant to the debtor's security agreement;

(C) The collateral is a certificated security in registered form and the security certificate has been delivered to the secured party under Code Section 11-8-301 pursuant to the debtor's security agreement; or

(D) The collateral is deposit accounts, electronic chattel paper, investment property, or letter of credit rights, and the secured party has control under Code Section 11-9-104, 11-9-105, 11-9-106, or 11-9-107 pursuant to the debtor's security agreement.

(c) *Other provisions of this title.* Subsection (b) of this Code section is subject to Code Section 11-4-210 on the security interest of a collecting bank, Code Section 11-5-118 on the security interest of a letter of credit issuer or nominated person, Code Section 11-9-110 on a security interest arising under Article 2 or 2A of this title, and Code Section 11-9-206 on security interests in investment property.

(d) *When person becomes bound by another person's security agreement.* A person becomes bound as debtor by a security agreement entered into by another person if, by operation of law other than this article or by contract:

(1) The security agreement becomes effective to create a security interest in the person's property; or

(2) The person becomes generally obligated for the obligations of the other person, including the obligation secured under the security

agreement, and acquires or succeeds to all or substantially all of the assets of the other person.

(e) *Effect of new debtor becoming bound.* If a new debtor becomes bound as debtor by a security agreement entered into by another person:

- (1) The agreement satisfies paragraph (3) of subsection (b) of this Code section with respect to existing or after acquired property of the new debtor to the extent the property is described in the agreement; and
- (2) Another agreement is not necessary to make a security interest in the property enforceable.

(f) *Proceeds and supporting obligations.* The attachment of a security interest in collateral gives the secured party the rights to proceeds provided by Code Section 11-9-315 and is also attachment of a security interest in a supporting obligation for the collateral.

(g) *Lien securing right to payment.* The attachment of a security interest in a right to payment or performance secured by a security interest or other lien on personal or real property is also attachment of a security interest in the security interest, mortgage, or other lien.

(h) *Security entitlement carried in securities account.* The attachment of a security interest in a securities account is also attachment of a security interest in the security entitlements carried in the securities account.

(i) *Commodity contracts carried in commodity account.* The attachment of a security interest in a commodity account is also attachment of a security interest in the commodity contract carried in the commodity account. (Code 1981, § 11-9-203, enacted by Ga. L. 2001, p. 362, § 1.)

**Law reviews.** — For article on the 1963 amendment to Georgia Uniform Commercial Code, see 14 Mercer L. Rev. 378 (1963). For article discussing the Uniform Commercial Code provisions regarding sufficiency of the description of collateral in security agreements and financing statements, see 28

Mercer L. Rev. 611 (1977). For article discussing the resolution of conflicting claims to goods between an unsecured seller of goods and a creditor of a buyer claiming under an after-acquired property clause, see 28 Mercer L. Rev. 625 (1977).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION  
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ATTACHMENT

General Consideration

**Editor's notes.** — In the light of the similarity of the provisions, decisions under former Article 9 are included in the annota-

tions for this Code section. For a table of comparable provisions, see the table at the beginning of the Article.

**Rights in collateral required.** — Fundamental to secured party's acquisition of se-

curity interest in property of debtor is that debtor have rights in collateral. A security interest can be created in no other property. *Anthony v. Community Loan & Inv. Corp.*, 559 F.2d 1363 (5th Cir. 1977) (decided prior to 1978 amendment which incorporated parts of § 109A-9-204 into what was § 11-9-203) (decided under former Code Section 11-9-203).

One cannot encumber another person's property in the absence of consent, estoppel, or some other special rule. *Russell v. Lawrence*, 234 Ga. App. 612, 507 S.E.2d 161 (1998).

**Purchase money security interests.** — To perfect purchase money security interest and for it to be enforceable against debtor and third parties, there must be a written agreement, signed by debtor under former subsection (1) of this section and filing of a financing statement under former § 11-9-302(1). *Food Serv. Equip. Co. v. First Nat'l Bank*, 121 Ga. App. 421, 174 S.E.2d 216 (1970) (decided under former Code Section 11-9-203).

**Financing statements.** — A financing statement merely gives notice of the existence of a security interest but in itself does not create a security interest, for which a security agreement is required. *Amoco Oil Co. v. G. Sims & Assocs.*, 162 Ga. App. 307, 291 S.E.2d 128 (1982) (decided under former Code Section 11-9-203).

A financing statement cannot serve as a security agreement because it does not grant the creditor a security interest in the collateral and does not identify the obligation owed to the creditor. *Amoco Oil Co. v. G. Sims & Assocs.*, 162 Ga. App. 307, 291 S.E.2d 128 (1982) (decided under former Code Section 11-9-203).

**Security agreement was unenforceable.** — Where bank did not introduce written security agreement but instead relied upon its officer's deposition indicating that it possessed car's certificate of title, which car dealer had given to bank pursuant to its financing the dealer's inventory, and where certificate of title, purportedly executed in blank, was not produced, bank's failure to establish compliance with former subsection (1)(a) of this section rendered security interest unenforceable by means of summary judgment. *Holloway v. F & M Bank*, 151 Ga. App. 424, 260 S.E.2d 380 (1979) (decided under former Code Section 11-9-203).

Unless secured party is in possession of collateral, the party's security interest, absent writing which satisfies former subsection (1)(a), is not enforceable even against debtor, and cannot be made so on theory of equitable mortgage or the like. *McDonald v. Peoples Auto. Loan & Fin. Corp.*, 115 Ga. App. 483, 154 S.E.2d 886 (1967) (decided under former Code Section 11-9-203).

The purchasers of a horse farm did not have a right in certain horses superior to that of the vendor's former partner based on the horses as collateral for a secured transaction, where the former partner was awarded the horses in a judgment against the vendor and, thus, the collateral did not belong to the vendor/debtor and the security interest did not attach. *Russell v. Lawrence*, 234 Ga. App. 612, 507 S.E.2d 161 (1998).

**Writing not required.** — Where collateral is in possession of secured party, evidentiary need for written record is much less than where collateral is in debtor's possession, and under this article, as at common law, writing is not a formal requisite in former situation. *Barton v. Chemical Bank*, 577 F.2d 1329 (5th Cir. 1978) (decided under former Code Section 11-9-203).

**Good faith purchaser.** — A bank was a good faith purchaser for value of certain cars under the following circumstances: The proprietor of a used-car business maintained a special checking account with the bank; the proprietor purchased cars from a car auction company with checks drawn upon this account and he then executed a promissory note to the bank, which loaned the proprietor the purchase price and took a security interest in the car; the account became overdrawn and the bank refused to honor the checks made out to the auction company. *Georgia Cas. & Sur. Co. v. Tennille Banking Co. (In re Smith)*, 51 Bankr. 904 (Bankr. M.D. Ga. 1985) (decided under former Code Section 11-9-203).

**Insurance benefits considered "proceeds" and subject to lender's security interest.** — Insurance benefits payable from a third-party tortfeasor's insurer upon the destruction of a vehicle became "proceeds," subject to a lender's security interest, before payment to the victims. *JCS Enter., Inc. v. Vanliner Ins.*, 227 Ga. App. 371, 489 S.E.2d 95 (1997).

**Computer information and programming.** — Computer information and program-



**General Consideration (Cont'd)**

ming recorded on magnetic tape were “general intangibles” which are not included in the types of collateral in which security interests can be perfected by possession under former § 11-9-305, and a security interest therein could therefore only be perfected by filing a financing statement. *Dabney v. Information Exch., Inc.*, 98 Bankr. 603 (Bankr. N.D. Ga. 1989) (decided under former Code Section 11-9-203).

**Motor Vehicle Certificate of Title Act.** — Failure to comply with the Motor Vehicle Certificate of Title Act (O.C.G.A. § 40-3-1 et seq.) with respect to the perfection of a security interest (former O.C.G.A. § 40-3-50(b)) does not affect the creation of the security interest, which remains a matter of contract between the parties. *Spoon v. Herndon*, 167 Ga. App. 794, 307 S.E.2d 693 (1983) (decided under former Code Section 11-9-203).

**Uniform Commercial Code financing statement found not to cover mobile home.** See *Homac, Inc. v. Fort Wayne Mtg. Co.*, 577 F. Supp. 1065 (N.D. Ga. 1983) (decided under former Code Section 11-9-203).

**Noncompliance with former subsection (1).** — Security interest found to comply with former subsection (1). See *USI Capital & Leasing v. Medical Oxygen Serv., Inc.*, 36 Bankr. 341 (Bankr. N.D. Ga. 1984) (decided under former Code Section 11-9-203).

**Sufficiency of Writing**

**Requirements, generally.** — For a security interest to be enforceable, there must be a writing signed by debtor, which includes “security agreement” as that term is defined, which describes collateral. In re *Carmichael Enters., Inc.*, 334 F. Supp. 94 (N.D. Ga. 1971), aff’d, 460 F.2d 1405 (5th Cir. 1972) (decided under former Code Section 11-9-203).

**Signatures on face of documents.** — Placing of initials and/or signatures on face of documents does not suffice to authenticate title retention agreement on reverse and as consequence does not entitle creditor to priority over disputed collateral. *Food Serv. Equip. Co. v. First Nat’l Bank*, 121 Ga. App. 421, 174 S.E.2d 216 (1970) (decided under former Code Section 11-9-203).

Party does not receive signed security

agreement from debtor with reference to sales orders where only signing appears on face of instruments and neither sale order nor delivery receipt makes any reference to reverse side of documents. *Food Serv. Equip. Co. v. First Nat’l Bank*, 121 Ga. App. 421, 174 S.E.2d 216 (1970) (decided under former Code Section 11-9-203).

**Written assignments of debt.** — Letter written by creditor to debtor stating that the creditor “has assigned” debt to third party, which letter bears “acceptance” by debtor of assignment, and on the basis of which assignee lends money to assignor, is sufficient writing to create security interest in assignee, attaching at time of loan to assignor. *Citizens & S. Nat’l Bank v. Capital Constr. Co.*, 112 Ga. App. 189, 144 S.E.2d 465 (1965) (decided under former Code Section 11-9-203).

**Language held insufficient to prove security interest.** — Sales invoices, which stated that sales of household goods were subject to a “charge agreement,” were not sufficient to prove the existence of a security interest, where such invoices did not constitute a security agreement but merely gave notice of the existence of one. *Grier v. Skinner’s Furn. Store of Newnan, Inc.*, 180 Ga. App. 607, 349 S.E.2d 826 (1986) (decided under former Code Section 11-9-203).

**Description**

**Purpose of description in unfiled security agreements.** — Purchase money security agreements on consumer goods are not required to be filed, and purpose of description of collateral in such agreements is not to give notice, as on a financing statement, but is to provide identification of collateral so as to avoid disputes over its identity. *Personal Thrift Plan of Perry, Inc. v. Georgia Power Co.*, 242 Ga. 388, 249 S.E.2d 72 (1978) (decided under former Code Section 11-9-203).

**Sufficiency of description.** — Test of the sufficiency of a description is that the description do job assigned to it, that it make possible identification of thing described. *Personal Thrift Plan of Perry, Inc. v. Georgia Power Co.*, 242 Ga. 388, 249 S.E.2d 72 (1978) (decided under former Code Section 11-9-203).

Written security agreement satisfies this provision if it is signed by debtor and contains description of collateral. Additional

requirement of description of collateral is necessary to solve the evidentiary problem of identifying collateral when secured party lacks possession of it. *Barton v. Chemical Bank*, 577 F.2d 1329 (5th Cir. 1978) (decided under former Code Section 11-9-203).

**Type of collateral.** — Requirement that identification of collateral indicate type of collateral is applicable to financing statements, not security agreements. *Personal Thrift Plan of Perry, Inc. v. Georgia Power Co.*, 242 Ga. 388, 249 S.E.2d 72 (1978) (decided under former Code Section 11-9-203).

**Model and serial number.** — Description of collateral in a purchase money security agreement by model and serial number alone meets requirements of former §§ 11-9-203(1)(b) and 11-9-110, where secured party named is manufacturer or dealer in specialty appliances sold under trade name. *Personal Thrift Plan of Perry, Inc. v. Georgia Power Co.*, 242 Ga. 388, 249 S.E.2d 72 (1978) (decided under former Code Section 11-9-203).

**Accounts receivable.** — Where the security agreement, like the financing statement, provided that creditor had a security interest in “all those items of personal property” located on debtor’s premises, but the security agreement went further than the financing statement by including “all replacements and accessions thereto,” the scope of the security agreement was thereby limited to debtor’s personal property and any replacements and accessions, and this description did not entail accounts receivable. Thus, like the financing statement, the security agreement failed to place third parties on notice of a possible security interest in accounts receivable. *Healthcorp, Inc. v. Southeastern Emergency Healthcare*, 85 Bankr. 170 (Bankr. N.D. Ga. 1988) (decided under former Code Section 11-9-203).

**Security agreement lacked description of collateral.** — Security agreement lacked description of collateral required for perfection of a security interest, where, although the agreement referred to a “Collateral List and Valuation,” there was no record of a “Collateral List and Valuation” document. *ITT Fin. Servs. v. Gibson*, 188 Ga. App. 188, 372 S.E.2d 468 (1988) (decided under former Code Section 11-9-203).

**Crops.** — Crop need not be described as tobacco crop when all crops on land are

collateral for the debt, such description reasonably identifies what is described. *United States v. Big Z Whse.*, 311 F. Supp. 283 (S.D. Ga. 1970) (decided under former Code Section 11-9-203).

Description in security instrument of land or crops must raise warning flag, providing key to identity of property. *United States v. Big Z Whse.*, 311 F. Supp. 283 (S.D. Ga. 1970) (decided under former Code Section 11-9-203).

A debtor may not defeat the rights acquired by the creditor in existing or future crops by turning over the property described in the financing statement to a third party to produce a crop covered by the terms of the statement, where such statement has been executed and recorded according to law. *Southwest Ga. Prod. Credit Ass’n v. James*, 180 Ga. App. 795, 350 S.E.2d 786 (1986) (decided under former Code Section 11-9-203).

A credit association’s security interest in a pea crop grown on debtor’s land attached at the time the crop was planted. *Southwest Ga. Prod. Credit Ass’n v. James*, 180 Ga. App. 795, 350 S.E.2d 786 (1986) (decided under former Code Section 11-9-203).

**Animals.** — Where the security agreements signed by a debtor for a loan did not cover after-acquired collateral, nor did it cover the offspring of the pigs purchased with these funds, the bank did not have a valid security interest in the offspring of the pigs. *F & M Bank v. Alexander*, 70 Bankr. 419 (M.D. Ga. 1987) (decided under former Code Section 11-9-203).

### Attachment

**Attachment.** — Security interest attaches as soon as parties reach agreement, creditor gives value, and debtor has rights in collateral, unless explicit agreement postpones time of attaching. *Barton v. Chemical Bank*, 577 F.2d 1329 (5th Cir. 1978) (decided under former Code Section 11-9-203).

Where additional collateral is given to secure antecedent debt, new value is not necessary before a security interest will attach. However, where there is a purchase money security interest in crop to be grown, new value is necessary. *United States v. Big Z Whse.*, 311 F. Supp. 283 (S.D. Ga. 1970)



**Attachment** (Cont'd)

(decided under former Code Section 11-9-203).

It is self-evident that in absence of special

circumstances, a security interest can attach only to extent of interest of debtor. First Nat'l Bank & Trust Co. v. Smithloff, 119 Ga. App. 284, 167 S.E.2d 190 (1969) (decided under former Code Section 11-9-203).

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 68A Am. Jur. 2d, Secured Transactions, §§ 23, 65-67, 109, 155 et seq., 192 et seq., 234, 267 et seq., 482 et seq., 926 et seq.

**C.J.S.** — 72 C.J.S., Pledges, §§ 10-23, 28, 29, 36.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 9-203.

**ALR.** — Waiver of usury by renewal or other executory agreement, 13 ALR 1213; 74 ALR 1184.

What amounts to a conditional sale, 17 ALR 1421; 43 ALR 1247; 92 ALR 304; 175 ALR 1366.

Right of conditional seller or mortgagee in respect of proceeds of insurance which conditional purchaser or mortgagor, who had bound himself to carry insurance for former's benefit, had made payable to himself, 92 ALR 559.

Lien which attaches under chattel mortgage of livestock to offspring subsequently born, as surviving period of suitable nurture, 144 ALR 330.

Rights and duties of parties to conditional sales contract as to resale of repossessed property, 49 ALR2d 15.

Priority as between seller or conditional seller of personalty and claimant under after-acquired-property clause of mortgage or other instrument, 86 ALR2d 1152.

Consignment transactions under the Uniform Commercial Code, 40 ALR3d 1078.

Sufficiency of description of crops under UCC §§ 9-203(1)(b) and 9-402(1), 67 ALR3d 308; 100 ALR3d 10; 100 ALR3d 940.

Effectiveness of original financing statement under UCC Article 9 after change in debtor's name, identity, or business structure, 99 ALR3d 1194.

Sufficiency of debtor's signature on security agreement or financing statement under UCC §§ 9-203 and 9-402, 3 ALR4th 502.

What is "commercially reasonable" disposition of collateral required by UCC § 9-504(3), 7 ALR4th 308.

Conveyance of land as including mature but unharvested crops, 51 ALR4th 1263.

**11-9-204. After acquired property; future advances.**

(a) *After acquired collateral.* Except as otherwise provided in subsection (b) of this Code section, a security agreement may create or provide for a security interest in after acquired collateral.

(b) *When after acquired property clause not effective.* A security interest does not attach under a term constituting an after acquired property clause to:

(1) Consumer goods, other than an accession when given as additional security, unless the debtor acquires rights in them within ten days after the secured party gives value; or

(2) A commercial tort claim.

(c) *Future advances and other value.* A security agreement may provide that collateral secures, or that accounts, chattel paper, payment intangibles, or promissory notes are sold in connection with, future advances or other value, whether or not the advances or value are given pursuant to commitment. (Code 1981, § 11-9-204, enacted by Ga. L. 2001, p. 362, § 1.)



**Law reviews.** — For article on the 1963 amendment to the Georgia Uniform Commercial Code, see 14 Mercer L. Rev. 378 (1963). For article discussing the classification of a continuing security interest in changing collateral as an unenforceable preference under Section 60a of the Bankruptcy Act, see 1 Ga. L. Rev. 257 (1967). For

article "The Good Faith Purchase Idea and the Uniform Commercial Code," see 15 Ga. L. Rev. 605 (1981).

For note examining the conflict between the floating lien in after-acquired property under the Uniform Commercial Code and the voidable preferences provisions of the Bankruptcy Act, see 9 Ga. L. Rev. 685 (1975).

## JUDICIAL DECISIONS

### ANALYSIS

GENERAL CONSIDERATION  
AFTER-ACQUIRED PROPERTY  
CONSUMER GOODS  
FUTURE ADVANCES

#### General Consideration

**Editor's notes.** — In the light of the similarity of the provisions, decisions under former Article 9 are included in the annotations for this Code section. For a table of comparable provisions, see the table at the beginning of the Article.

**Scope.** — This section governs whether, in a security agreement, after-acquired property is subject to a security interest. *Williams v. Western Pac. Fin. Corp.*, 643 F.2d 331 (5th Cir. 1981) (decided under former Code Section 11-9-204).

**Construction with federal law.** — State law determines whether lender possesses substantive interest in property securing performance of obligation, while regulation Z § 226.8(b)(5), 15 U.S.C. foll. § 1700, under the Truth in Lending Act, 15 U.S.C. § 1601 et seq., merely defines whether this state-created substantive right constitutes a security interest for federal disclosure purposes. *Williams v. Western Pac. Fin. Corp.*, 643 F.2d 331 (5th Cir. 1981) (decided under former Code Section 11-9-204).

**Guaranty on real estate.** — Execution of guaranty, although ineffective to create security interest in debtor's residence, since real property is excluded from operation of Article 9, was effective to create a security interest in cash proceeds from sale of debtor's residence. *United States v. Wood*, 28 Bankr. 383 (N.D. Ga. 1983) (decided under former Code Section 11-9-204).

**Additional collateral given to secure antecedent debt.** — Where additional collateral is given to secure antecedent debt, new value

is not necessary before security interest will attach. However, where there is a purchase money security interest in crop to be grown, new value is necessary. *United States v. Big Z Whse.*, 311 F. Supp. 283 (S.D. Ga. 1970) (decided under former Code Section 11-9-204).

**"Magic words" not required.** — Although the security agreement must provide that after-acquired collateral is covered under the security agreement, no "magic words" are required in the drafting. The test is whether a reasonable man looking at the entire security agreement and financing statement would recognize that the parties intended to secure after-acquired property. *Kubota Tractor Corp. v. Citizens & S. Nat'l Bank*, 198 Ga. App. 830, 403 S.E.2d 218 (1991) (decided under former Code Section 11-9-204).

Although usually desirable, it is not mandatory that words such as "after-acquired" or "hereafter acquired" appear in the agreement's description. *Kubota Tractor Corp. v. Citizens & S. Nat'l Bank*, 198 Ga. App. 830, 403 S.E.2d 218 (1991) (decided under former Code Section 11-9-204).

#### After-Acquired Property

**Floating liens.** — "Floating lien" theory, by which all subsequently acquired property comes under earlier security instrument, has been approved by this section, however, former § 11-9-312 provides seller of noninventory goods under purchase money contract with right to retain priority provided the seller perfects the security interest

**After-Acquired Property (Cont'd)**

before delivery or within ten days after delivery. *Babson Credit Plan, Inc. v. Cordele Prod. Credit Ass'n*, 146 Ga. App. 266, 246 S.E.2d 354 (1978) (decided prior to 1978 amendment of former Code Section 11-9-204, which changed time limit for perfecting under prior § 109A-9-312).

**Unperfected interest of seller of fixtures.** — Where seller of personal property which is later affixed to realty retains security interest in the goods, which is not perfected, the seller's security interest attaches upon delivery and is superior to another creditor's prior perfected security interest in personalty and "after-acquired" "personal property" and "equipment of every description" of the common debtor when such "after-acquired" personalty is affixed to realty as fixtures. *Babson Credit Plan, Inc. v. Cordele Prod. Credit Ass'n*, 146 Ga. App. 266, 246 S.E.2d 354 (1978) (decided under former Code Section 11-9-204).

**Security interest in after-acquired fixtures.** — Section does not apply to creation of real estate security interest in after-acquired fixtures, even though those fixtures might otherwise be encompassed in code definition of consumer goods on basis of their physical and utilitarian characteristics; a real estate interest in fixtures arises pursuant to real estate law and is contingent upon item of property attaining legal status of fixture, as defined by that law. *Williams v. Western Pac. Fin. Corp.*, 643 F.2d 331 (5th Cir. 1981) (decided under former Code Section 11-9-204).

**Property located in different place.** — After-acquired property clause may be interpreted to include property located in a different place than the location specified in the agreement where the reference to the location of the secured property is to facilitate identification of that property, not to limit the attachment of the security interest to only after-acquired property kept at that location. *Hudson Properties, Inc. v. Citizens & S. Nat'l Bank*, 168 Ga. App. 331, 308 S.E.2d 708 (1983) (decided under former Code Section 11-9-204).

**Mobile homes.** — Transaction between a mobile home manufacturer and a retail dealer, involving a mobile home claimed by a floor-plan financier, was a "sale or return,"

and the mobile home was subject to the financier's claim arising from a security interest in the dealer's after-acquired inventory without regard to whether the manufacturer was compensated for the mobile home. *GECC v. Catalina Homes, Inc.*, 178 Ga. App. 319, 342 S.E.2d 734 (1986) (decided under former Code Section 11-9-204).

**Animals.** — Where the security agreement signed by debtor for a loan did not cover after-acquired collateral, nor did it cover the offspring of the pigs purchased with these funds, the bank did not have a valid security interest in the offspring of the pigs. *F & M Bank v. Alexander*, 70 Bankr. 419 (M.D. Ga. 1987) (decided under former Code Section 11-9-204).

**Consumer Goods**

**Truth in Lending Act.** — Truth in Lending Act, 15 U.S.C.S. § 1601 et seq., requires lender to explain ten-day limitation of former subsection (2) of this section so that borrower is informed that any consumer goods which the borrower may acquire within ten days of loan transaction are subject to security interest and that any consumer goods acquired after that date are not. *Glenn v. Trust Co.*, 152 Ga. App. 314, 262 S.E.2d 590 (1979) (decided under former Code Section 11-9-204).

After-acquired property was included under the part in a security agreement providing that a loan was secured by "all equipment, accessories and parts added or attached thereto," and the failure of a lender to disclose in the agreement the ten-day limitation of former subsection (2) of this section on after-acquired property subject to the lender's security interest violated a regulation of the Truth in Lending Act. *Brown v. Termplan, Inc.*, 693 F.2d 1047 (11th Cir. 1982) (decided under former Code Section 11-9-204).

Failure to disclose ten-day limitation provided in former subsection (2) violates Truth in Lending Act. Lender violates regulation Z § 226.8(b)(5), 15 U.S.C. foll. § 1700, under Truth in Lending Act, 15 U.S.C. § 1601 et seq., by failing to disclose nature of its security interest retained in after-acquired consumer goods when it omits from its disclosure statement the ten-day limitation provided in former subsection (2) of this section. *Williams v. West-*

ern Pac. Fin. Corp., 643 F.2d 331 (5th Cir. 1981) (decided under former Code Section 11-9-204).

A disclosure statement accompanying a promissory note violated the federal Truth in Lending Act, 15 U.S.C.S. § 1601 et seq., for failing to disclose the ten-day limit imposed under former subsection (2) of this section. *Varner v. Century Fin. Co.*, 738 F.2d 1143 (11th Cir. 1984) (decided under former Code Section 11-9-204).

**Consumer goods.** — To determine whether after-acquired consumer goods within meaning of section are contemplated within scope of any particular security deed, one must look to language of deed and interpret it in light of Uniform Commercial Code as adopted by Georgia Legislature. *Williams v. Western Pac. Fin. Corp.*, 643 F.2d 331 (5th Cir. 1981) (decided under former Code Section 11-9-204).

Section permits security interest in after-acquired consumer goods acquired within ten-day limitation period. *Williams v. Western Pac. Fin. Corp.*, 643 F.2d 331 (5th Cir. 1981) (decided under former Code Section 11-9-204).

**Equipment.** — By definition equipment is not consumer goods, and as such, security interest in after-acquired equipment is unaffected by ten-day limitation imposed in former subsection (2) of this section. *Williams v. Western Pac. Fin. Corp.*, 643 F.2d 331 (5th Cir. 1981) (decided under former Code Section 11-9-204).

### Future Advances

**Future advances.** — Georgia courts have long recognized and enforced “future advance” schemes in security instruments to effectuate a cross collateralization of previously granted security interests to indebtedness thereafter arising. *Safeway Fin. Co. v. Ward*, 14 Bankr. 549 (S.D. Ga. 1981) (decided under former Code Section 11-9-204).

Former subsection (3) of this section allows use of future advances clause in retaining security interests in personal property and requires only that obligation of future advances be covered by security agreement. *Barksdale v. Peoples Fin. Corp.*, 393 F. Supp. 112 (N.D. Ga. 1975), aff’d, 578 F.2d 1185 (5th Cir. 1978), rev’d on other grounds sub nom. *McDaniel v. Fulton Nat’l Bank*, 543 F.2d 568 (5th Cir. 1976) (decided under former Code Section 11-9-204).

**Indebtedness arising in future.** — Clause setting up open ended security interest which expressly provides that it shall extend to other indebtedness arising in future, makes clear intent of parties and will be given full effect to bind subsequently arising debts. *Barksdale v. Peoples Fin. Corp.*, 393 F. Supp. 112 (N.D. Ga. 1975), aff’d, 578 F.2d 1185 (5th Cir. 1978), rev’d on other grounds sub nom. *McDaniel v. Fulton Nat’l Bank*, 543 F.2d 568 (5th Cir. 1976) (decided under former Code Section 11-9-204).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 68A Am. Jur. 2d, Secured Transactions, §§ 85 et seq., 174 et seq., 234 et seq.

**C.J.S.** — 72 C.J.S., Pledges, § 22.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 9-204.

**ALR.** — What are “minerals” within deed, lease, or license, 17 ALR 156; 86 ALR 983.

Construction and effect of “future advances” clauses under UCC Article 9, 90 ALR4th 859.

### 11-9-205. Use or disposition of collateral permissible.

(a) *When security interest not invalid or fraudulent.* A security interest is not invalid or fraudulent against creditors solely because:

(1) The debtor has the right or ability to:

(A) Use, commingle, or dispose of all or part of the collateral, including returned or repossessed goods;



- (B) Collect, compromise, enforce, or otherwise deal with collateral;
- (C) Accept the return of collateral or make repossessions; or
- (D) Use, commingle, or dispose of proceeds; or

(2) The secured party fails to require the debtor to account for proceeds or replace collateral.

(b) *Requirements of possession not relaxed.* This Code section does not relax the requirements of possession if attachment, perfection, or enforcement of a security interest depends upon possession of the collateral by the secured party. (Code 1981, § 11-9-205, enacted by Ga. L. 2001, p. 362, § 1.)

**Law reviews.** — For article discussing the classification of a continuing security interest in changing collateral as an unenforceable preference under Section 60a of the Bankruptcy Act, see 1 Ga. L. Rev. 257 (1967). For article, “The Good Faith Purchase Idea and the Uniform Commercial Code,” see 15 Ga. L. Rev. 605 (1981).

For note examining the conflict between the floating lien in after-acquired property under the Uniform Commercial Code and the voidable preferences provisions of the Bankruptcy Act, see 9 Ga. L. Rev. 685 (1975).

### JUDICIAL DECISIONS

**Editor’s notes.** — In the light of the similarity of the provisions, decisions under former Article 9 are included in the annotations for this Code section. For a table of comparable provisions, see the table at the beginning of the Article.

**Floating liens on inventory.** — Floating liens against inventory, except insofar as

security instrument itself may stipulate otherwise, are valid and debtor has no legal responsibility for keeping property or proceeds from sale sequestered. *Sowards v. State*, 137 Ga. App. 423, 224 S.E.2d 85 (1976) (decided under former Code Section 11-9-205).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 68A Am. Jur. 2d, Secured Transactions, § 510.

**C.J.S.** — 37 C.J.S., Fraudulent Conveyances, § 159.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 9-205.

**ALR.** — Necessity and sufficiency of notice or statement prescribed by factor’s lien law, 96 ALR2d 727.

Uniform Commercial Code: Burden of proof as to commercially reasonable disposition of collateral, 59 ALR3d 369.

Uniform Commercial Code: failure of secured creditor to give required notice of disposition of collateral as bar to deficiency judgment, 59 ALR3d 401.

## 11-9-206. Security interest arising in purchase or delivery of financial asset.

(a) *Security interest when person buys through securities intermediary.* A security interest in favor of a securities intermediary attaches to a person’s security entitlement if:

(1) The person buys a financial asset through the securities intermediary in a transaction in which the person is obligated to pay the purchase price to the securities intermediary at the time of the purchase; and

(2) The securities intermediary credits the financial asset to the buyer's securities account before the buyer pays the securities intermediary.

(b) *Security interest secures obligation to pay for financial asset.* The security interest described in subsection (a) of this Code section secures the person's obligation to pay for the financial asset.

(c) *Security interest in payment against delivery transaction.* A security interest in favor of a person that delivers a certificated security or other financial asset represented by a writing attaches to the security or other financial asset if:

(1) The security or other financial asset:

(A) In the ordinary course of business is transferred by delivery with any necessary indorsement or assignment; and

(B) Is delivered under an agreement between persons in the business of dealing with such securities or financial assets; and

(2) The agreement calls for delivery against payment.

(d) *Security interest secures obligation to pay for delivery.* The security interest described in subsection (c) of this Code section secures the obligation to make payment for the delivery. (Code 1981, § 11-9-206, enacted by Ga. L. 2001, p. 362, § 1.)

## RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 9-206.

### Subpart 2

#### Rights and Duties

### **11-9-207. Rights and duties of secured party having possession or control of collateral.**

(a) *Duty of care when secured party in possession.* Except as otherwise provided in subsection (d) of this Code section, a secured party shall use reasonable care in the custody and preservation of collateral in the secured party's possession. In the case of chattel paper or an instrument, reasonable care includes taking necessary steps to preserve rights against prior parties unless otherwise agreed.

(b) *Expenses, risks, duties, and rights when secured party in possession.* Except as otherwise provided in subsection (d) of this Code section, if a secured party has possession of collateral:

(1) Reasonable expenses, including the cost of insurance and payment of taxes or other charges, incurred in the custody, preservation, use, or operation of the collateral are chargeable to the debtor and are secured by the collateral;

(2) The risk of accidental loss or damage is on the debtor to the extent of a deficiency in any effective insurance coverage;

(3) The secured party shall keep the collateral identifiable, but fungible collateral may be commingled; and

(4) The secured party may use or operate the collateral:

(A) For the purpose of preserving the collateral or its value;

(B) As permitted by an order of a court having competent jurisdiction; or

(C) Except in the case of consumer goods, in the manner and to the extent agreed by the debtor.

(c) *Duties and rights when secured party in possession or control.* Except as otherwise provided in subsection (d) of this Code section, a secured party having possession of collateral or control of collateral under Code Section 11-9-104, 11-9-105, 11-9-106, or 11-9-107:

(1) May hold as additional security any proceeds, except money or funds, received from the collateral;

(2) Shall apply money or funds received from the collateral to reduce the secured obligation, unless remitted to the debtor; and

(3) May create a security interest in the collateral.

(d) *Buyer of certain rights to payment.* If the secured party is a buyer of accounts, chattel paper, payment intangibles, or promissory notes or a consignor:

(1) Subsection (a) of this Code section does not apply unless the secured party is entitled under an agreement:

(A) To charge back uncollected collateral; or

(B) Otherwise to full or limited recourse against the debtor or a secondary obligor based on the nonpayment or other default of an account debtor or other obligor on the collateral; and

(2) Subsections (b) and (c) of this Code section do not apply. (Code 1981, § 11-9-207, enacted by Ga. L. 2001, p. 362, § 1.)



## JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Code 1933, §§ 12-605 and 12-607 and former Code Section 11-9-207 are included in the annotations for this section.

**Value of collateral.** — This Code section requires only that a creditor use reasonable care to preserve the value of the collateral; it does not impose a duty to increase the value of the collateral, such as by repairing a repossessed automobile. *McMillian v. Bank S.*, 188 Ga. App. 355, 373 S.E.2d 61 (1988) (decided under former Code Section 11-9-207).

Subsection (2)(c) of this section concerns increase in collateral held by secured party which, if money, must be paid to debtor or applied to reduce secured obligation. *Twisdale v. Georgia R.R. Bank & Trust Co.*, 129 Ga. App. 18, 198 S.E.2d 396 (1973) (decided under former Code Section 11-9-207).

**Care and diligence of pawnee.** — A pawnee is bound to exercise ordinary care and diligence, and whether such care has been exercised is question for jury. *Johnson v. First Nat'l Bank*, 53 Ga. App. 56, 184 S.E. 915 (1936) (decided under former Code 1933, § 12-605).

**Expenses and repairs.** — A pawner is chargeable with necessary expenses and re-

pairs on property pledged. *Johnson v. First Nat'l Bank*, 53 Ga. App. 56, 184 S.E. 915 (1936) (decided under former Code 1933, § 12-607).

**Negligence by creditor.** — Where the creditor has negligently failed to perform its duty, which results in default on main debt, resulting injury or additional expense should be paid by creditor rather than by debtors. *Irwin v. Life & Cas. Ins. Co.*, 204 Ga. 582, 50 S.E.2d 354 (1948) (decided under former Code 1933, § 12-605).

**Decline in value of collateral.** — Pledgor of personalty cannot require pledgee to sell property, but where certain cotton was pledged to bank as security for note, and contract provided that pledgor should maintain excess of 10 percent in value of security over amount of debt, in default of which note should become due immediately, and where pledgor afterwards became alarmed by decline in cotton market and requested bank to sell, and bank refused, agreeing it would sell as soon as price of cotton declined to point where value of the cotton would not exceed amount of debt, breach of this agreement by bank could be set up in defense to suit on note. *Johnson v. First Nat'l Bank*, 53 Ga. App. 56, 184 S.E. 915 (1936) (decided under former Code 1933, §§ 12-605, 12-607).

## RESEARCH REFERENCES

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 9-207.

**11-9-208. Additional duties of secured party having control of collateral.**

(a) *Applicability of Code section.* This Code section applies to cases in which there is no outstanding secured obligation and the secured party is not committed to make advances, incur obligations, or otherwise give value.

(b) *Duties of secured party after receiving demand from debtor.* Within ten days after receiving an authenticated demand by the debtor:

(1) A secured party having control of a deposit account under paragraph (2) of subsection (a) of Code Section 11-9-104 shall send to the bank with which the deposit account is maintained an authenticated statement that releases the bank from any further obligation to comply with instructions originated by the secured party;

(2) A secured party having control of a deposit account under paragraph (3) of subsection (a) of Code Section 11-9-104 shall:

(A) Pay the debtor the balance on deposit in the deposit account; or

(B) Transfer the balance on deposit into a deposit account in the debtor's name;

(3) A secured party, other than a buyer, having control of electronic chattel paper under Code Section 11-9-105 shall:

(A) Communicate the authoritative copy of the electronic chattel paper to the debtor or its designated custodian;

(B) If the debtor designates a custodian that is the designated custodian with which the authoritative copy of the electronic chattel paper is maintained for the secured party, communicate to the custodian an authenticated record releasing the designated custodian from any further obligation to comply with instructions originated by the secured party and instructing the custodian to comply with instructions originated by the debtor; and

(C) Take appropriate action to enable the debtor or its designated custodian to make copies of or revisions to the authoritative copy which add or change an identified assignee of the authoritative copy without the consent of the secured party;

(4) A secured party having control of investment property under paragraph (2) of subsection (d) of Code Section 11-8-106 or subsection (b) of Code Section 11-9-106 shall send to the securities intermediary or commodity intermediary with which the security entitlement or commodity contract is maintained an authenticated record that releases the securities intermediary or commodity intermediary from any further obligation to comply with entitlement orders or directions originated by the secured party; and

(5) A secured party having control of a letter of credit right under Code Section 11-9-107 shall send to each person having an unfulfilled obligation to pay or deliver proceeds of the letter of credit to the secured party an authenticated release from any further obligation to pay or deliver proceeds of the letter of credit to the secured party. (Code 1981, § 11-9-208, enacted by Ga. L. 2001, p. 362, § 1.)

#### RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 9-208.

**11-9-209. Duties of secured party if account debtor has been notified of assignment.**

(a) *Applicability of Code section.* Except as otherwise provided in subsection (c) of this Code section, this Code section applies if:

(1) There is no outstanding secured obligation; and

(2) The secured party is not committed to make advances, incur obligations, or otherwise give value.

(b) *Duties of secured party after receiving demand from debtor.* Within ten days after receiving an authenticated demand by the debtor, a secured party shall send to an account debtor that has received notification of an assignment to the secured party as assignee under subsection (a) of Code Section 11-9-406 an authenticated record that releases the account debtor from any further obligation to the secured party.

(c) *Inapplicability to sales.* This Code section does not apply to an assignment constituting the sale of an account, chattel paper, or payment intangible. (Code 1981, § 11-9-209, enacted by Ga. L. 2001, p. 362, § 1.)

**RESEARCH REFERENCES**

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 9-209.

**11-9-210. Request for accounting; request regarding list of collateral or statement of account.**

(a) *Definitions.* As used in this Code section, the term:

(1) “Request” means a record of a type described in paragraph (2), (3), or (4) of this subsection.

(2) “Request for an accounting” means a record authenticated by a debtor requesting that the recipient provide an accounting of the unpaid obligations secured by collateral and reasonably identifying the transaction or relationship that is the subject of the request.

(3) “Request regarding a list of collateral” means a record authenticated by a debtor requesting that the recipient approve or correct a list of what the debtor believes to be the collateral securing an obligation and reasonably identifying the transaction or relationship that is the subject of the request.

(4) “Request regarding a statement of account” means a record authenticated by a debtor requesting that the recipient approve or correct a statement indicating what the debtor believes to be the aggregate amount of unpaid obligations secured by collateral as of a



specified date and reasonably identifying the transaction or relationship that is the subject of the request.

(b) *Duty to respond to requests.* Subject to subsections (c), (d), (e), and (f) of this Code section, a secured party, other than a buyer of accounts, chattel paper, payment intangibles, or promissory notes or a consignor, shall comply with a request within 14 days after receipt:

(1) In the case of a request for an accounting, by authenticating and sending to the debtor an accounting; and

(2) In the case of a request regarding a list of collateral or a request regarding a statement of account, by authenticating and sending to the debtor an approval or correction.

(c) *Request regarding list of collateral; statement concerning type of collateral.* A secured party that claims a security interest in all of a particular type of collateral owned by the debtor may comply with a request regarding a list of collateral by sending to the debtor an authenticated record including a statement to that effect within 14 days after receipt.

(d) *Request regarding list of collateral; no interest claimed.* A person that receives a request regarding a list of collateral, claims no interest in the collateral when it receives the request, and claimed an interest in the collateral at an earlier time shall comply with the request within 14 days after receipt by sending to the debtor an authenticated record:

(1) Disclaiming any interest in the collateral; and

(2) If known to the recipient, providing the name and mailing address of any assignee of or successor to the recipient's interest in the collateral.

(e) *Request for accounting or regarding a statement of account; no interest in obligation claimed.* A person that receives a request for an accounting or a request regarding a statement of account, claims no interest in the obligations when it receives the request, and claimed an interest in the obligations at an earlier time shall comply with the request within 14 days after receipt by sending to the debtor an authenticated record:

(1) Disclaiming any interest in the obligations; and

(2) If known to the recipient, providing the name and mailing address of any assignee of or successor to the recipient's interest in the obligations.

(f) *Charges for responses.* A debtor is entitled without charge to one response to a request under this Code section during any six-month period. The secured party may require payment of a charge not exceeding \$10.00 for each additional response. (Code 1981, § 11-9-210, enacted by Ga. L. 2001, p. 362, § 1.)

## JUDICIAL DECISIONS

**Editor's notes.** — In the light of the similarity of the provisions, decisions under former Article 9 are included in the annotations for this Code section. For a table of comparable provisions, see the table at the beginning of the Article.

**Requests by third persons.** — Fact that this section provided for a request for information by debtor does not preclude a request being made by third person directly to creditor. *Ayers v. Yancy Bros. Co.*, 141 Ga. App. 358, 233 S.E.2d 471 (1977) (decided

under former Code Section 11-9-208).

Should secured party fail to furnish information requested by third party, the third party should require debtor to obtain information from secured party and may refuse to complete transaction with debtor until such information is obtained and is satisfactory to subsequent party. *Ayers v. Yancy Bros. Co.*, 141 Ga. App. 358, 233 S.E.2d 471 (1977) (decided under former Code Section 11-9-208).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 68A Am. Jur. 2d, Secured Transactions, §§ 35, 547-549.

**C.J.S.** — 72 C.J.S., Pledges, §§ 20, 27, 36-48.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 9-210.

## PART 3

## PERFECTION AND PRIORITY

## Subpart 1

## Law Governing Perfection and Priority

**11-9-301. Law governing perfection and priority of security interests.**

Except as otherwise provided in Code Sections 11-9-303 through 11-9-306, the following rules determine the law governing perfection, the effect of perfection or nonperfection, and the priority of a security interest in collateral:

(1) Except as otherwise provided in this Code section, while a debtor is located in a jurisdiction, the local law of that jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in collateral;

(2) While collateral is located in a jurisdiction, the local law of that jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a possessory security interest in that collateral;

(3) Except as otherwise provided in paragraph (4) of this Code section, while negotiable documents, goods, instruments, money, or tangible chattel paper is located in a jurisdiction, the local law of that jurisdiction governs:

(A) Perfection of a security interest in the goods by filing a fixture filing;

(B) Perfection of a security interest in timber to be cut;

(C) Perfection of a security interest in crops; and

(D) The effect of perfection or nonperfection and the priority of a nonpossessory security interest in the collateral; and

(4) The local law of the jurisdiction in which the wellhead or minehead is located governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in as-extracted collateral. (Code 1981, § 11-9-301, enacted by Ga. L. 2001, p. 362, § 1.)

### JUDICIAL DECISIONS

**Editor's notes.** — In the light of the similarity of the provisions, decisions under former Article 9 are included in the annotations for this Code section. For a table of comparable provisions, see the table at the beginning of the Article.

**Failure to perfect after relocation of debtor.** — Since the security interest was not perfected upon transfer of debtor's corporate offices to Georgia, the security interest was deemed unperfected upon the expiration of four months after the relocation to Georgia. *United States v. Specialty Contract-*

*ing & Supply, Inc.*, 140 Bankr. 922 (Bankr. N.D. Ga. 1992) (decided under former Code Section 11-9-103).

**Transfer of collateral.** — Former Code Section 11-9-407(7), not former paragraph (3)(e) of this Code section was applicable when a debtor had transferred collateral encumbered by a security interest to another debtor. *NCNB Nat'l Bank v. Major Leasing, Inc.*, 140 Bankr. 826 (Bankr. N.D. Ga. 1991) (decided under former Code Section 11-9-103).

### RESEARCH REFERENCES

**C.J.S.** — 79 C.J.S., Secured Transactions, § 88 et seq.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 9-301.

### 11-9-302. Law governing perfection and priority of agricultural liens.

While farm products are located in a jurisdiction, the local law of that jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of an agricultural lien on the farm products. (Code 1981, § 11-9-302, enacted by Ga. L. 2001, p. 362, § 1.)

### RESEARCH REFERENCES

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 9-302.

### 11-9-303. Law governing perfection and priority of security interests in goods covered by a certificate of title.

(a) *Applicability of Code section.* This Code section applies to goods covered by a certificate of title, even if there is no other relationship between the



jurisdiction under whose certificate of title the goods are covered and the goods or the debtor.

(b) *When goods covered by certificate of title.* Goods become covered by a certificate of title when a valid application for the certificate of title and the applicable fee are delivered to the appropriate authority. Goods cease to be covered by a certificate of title at the earlier of the time the certificate of title ceases to be effective under the law of the issuing jurisdiction or the time the goods become covered subsequently by a certificate of title issued by another jurisdiction.

(c) *Applicable law.* The local law of the jurisdiction under whose certificate of title the goods are covered governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in goods covered by a certificate of title from the time the goods become covered by the certificate of title until the goods cease to be covered by the certificate of title. (Code 1981, § 11-9-303, enacted by Ga. L. 2001, p. 362, § 1.)

### JUDICIAL DECISIONS

**Editor's notes.** — In the light of the similarity of the provisions, decisions under former Article 9 are included in the annotations for this Code section. For a table of comparable provisions, see the table at the beginning of the Article.

**Security interest in car, perfected in another state.** — Where creditor of car owner had perfected security interest in the car, and name of creditor as holder of security interest was shown on existing certificate of title issued by jurisdiction where car was located when security interest attached,

creditors security interest perfected in North Carolina continued perfected in Georgia, and was valid against subsequent transferees. *United Carolina Bank v. Sistrunk*, 158 Ga. App. 107, 279 S.E.2d 272 (1981).

**Applying Canadian law** to the facts of the case, a remote purchaser could not prevail over a creditor who had perfected its purchase money security interest in a truck within the time specified by Canadian law. *Paccar Fin. Servs., Ltd. v. Johnson*, 195 Ga. App. 412, 393 S.E.2d 685 (1990).

### RESEARCH REFERENCES

**U.L.A.** — Uniform Commercial Code  
(U.L.A.) § 9-303.

### 11-9-304. Law governing perfection and priority of security interests in deposit accounts.

(a) *Law of bank's jurisdiction governs.* The local law of a bank's jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in a deposit account maintained with that bank.

(b) *Bank's jurisdiction.* The following rules determine a bank's jurisdiction for purposes of this part:

(1) If an agreement between the bank and its customer governing the deposit account expressly provides that a particular jurisdiction is the

bank's jurisdiction for purposes of this part, this article, or this title, that jurisdiction is the bank's jurisdiction;

(2) If paragraph (1) of this subsection does not apply and an agreement between the bank and its customer governing the deposit account expressly provides that the agreement is governed by the law of a particular jurisdiction, that jurisdiction is the bank's jurisdiction;

(3) If neither paragraph (1) nor (2) of this subsection applies and an agreement between the bank and its customer governing the deposit account expressly provides that the deposit account is maintained at an office in a particular jurisdiction, that jurisdiction is the bank's jurisdiction;

(4) If none of the preceding paragraphs of this subsection applies, the bank's jurisdiction is the jurisdiction in which the office identified in an account statement as the office serving the customer's account is located; and

(5) If none of the preceding paragraphs of this subsection applies, the bank's jurisdiction is the jurisdiction in which the chief executive office of the bank is located. (Code 1981, § 11-9-304, enacted by Ga. L. 2001, p. 362, § 1; Ga. L. 2002, p. 995, § 4.)

**The 2002 amendment**, effective July 1, 2002, substituted "its customer" for "the debtor" near the beginning of paragraph (b)(1).

**Editor's notes.** — Ga. L. 2002, p. 995, § 8, not codified by the General Assembly, provides that: "This Act shall become effec-

tive July 1, 2002, and shall apply to a letter of credit that is issued on or after July 1, 2002. This Act does not apply to a transaction, event, obligation, or duty arising out of or associated with a letter of credit that was issued before July 1, 2002."

#### RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 9-304.

### 11-9-305. Law governing perfection and priority of security interests in investment property.

(a) *Governing law; general rules.* Except as otherwise provided in subsection (c) of this Code section, the following rules apply:

(1) While a security certificate is located in a jurisdiction, the local law of that jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in the certificated security represented thereby;

(2) The local law of the issuer's jurisdiction as specified in subsection (d) of Code Section 11-8-110 governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in an uncertificated security;

(3) The local law of the securities intermediary's jurisdiction as specified in subsection (e) of Code Section 11-8-110 governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in a security entitlement or securities account; and

(4) The local law of the commodity intermediary's jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in a commodity contract or commodity account.

(b) *Commodity intermediary's jurisdiction.* The following rules determine a commodity intermediary's jurisdiction for purposes of this part:

(1) If an agreement between the commodity intermediary and commodity customer governing the commodity account expressly provides that a particular jurisdiction is the commodity intermediary's jurisdiction for purposes of this part, this article, or this title, that jurisdiction is the commodity intermediary's jurisdiction;

(2) If paragraph (1) of this subsection does not apply and an agreement between the commodity intermediary and commodity customer governing the commodity account expressly provides that the agreement is governed by the law of a particular jurisdiction, that jurisdiction is the commodity intermediary's jurisdiction;

(3) If neither paragraph (1) nor (2) of this subsection applies and an agreement between the commodity intermediary and commodity customer governing the commodity account expressly provides that the commodity account is maintained at an office in a particular jurisdiction, that jurisdiction is the commodity intermediary's jurisdiction;

(4) If none of the preceding paragraphs of this subsection applies, the commodity intermediary's jurisdiction is the jurisdiction in which the office identified in an account statement as the office serving the commodity customer's account is located; and

(5) If none of the preceding paragraphs of this subsection applies, the commodity intermediary's jurisdiction is the jurisdiction in which the chief executive office of the commodity intermediary is located.

(c) *When perfection governed by law of jurisdiction where debtor located.* The local law of the jurisdiction in which the debtor is located governs:

(1) Perfection of a security interest in investment property by filing;

(2) Automatic perfection of a security interest in investment property created by a broker or securities intermediary; and

(3) Automatic perfection of a security interest in a commodity contract or commodity account created by a commodity intermediary. (Code 1981, § 11-9-305, enacted by Ga. L. 2001, p. 362, § 1.)



## RESEARCH REFERENCES

**Am. Jur. 2d.** — 68A Am. Jur. 2d, Secured Transactions, §§ 75-84, 841.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 9-305.

**C.J.S.** — 82 C.J.S., Statutes, § 309.

**11-9-306. Law governing perfection and priority of security interests in letter of credit rights.**

(a) *Governing law; issuer's or nominated person's jurisdiction.* Subject to subsection (c) of this Code section, the local law of the issuer's jurisdiction or a nominated person's jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in a letter of credit right if the issuer's jurisdiction or nominated person's jurisdiction is a state.

(b) *Issuer's or nominated person's jurisdiction.* For purposes of this part, an issuer's jurisdiction or nominated person's jurisdiction is the jurisdiction whose law governs the liability of the issuer or nominated person with respect to the letter of credit right as provided in Code Section 11-5-116.

(c) *When Code section not applicable.* This Code section does not apply to a security interest that is perfected only under subsection (d) of Code Section 11-9-308. (Code 1981, § 11-9-306, enacted by Ga. L. 2001, p. 362, § 1.)

## RESEARCH REFERENCES

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 9-306.

**11-9-307. Location of debtor.**

(a) *"Place of business."* As used in this Code section, the term "place of business" means a place where a debtor conducts its affairs.

(b) *Debtor's location; general rules.* Except as otherwise provided in this Code section, the following rules determine a debtor's location:

(1) A debtor who is an individual is located at the individual's principal residence;

(2) A debtor that is an organization and has only one place of business is located at its place of business; and

(3) A debtor that is an organization and has more than one place of business is located at its chief executive office.

(c) *Limitation of applicability of subsection (b) of this Code section.* Subsection (b) of this Code section applies only if a debtor's residence, place of business, or chief executive office, as applicable, is located in a jurisdiction whose law generally requires information concerning the existence of a

nonpossessory security interest to be made generally available in a filing, recording, or registration system as a condition or result of the security interest's obtaining priority over the rights of a lien creditor with respect to the collateral. If subsection (b) of this Code section does not apply, the debtor is located in the District of Columbia.

(d) *Continuation of location; cessation of existence, etc.* A person that ceases to exist, have a residence, or have a place of business continues to be located in the jurisdiction specified by subsections (b) and (c) of this Code section.

(e) *Location of registered organization organized under state law.* A registered organization that is organized under the law of a state is located in that state.

(f) *Location of registered organization organized under federal law; bank branches and agencies.* Except as otherwise provided in subsection (i) of this Code section, a registered organization that is organized under the law of the United States and a branch or agency of a bank that is not organized under the law of the United States or a state are located:

(1) In the state that the law of the United States designates, if the law designates a state of location;

(2) In the state that the registered organization, branch, or agency designates, if the law of the United States authorizes the registered organization, branch, or agency to designate its state of location; or

(3) In the District of Columbia, if neither paragraph (1) nor (2) of this subsection applies.

(g) *Continuation of location; change in status of registered organization.* A registered organization continues to be located in the jurisdiction specified by subsection (e) or (f) of this Code section notwithstanding:

(1) The suspension, revocation, forfeiture, or lapse of the registered organization's status as such in its jurisdiction of organization; or

(2) The dissolution, winding up, or cancellation of the existence of the registered organization.

(h) *Location of United States.* The United States is located in the District of Columbia.

(i) *Location of foreign bank branch or agency if licensed in only one state.* A branch or agency of a bank that is not organized under the law of the United States or a state is located in the state in which the branch or agency is licensed, if all branches and agencies of the bank are licensed in only one state.

(j) *Location of foreign air carrier.* A foreign air carrier under the Federal Aviation Act of 1958, as amended, is located at the designated office of the agent upon which service of process may be made on behalf of the carrier.

(k) *Code section applies only to this part.* This Code section applies only for purposes of this part. (Code 1981, § 11-9-307, enacted by Ga. L. 2001, p. 362, § 1.)

#### RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 9-307.

#### Subpart 2

#### Perfection

### **11-9-308. When security interest or agricultural lien is perfected; continuity of perfection.**

(a) *Perfection of security interest.* Except as otherwise provided in this Code section and Code Section 11-9-309, a security interest is perfected if it has attached and all of the applicable requirements for perfection in Code Sections 11-9-310 through 11-9-316 have been satisfied. A security interest is perfected when it attaches if the applicable requirements are satisfied before the security interest attaches.

(b) *Perfection of agricultural lien.* An agricultural lien is perfected if it has become effective and all of the applicable requirements for perfection in Code Section 11-9-310 have been satisfied. An agricultural lien is perfected when it becomes effective if the applicable requirements are satisfied before the agricultural lien becomes effective.

(c) *Continuous perfection; perfection by different methods.* A security interest or agricultural lien is perfected continuously if it is originally perfected by one method under this article and is later perfected by another method under this article, without an intermediate period when it was unperfected.

(d) *Supporting obligation.* Perfection of a security interest in collateral also perfects a security interest in a supporting obligation for the collateral.

(e) *Lien securing right to payment.* Perfection of a security interest in a right to payment or performance also perfects a security interest in a security interest, mortgage, or other lien on personal or real property securing the right.

(f) *Security entitlement carried in securities account.* Perfection of a security interest in a securities account also perfects a security interest in the security entitlements carried in the securities account.

(g) *Commodity contract carried in commodity account.* Perfection of a security interest in a commodity account also perfects a security interest in the commodity contracts carried in the commodity account. (Code 1981, § 11-9-308, enacted by Ga. L. 2001, p. 362, § 1.)



**Cross references.** — When instruments requiring recording take effect, § 44-2-2.

**Law reviews.** — For note examining the conflict between the floating lien in

after-acquired property under the Uniform Commercial Code and the voidable preferences provisions of the Bankruptcy Act, see 9 Ga. L. Rev. 685 (1975).

### JUDICIAL DECISIONS

**Editor's notes.** — In the light of the similarity of the provisions, decisions under former Article 9 are included in the annotations for this Code section. For a table of comparable provisions, see the table at the beginning of the Article.

**Perfection, generally.** — Security interest is perfected when it has attached under former § 11-9-204(1) and when all applicable steps required for perfection have been taken under former § 11-9-312(4). *Continental Oil Co. Agrico Chem. Co. Div. v. Sutton*, 126 Ga. App. 78, 189 S.E.2d 925 (1972) (decided under former Code Section 11-9-303).

To perfect a purchase money security interest and for it to be enforceable against debtor and third parties, there must be a written agreement, signed by debtor under former § 11-9-203(1)(b) and filing of financing statement under former § 11-9-302(1). *Food Serv. Equip. Co. v. First Nat'l Bank*, 121 Ga. App. 421, 174 S.E.2d 216 (1970) (decided under former Code Section 11-9-303).

**Judgment on note.** — Judgment on debt for unpaid balance on note does not in itself operate to perfect security interest in collateral listed on note, and payee's rights are subordinate to those of lien creditor who has

no knowledge of security interest. *Fas-Pac, Inc. v. Fillingame*, 123 Ga. App. 203, 180 S.E.2d 243 (1971) (decided under former Code Section 11-9-303).

**Extent of security interest.** — In absence of special circumstances, security interest can attach only to extent of debtor's interest. *First Nat'l Bank & Trust Co. v. Smithloff*, 119 Ga. App. 284, 167 S.E.2d 190 (1969) (decided under former Code Section 11-9-303).

**Cited in** *Mack Trucks, Inc. v. Ryder Truck Rental, Inc.*, 110 Ga. App. 68, 137 S.E.2d 718 (1964); *Green v. King Edward Employees' Fed. Credit Union*, 373 F.2d 613 (5th Cir. 1967); *Johnson v. Dempsey*, 117 Ga. App. 722, 161 S.E.2d 889 (1968); *First Nat'l Bank & Trust Co. v. McElmurray*, 120 Ga. App. 134, 169 S.E.2d 720 (1969); *Bank of Madison v. Tri-County Livestock Auction Co.*, 123 Ga. App. 768, 182 S.E.2d 687 (1971); *Enterprises Now, Inc. v. Citizens & S. Dev. Corp.*, 135 Ga. App. 602, 218 S.E.2d 309 (1975); *Tuftco Sales Corp. v. Garrison Carpet Mills, Inc.*, 158 Ga. App. 674, 282 S.E.2d 159 (1981); *GTE Leasing Corp. v. Load-It, Inc.*, 860 F.2d 393 (11th Cir. 1988); *Southern Horizons Aviation v. F & M Bank*, 231 Ga. App. 55, 497 S.E.2d 637 (1998).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 68A Am. Jur. 2d, Secured Transactions, §§ 288-293, 310, 311, 412-448.

**C.J.S.** — 6A C.J.S., Assignments, §§ 79, 80, 85. 72 C.J.S., Pledges, § 22.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 9-308.

### 11-9-309. Security interest perfected upon attachment.

The following security interests are perfected when they attach:

(1) A purchase money security interest in consumer goods, except as otherwise provided in subsection (b) of Code Section 11-9-311 with respect to consumer goods that are subject to a statute or treaty described in subsection (a) of Code Section 11-9-311;

(2) An assignment of accounts or payment intangibles which does not by itself or in conjunction with other assignments to the same assignee transfer a significant part of the assignor's outstanding accounts or payment intangibles;

(3) A sale of a payment intangible;

(4) A sale of a promissory note;

(5) A security interest created by the assignment of a health care insurance receivable to the provider of the health care goods or services;

(6) A security interest arising under Code Section 11-2-401 or 11-2-505, subsection (3) of Code Section 11-2-711, or subsection (5) of Code Section 11-2A-508, until the debtor obtains possession of the collateral;

(7) A security interest of a collecting bank arising under Code Section 11-4-210;

(8) A security interest of an issuer or nominated person arising under Code Section 11-5-118;

(9) A security interest arising in the delivery of a financial asset under subsection (c) of Code Section 11-9-206;

(10) A security interest in investment property created by a broker or securities intermediary;

(11) A security interest in a commodity contract or a commodity account created by a commodity intermediary;

(12) An assignment for the benefit of all creditors of the transferor and subsequent transfers by the assignee thereunder; and

(13) A security interest created by an assignment of a beneficial interest in a decedent's estate. (Code 1981, § 11-9-309, enacted by Ga. L. 2001, p. 362, § 1.)

**Law reviews.** — Commercial Law, see 53  
Mercer L. Rev. 153 (2001).

#### RESEARCH REFERENCES

**U.L.A.** — Uniform Commercial Code  
(U.L.A.) § 9-309.

**11-9-310. When filing required to perfect security interest or agricultural lien; security interests and agricultural liens to which filing provisions do not apply.**

(a) *General rule; perfection by filing.* Except as otherwise provided in subsection (b) of this Code section and subsection (b) of Code Section

11-9-312, a financing statement must be filed to perfect all security interests and agricultural liens.

(b) *Exceptions; filing not necessary.* The filing of a financing statement is not necessary to perfect a security interest:

(1) That is perfected under subsection (d), (e), (f), or (g) of Code Section 11-9-308;

(2) That is perfected under Code Section 11-9-309 when it attaches;

(3) In property subject to a statute, regulation, or treaty described in subsection (a) of Code Section 11-9-311;

(4) In goods in possession of a bailee which is perfected under paragraph (1) or (2) of subsection (d) of Code Section 11-9-312;

(5) In certificated securities, documents, goods, or instruments which is perfected without filing or possession under subsection (e), (f), or (g) of Code Section 11-9-312;

(6) In collateral in the secured party's possession under Code Section 11-9-313;

(7) In a certificated security which is perfected by delivery of the security certificate to the secured party under Code Section 11-9-313;

(8) In deposit accounts, electronic chattel paper, investment property, or letter of credit rights which is perfected by control under Code Section 11-9-314;

(9) In proceeds which is perfected under Code Section 11-9-315; or

(10) That is perfected under Code Section 11-9-316.

(c) *Assignment of perfected security interest.* If a secured party assigns a perfected security interest or agricultural lien, a filing under this article is not required to continue the perfected status of the security interest against creditors of and transferees from the original debtor. (Code 1981, § 11-9-310, enacted by Ga. L. 2001, p. 362, § 1.)

**Law reviews.** — For article discussing the classification of a continuing security interest in changing collateral as an unenforceable preference under Section 60a of the Bankruptcy Act, see 1 Ga. L. Rev. 257 (1967). For article, "Security Transfers by Secured Parties," see 4 Ga. L. Rev. 527 (1970). For article, "Commercial Law," see 53 Mercer L. Rev. 153 (2001).

For note examining the conflict between the floating lien in after-acquired property under the Uniform Commercial Code and the voidable preferences provisions of the Bankruptcy Act, see 9 Ga. L. Rev. 685 (1975).

For comment on *Maley v. National Acceptance Co.*, 250 F. Supp. 841 (N.D. Ga. 1966), see 3 Ga. St. B.J. 248 (1966).



## JUDICIAL DECISIONS

## ANALYSIS

GENERAL CONSIDERATION  
PERFECTION BY POSSESSION  
CONSUMER GOODS  
ASSIGNMENTS OF ACCOUNTS  
MOTOR VEHICLES

## General Consideration

**Editor's notes.** — In the light of the similarity of the provisions, decisions under former Article 9 are included in the annotations for this Code section. For a table of comparable provisions, see the table at the beginning of the Article.

**Filing of financing statement can perfect only those interests acquired through security agreements.** *Tri-County Livestock Auction Co. v. Bank of Madison*, 228 Ga. 325, 185 S.E.2d 393 (1971) (decided under former Code Section 11-9-302).

**Financing statements and security agreements distinguished.** — Financing statement merely gives notice of existence of security interest but in itself does not create a security interest, for which a security agreement is required. *Trust Co. v. Associated Grocers Co-Op.*, 152 Ga. App. 701, 263 S.E.2d 676 (1979) (decided under former Code Section 11-9-302).

**Requirements to perfect purchase money security interests.** — To perfect a purchase money security interest and for it to be enforceable against debtor and third parties, there must be a written agreement, signed by debtor under former § 11-9-203(1)(b) and filing of financing statement under former § 11-9-302(1) (see now § 11-9-310). *Food Serv. Equip. Co. v. First Nat'l Bank*, 121 Ga. App. 421, 174 S.E.2d 216 (1970) (decided under former Code Section 11-9-302).

**Computer information and programming.** — Computer information and programming recorded on magnetic tape were "general intangibles" which are not included in the types of collateral in which security interests can be perfected by possession under former § 11-9-305 (see now § 11-9-313), and a security interest therein could therefore only be perfected by filing a financing statement. *Dabney v. Information Exch., Inc.*, 98 Bankr. 603 (Bankr. N.D. Ga. 1989) (decided under former Code Section 11-9-302).

**Security interest in accounts.** — This section required filing of financing statement to perfect security interest in accounts. *M.D. Hodges Enters., Inc. v. First Ga. Bank*, 243 Ga. 664, 256 S.E.2d 350 (1979) (decided under former Code Section 11-9-302).

**Equipment lessors.** — To take precedence over previously recorded loan deed covering subsequently purchased equipment, equipment lessor must perfect security interest. *Citizens & S. Equip. Leasing, Inc. v. Atlanta Fed. Sav. & Loan Ass'n*, 144 Ga. App. 800, 243 S.E.2d 243 (1978) (decided under former Code Section 11-9-302).

**Banks.** — Bank perfected security interest by filing UCC financing statement. See *Trust Co. Bank v. Walker*, 35 Bankr. 237 (Bankr. N.D. Ga. 1983) (decided under former Code Section 11-9-302).

## Perfection by Possession

**Security interest in money is perfected by possession.** — Security interest in money (either originally given or received as proceeds from negotiation of instrument) is perfected by possession. In re *Atlanta Times, Inc.*, 259 F. Supp. 820 (N.D. Ga. 1966), *aff'd* sub. nom. *Sanders v. National Acceptance Co. of Am.*, 383 F.2d 606 (5th Cir. 1967) (decided under former Code Section 11-9-302).

## Consumer Goods

**Constitutionality.** — This section, pursuant to which purchase money security interest in consumer goods is perfected without filing, does not violate equal protection, is a rational classification, and does not violate due process because it does not provide notice by filing, since existence of exception is sufficient to put corporate entities on notice. *Personal Thrift Plan of Perry, Inc. v. Georgia Power Co.*, 242 Ga. 388, 249 S.E.2d 72 (1978) (decided under former Code Section 11-9-302).

**Purpose of description in unfiled security agreement.** — Purchase money security agreements on consumer goods are not required to be filed, and purpose of description of collateral in unfiled security agreement is not to give notice, as on a financing statement, but is to provide identification of collateral so as to avoid disputes over its identity. *Personal Thrift Plan of Perry, Inc. v. Georgia Power Co.*, 242 Ga. 388, 249 S.E.2d 72 (1978) (decided under former Code Section 11-9-302).

**Interest in consumer goods cannot exceed price.** — Purchase money security interest must be in the item purchased, and if vendor of consumer goods is to be protected despite absence of filing security interest cannot exceed price of item purchased in transaction out of which it arose. *Roberts Furn. Co. v. Pierce*, 507 F.2d 990 (5th Cir. 1975) (decided under former Code Section 11-9-302).

**Household goods.** — A purchase-money security interest in household goods is automatically perfected without filing. *Dennis v. W.S. Badcock Corp.*, 31 Bankr. 128 (Bankr. M.D. Ga. 1983) (decided under former Code Section 11-9-302).

#### Assignments of Accounts

**Filing requirements.** — Financing statement must be filed to perfect all security interests unless assignment to assignee does not transfer a significant part of outstanding contract rights of assignor. *Park Ave. Bank v. Bassford*, 232 Ga. 216, 205 S.E.2d 861 (1974) (decided under former Code Section 11-9-302).

**Exceptions from filing requirements.** — Official comment to this section indicates that exception from filing for isolated or casual assignment of accounts is not available to "any person who regularly takes assignments of any debtor's account"; a bank which regularly loans money and accepts accounts as security must file to perfect its security interests and cannot rely on automatic perfection. *M.D. Hodges Enters., Inc. v. First Ga. Bank*, 243 Ga. 664, 256 S.E.2d 350 (1979) (decided under former Code Section 11-9-302).

**Assignment of future proceeds.** — Debtor's assignment to bank of specific amounts from future proceeds from debtor's business was not exempted from this article and was required to be perfected by the filing of a

financing statement. *Bank of Cave Spring v. Gold Kist, Inc.*, 173 Ga. App. 679, 327 S.E.2d 800 (1985) (decided under former Code Section 11-9-302).

#### Motor Vehicles

**Inventory.** — Security interest in automobiles in dealer's inventory must be perfected under this article. *Staley v. Phelan Fin. Corp.*, 116 Ga. App. 1, 156 S.E.2d 201 (1967). But see *In re Chappell*, 224 Bankr. 507 (Bankr. M.D. Ga. 1998).

**Motor Vehicle Certificate of Title Act.** — Security interest in motor vehicle may be perfected under Motor Vehicle Certificate of Title Act, Ga. L. 1968, p. 68 et seq., if created by other than a dealer or manufacturer or under Uniform Commercial Code if by a dealer or manufacturer. *Guardian Disct. Co. v. Settles*, 114 Ga. App. 418, 151 S.E.2d 530 (1966) (decided under former Code Section 11-9-302).

As a result of adoption of former § 11-9-302 and the UCC, the only way to perfect security interest in motor vehicles is by filing under Motor Vehicle Certificate of Title Act, Ga. L. 1968, p. 68 et seq. *Staley v. Phelan Fin. Corp.*, 116 Ga. App. 1, 156 S.E.2d 201 (1967); *General Fin. Corp. v. Hester*, 141 Ga. App. 28, 232 S.E.2d 375 (1977); *Freeman v. Bentley*, 205 Ga. App. 409, 422 S.E.2d 435 (1992). But see *In re Chappell*, 224 Bankr. 507 (Bankr. M.D. Ga. 1998).

**Centralized method of filing security interests in vehicles.** — Legal result of passage of Uniform Commercial Code was to replace prior law and provide for only one centralized method of filing security interests in pre-1963 motor vehicles. Any such security interest filed subsequent to effective date of Uniform Commercial Code, to be valid, must be filed pursuant to provisions of the Georgia Motor Vehicle Certificate of Title Act, Ga. L. 1968, p. 68 et seq. *Maley v. National Acceptance Co.*, 250 F. Supp. 841 (N.D. Ga. 1966). But see *In re Chappell*, 224 Bankr. 507 (Bankr. M.D. Ga. 1998).

**Innocent third-party purchaser protected.** — Under this section and the Motor Vehicle Certificate of Title Act, O.C.G.A. §§ 40-3-20, 40-3-50, 40-3-51, the rights of the holder of an unperfected security interest in an automobile are subordinate to the rights of an innocent third party who acquires the auto-

**Motor Vehicles** (Cont'd)

mobile for value. A party who purchases a car from another party, who purchased the car at a judicial sale after the car, which had an unperfected security interest on it, was

sold to satisfy a judgment against the owner's spouse, is such an innocent party. *May v. Macioce*, 200 Ga. App. 542, 409 S.E.2d 45, cert. denied, 200 Ga. App. 896, 409 S.E.2d 45 (1991) (decided under former Code Section 11-9-302).

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 68A Am. Jur. 2d, Secured Transactions, §§ 15, 39-69, 104, 106, 110, 127, 128, 149, 150, 192 et seq., 282, 288 et seq., 304, 306, 323, 437-461, 796, 907.

**C.J.S.** — 6A C.J.S., Assignments, §§ 79, 80, 85. 72 C.J.S., Pledges, § 23.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 9-310.

**ALR.** — Rights of holders of different notes in respect of collateral securing them, 52 ALR 1391.

Retention of check received by drawee bank for collection as payment of check, 68 ALR 862.

Assignees for creditors as within protection of statute requiring filing or recording of conditional-sale contract or chattel mortgage, 71 ALR 981.

Assignability of contemplated debt before execution of agreement by which it is to be created, 116 ALR 955.

Federal government or agencies of federal government as subject to payment of tax or fee imposed upon, or for, recording or filing instrument, 124 ALR 1267.

Coverage of "nonrecording" or

"nonfiling" insurance against loss from failure to record chattel mortgage, conditional sale, or other security instrument, 51 ALR2d 325.

Construction and effect of UCC Article 9, dealing with secured transactions, sales of accounts, contract rights, and chattel paper, 30 ALR3d 9; 67 ALR3d 308; 69 ALR3d 1162; 76 ALR3d 11; 99 ALR3d 807; 99 ALR3d 1080; 100 ALR3d 10; 100 ALR3d 940; 7 ALR4th 308; 11 ALR4th 241; 25 ALR5th 696.

Determination of purchase price of farm equipment for purposes of UCC § 9-302(1)(c) excusing filing of financing statement, 85 ALR3d 1037.

When is filing of financing statement necessary to perfect an assignment of accounts under UCC § 9-302(1)(e), 85 ALR3d 1050.

Effectiveness of original financing statement under UCC Article 9 after change in debtor's name, identity, or business structure, 99 ALR3d 1194.

Construction and effect of "future advances" clauses under UCC Article 9, 90 ALR4th 859.

## **11-9-311. Perfection of security interests in property subject to certain statutes, regulations, and treaties.**

(a) *Security interest subject to other law.* Except as otherwise provided in subsection (d) of this Code section, the filing of a financing statement is not necessary or effective to perfect a security interest in property subject to:

(1) A statute, regulation, or treaty of the United States whose requirements for a security interest's obtaining priority over the rights of a lien creditor with respect to the property preempt subsection (a) of Code Section 11-9-310;

(2) Chapter 3 of Title 40; or

(3) A certificate of title statute of another jurisdiction which provides for a security interest to be indicated on the certificate as a condition or result of the security interest's obtaining priority over the rights of a lien creditor with respect to the property.



(b) *Compliance with other law.* Compliance with the requirements of a statute, regulation, or treaty described in subsection (a) of this Code section for obtaining priority over the rights of a lien creditor is equivalent to the filing of a financing statement under this article. Except as otherwise provided in subsection (d) of this Code section, in Code Section 11-9-313, and in subsections (d) and (e) of Code Section 11-9-316 for goods covered by a certificate of title, a security interest in property subject to a statute, regulation, or treaty described in subsection (a) of this Code section may be perfected only by compliance with those requirements, and a security interest so perfected remains perfected notwithstanding a change in the use or transfer of possession of the collateral.

(c) *Duration and renewal of perfection.* Except as otherwise provided in subsection (d) of this Code section and subsections (d) and (e) of Code Section 11-9-316, duration and renewal of perfection of a security interest perfected by compliance with the requirements prescribed by a statute, regulation, or treaty described in subsection (a) of this Code section are governed by the statute, regulation, or treaty. In other respects, the security interest is subject to this article.

(d) *Inapplicability to certain inventory.* During any period in which collateral subject to a statute specified in paragraph (2) of subsection (a) of this Code section is inventory held for sale or lease by a person or leased by that person as lessor and that person is in the business of selling goods of that kind, this Code section does not apply to a security interest in that collateral created by that person. (Code 1981, § 11-9-311, enacted by Ga. L. 2001, p. 362, § 1.)

#### RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 9-311.

**11-9-312. Perfection of security interests in chattel paper, deposit accounts, documents, goods covered by documents, instruments, investment property, letter of credit rights, and money; perfection by permissive filing; temporary perfection without filing or transfer of possession.**

(a) *Perfection by filing permitted.* A security interest in chattel paper, negotiable documents, instruments, or investment property may be perfected by filing.

(b) *Control or possession of certain collateral.* Except as otherwise provided in subsections (c) and (d) of Code Section 11-9-315 for proceeds:

(1) A security interest in a deposit account may be perfected only by control under Code Section 11-9-314;

(2) Except as otherwise provided in subsection (d) of Code Section 11-9-308, a security interest in a letter of credit right may be perfected only by control under Code Section 11-9-314; and

(3) A security interest in money may be perfected only by the secured party's taking possession under Code Section 11-9-313.

(c) *Goods covered by negotiable document.* While goods are in the possession of a bailee that has issued a negotiable document covering the goods:

(1) A security interest in the goods may be perfected by perfecting a security interest in the document; and

(2) A security interest perfected in the document has priority over any security interest that becomes perfected in the goods by another method during that time.

(d) *Goods covered by nonnegotiable document.* While goods are in the possession of a bailee that has issued a nonnegotiable document covering the goods, a security interest in the goods may be perfected by:

(1) Issuance of a document in the name of the secured party;

(2) The bailee's receipt of notification of the secured party's interest;  
or

(3) Filing as to the goods.

(e) *Temporary perfection; new value.* A security interest in certificated securities, negotiable documents, or instruments is perfected without filing or the taking of possession for a period of 20 days from the time it attaches to the extent that it arises for new value given under an authenticated security agreement.

(f) *Temporary perfection; goods or documents made available to debtor.* A perfected security interest in a negotiable document or goods in possession of a bailee, other than one that has issued a negotiable document for the goods, remains perfected for 20 days without filing if the secured party makes available to the debtor the goods or documents representing the goods for the purpose of:

(1) Ultimate sale or exchange; or

(2) Loading, unloading, storing, shipping, transshipping, manufacturing, processing, or otherwise dealing with them in a manner preliminary to their sale or exchange.

(g) *Temporary perfection; delivery of security certificate or instrument to debtor.* A perfected security interest in a certificated security or instrument remains perfected for 20 days without filing if the secured party delivers the security certificate or instrument to the debtor for the purpose of:

(1) Ultimate sale or exchange; or

(2) Presentation, collection, enforcement, renewal, or registration of transfer.

(h) *Expiration of temporary perfection.* After the 20 day period specified in subsection (e), (f), or (g) of this Code section expires, perfection depends upon compliance with this article. (Code 1981, § 11-9-312, enacted by Ga. L. 2001, p. 362, § 1.)

**Law reviews.** — For article, “Security Transfers by Secured Parties,” see 4 Ga. L. Rev. 527 (1970).

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 68A Am. Jur. 2d, Secured Transactions, §§ 18, 38, 51-53, 109, 288 et seq., 304, 310, 311, 445, 448, 455, 495-509, 534-537, 926-930.

**C.J.S.** — 6A C.J.S., Assignments, §§ 79, 80, 85. 72 C.J.S., Pledges, § 22.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 9-312.

**ALR.** — Effectiveness of original financing statement under UCC Article 9 after change in debtor’s name, identity, or business structure, 99 ALR3d 1194.

### **11-9-313. When possession by or delivery to secured party perfects security interest without filing.**

(a) *Perfection by possession or delivery.* Except as otherwise provided in subsection (b) of this Code section, a secured party may perfect a security interest in negotiable documents, goods, instruments, money, or tangible chattel paper by taking possession of the collateral. A secured party may perfect a security interest in certificated securities by taking delivery of the certificated securities under Code Section 11-8-301.

(b) *Goods covered by certificate of title.* With respect to goods covered by a certificate of title issued by this state, a secured party may perfect a security interest in the goods by taking possession of the goods only in the circumstances described in subsection (d) of Code Section 11-9-316.

(c) *Collateral in possession of person other than debtor.* With respect to collateral other than certificated securities and goods covered by a document, a secured party takes possession of collateral in the possession of a person other than the debtor, the secured party, or a lessee of the collateral from the debtor in the ordinary course of the debtor’s business, when:

(1) The person in possession authenticates a record acknowledging that it holds possession of the collateral for the secured party’s benefit; or

(2) The person takes possession of the collateral after having authenticated a record acknowledging that it will hold possession of collateral for the secured party’s benefit.

(d) *Time of perfection by possession; continuation of perfection.* If perfection of a security interest depends upon possession of the collateral by a secured



party, perfection occurs no earlier than the time the secured party takes possession and continues only while the secured party retains possession.

(e) *Time of perfection by delivery; continuation of perfection.* A security interest in a certificated security in registered form is perfected by delivery when delivery of the certificated security occurs under Code Section 11-8-301 and remains perfected by delivery until the debtor obtains possession of the security certificate.

(f) *Acknowledgment not required.* A person in possession of collateral is not required to acknowledge that it holds possession for a secured party's benefit.

(g) *Effectiveness of acknowledgment; no duties or confirmation.* If a person acknowledges that it holds possession for the secured party's benefit:

- (1) The acknowledgment is effective under subsection (c) of this Code section or subsection (a) of Code Section 11-8-301, even if the acknowledgment violates the rights of a debtor; and
- (2) Unless the person otherwise agrees or law other than this article otherwise provides, the person does not owe any duty to the secured party and is not required to confirm the acknowledgment to another person.

(h) *Secured party's delivery to person other than debtor.* A secured party having possession of collateral does not relinquish possession by delivering the collateral to a person other than the debtor or a lessee of the collateral from the debtor in the ordinary course of the debtor's business if the person was instructed before the delivery or is instructed contemporaneously with the delivery:

- (1) To hold possession of the collateral for the secured party's benefit; or
- (2) To redeliver the collateral to the secured party.

(i) *Effect of delivery under subsection (h) of this Code section; no duties or confirmation.* A secured party does not relinquish possession, even if a delivery under subsection (h) of this Code section violates the rights of a debtor. A person to which collateral is delivered under subsection (h) of this Code section does not owe any duty to the secured party and is not required to confirm the delivery to another person unless the person otherwise agrees or law other than this article otherwise provides. (Code 1981, § 11-9-313, enacted by Ga. L. 2001, p. 362, § 1.)

**Law reviews.** — For note, “Limits on Residential Mortgage Lender Protection Section 1322(b) of the Bankruptcy Code,” see 9 Ga. St. U.L. Rev. 647 (1993).

JUDICIAL DECISIONS

**Editor's notes.** — In the light of the similarity of the provisions, decisions under former Article 9 are included in the annotations for this Code section. For a table of comparable provisions, see the table at the beginning of the Article.

**Scope of section.** — This section deals with perfection of security interests so as to protect and give priority to secured creditors over claims of third parties in personal property taken as security; it does not govern creation of property rights or security interests. *McCrackin v. Hayes*, 118 Ga. App. 267, 163 S.E.2d 246 (1968) (decided under former Code Section 11-9-305).

**Money.** — Security interest in money (either originally given or received as proceeds from negotiation of instrument) is perfected by possession. *In re Atlanta Times, Inc.*, 259 F. Supp. 820 (N.D. Ga. 1966), *aff'd sub nom. Sanders v. National Acceptance Co. of Am.*, 383 F.2d 606 (5th Cir. 1967) (decided under former Code Section 11-9-305).

**Escrow account.** — Creditor's security interest in escrow account perfected by possession. *Dent v. Associates Equity Servs. Co.*, 130 Bankr. 623 (Bankr. S.D. Ga. 1991) (decided under former Code Section 11-9-305).

**Rights vested.** — This provision does not

nullify rule that "transfer of instrument vests in transferee such rights as transferor has." *McCrackin v. Hayes*, 118 Ga. App. 267, 163 S.E.2d 246 (1968) (decided under former Code Section 11-9-305).

**Ring.** — Creditor perfected its security interest in a diamond ring by taking possession of it. *First Am. Bank & Trust Co. v. Harris (In re Stewart)*, 74 Bankr. 350 (Bankr. M.D. Ga. 1987) (decided under former Code Section 11-9-305).

**Computer information and programming.** — Computer information and programming recorded on magnetic tape were "general intangibles" which are not included in the types of collateral in which security interests can be perfected by possession under former § 11-9-305 (see now § 11-9-313), and a security interest therein could therefore only be perfected by filing a financing statement. *Dabney v. Information Exch., Inc.*, 98 Bankr. 603 (Bankr. N.D. Ga. 1989) (decided under former Code Section 11-9-305).

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 68A Am. Jur. 2d, Secured Transactions, §§ 16, 49, 55, 109, 288 et seq., 444-479.

**C.J.S.** — 6A C.J.S., Assignments, §§ 79, 80, 85. 72 C.J.S., Pledges, § 22.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 9-313.

**ALR.** — Rights of holders of different notes in respect of collateral securing them, 52 ALR 1391.

#### 11-9-314. Perfection by control.

(a) *Perfection by control.* A security interest in investment property, deposit accounts, letter of credit rights, or electronic chattel paper may be perfected by control of the collateral under Code Section 11-9-104, 11-9-105, 11-9-106, or 11-9-107.

(b) *Specified collateral; time of perfection by control; continuation of perfection.* A security interest in deposit accounts, electronic chattel paper, or letter of credit rights is perfected by control under Code Section 11-9-104, 11-9-105, or 11-9-107 when the secured party obtains control and remains perfected by control only while the secured party retains control.

(c) *Investment property; time of perfection by control; continuation of perfection.* A security interest in investment property is perfected by control under Code Section 11-9-106 from the time the secured party obtains control and remains perfected by control until:

- (1) The secured party does not have control; and

(2) One of the following occurs:

(A) If the collateral is a certificated security, the debtor has or acquires possession of the security certificate;

(B) If the collateral is an uncertificated security, the issuer has registered or registers the debtor as the registered owner; or

(C) If the collateral is a security entitlement, the debtor is or becomes the entitlement holder. (Code 1981, § 11-9-314, enacted by Ga. L. 2001, p. 362, § 1.)

#### RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 9-314.

#### 11-9-315. Secured party's rights on disposition of collateral and in proceeds.

(a) *Disposition of collateral; continuation of security interest or agricultural lien; proceeds.* Except as otherwise provided in this article and in subsection (2) of Code Section 11-2-403:

(1) A security interest or agricultural lien continues in collateral notwithstanding sale, lease, license, exchange, or other disposition thereof unless the secured party authorized the disposition free of the security interest or agricultural lien; and

(2) A security interest attaches to any identifiable proceeds of collateral.

(b) *When commingled proceeds identifiable.* Proceeds that are commingled with other property are identifiable proceeds:

(1) If the proceeds are goods, to the extent provided by Code Section 11-9-336; and

(2) If the proceeds are not goods, to the extent that the secured party identifies the proceeds by a method of tracing, including application of equitable principles, that is permitted under law other than this article with respect to commingled property of the type involved.

(c) *Perfection of security interest in proceeds.* A security interest in proceeds is a perfected security interest if the security interest in the original collateral was perfected.

(d) *Continuation of perfection.* A perfected security interest in proceeds becomes unperfected on the twenty-first day after the security interest attaches to the proceeds unless:

(1) The following conditions are satisfied:

(A) A filed financing statement covers the original collateral;



(B) The proceeds are collateral in which a security interest may be perfected by filing in the office in which the financing statement has been filed; and

(C) The proceeds are not acquired with cash proceeds;

(2) The proceeds are identifiable cash proceeds; or

(3) The security interest in the proceeds is perfected other than under subsection (c) of this Code section when the security interest attaches to the proceeds or within 20 days thereafter.

(e) *When perfected security interest in proceeds becomes unperfected.* If a filed financing statement covers the original collateral, a security interest in proceeds which remains perfected under paragraph (1) of subsection (d) of this Code section becomes unperfected at the later of:

(1) When the effectiveness of the filed financing statement lapses under Code Section 11-9-515 or is terminated under Code Section 11-9-513; or

(2) The twenty-first day after the security interest attaches to the proceeds. (Code 1981, § 11-9-315, enacted by Ga. L. 2001, p. 362, § 1.)

**Law reviews.** — For article discussing the classification of a continuing security interest in changing collateral as an unenforceable preference under Section 60a of the Bankruptcy Act, see 1 Ga. L. Rev. 257 (1967). For article, “The Revisions to Article IX of the Uniform Commercial Code,” see 15 Ga. St. B.J. 120 (1977). For article, “The Good Faith Purchase Idea and the Uniform Commercial Code,” see 15 Ga. L. Rev. 605 (1981). For article, “Preparing the Georgia Farmer (or Other Smaller Entrepreneur)

for Bankruptcy,” see 22 Ga. State Bar J. 186 (1986). For annual survey article on commercial law, see 50 Mercer L. Rev. 193 (1998).

For note discussing creditor’s remedy of direct collection of accounts and instruments owed to the defaulting debtor, see 3 Ga. L. Rev. 198 (1968).

For comment on *Sherrock v. Commercial Credit Corp.*, 290 A.2d 648 (Del. S. Ct. 1972), see 10 Ga. St. B.J. 110 (1973).

## JUDICIAL DECISIONS

**Editor’s notes.** — In the light of the similarity of the provisions, decisions under former Article 9 are included in the annotations for this Code section. For a table of comparable provisions, see the table at the beginning of the Article.

**Construction.** — This statute is in derogation of common law and must be strictly construed and followed. *Citizens & S. Nat’l Bank v. Weyerhaeuser Co.*, 152 Ga. App. 176, 262 S.E.2d 485 (1979) (decided under former Code Section 11-9-306).

**Security interest in money.** — Security interest in money (either originally given or received as proceeds from negotiation of

instrument) is perfected by possession. In re *Atlanta Times, Inc.*, 259 F. Supp. 820 (N.D. Ga. 1966), *aff’d sub nom. Sanders v. National Acceptance Co. of Am.*, 383 F.2d 606 (5th Cir. 1967) (decided under former Code Section 11-9-306).

**Continuation of security interest.** — Security interest continues in collateral notwithstanding sale, exchange, or other disposition, unless authorized by secured party. *Commercial Credit Equip. Corp. v. Bates*, 159 Ga. App. 910, 285 S.E.2d 560 (1981) (decided under former Code Section 11-9-306).

Security interest remains perfected in

property transferred without secured creditor's knowledge or consent. *Abney v. Nikko Audio* (In re Environmental Elec. Sys.), 2 Bankr. 583 (N.D. Ga. 1980) (decided under former Code Section 11-9-306).

Any time a debtor sells collateral and the sale is not authorized by a secured party, the lien continues in the property in hands of third-party purchaser. *Moister v. National Bank* (In re Guaranteed Muffler Supply Co.), 1 Bankr. 324 (Bankr. N.D. Ga. 1979) (decided under former Code Section 11-9-306).

Where contract for the use of equipment was correctly held to be a sales contract which created a security interest, such security interest continued in collateral notwithstanding sale to a third party where the disposition was not authorized by the secured party as would have been evident from the filing of a financing statement. *Mann Inv. Co. v. Columbia Nitrogen Corp.*, 173 Ga. App. 77, 325 S.E.2d 612 (1984) (decided under former Code Section 11-9-306).

Georgia bank's perfected security interest was not terminated when it consented to the sale of the equipment to the debtor subject to its security interest. *Loeb v. Franchise Distribs., Inc.* (In re Franchise Sys.), 46 Bankr. 158 (Bankr. N.D. Ga. 1985) (decided under former Code Section 11-9-306).

**Bankruptcy debtor's unearned postpetition income.** — Bankruptcy debtor's unearned postpetition income under a contract for employment did not constitute "proceeds" of creditor's prepetition interest in accounts receivable. *In re Rumker*, 184 Bankr. 621 (Bankr. S.D. Ga. 1995).

**Unauthorized disposition of collateral.** — When debtor makes unauthorized disposition of collateral, secured party may maintain action for conversion against subsequent purchaser. *United States v. McCleskey Mills, Inc.*, 409 F.2d 1216 (5th Cir. 1969) (decided under former Code Section 11-9-306).

**Commingled funds.** — In event of insolvency proceedings by or against debtor, secured party's perfected security interest extends to all cash and bank accounts of debtor, if cash proceeds have been commingled or deposited with other funds in such accounts, subject, however, to any right of setoff. *Citizens & S. Nat'l Bank v. Weyerhaeuser Co.*, 152 Ga. App. 176, 262

S.E.2d 485 (1979) (decided under former Code Section 11-9-306).

Under former subsection (4)(d)(ii), when a debtor has commingled proceeds of collateral with other cash or in a deposit account, the ceiling on the secured creditor's recovery from the account is the amount of cash proceeds received by the debtor within the ten days prior to the filing of the petition, regardless of whether such proceeds were actually deposited in the account. *Small v. Collegedale Distribs.* (In re Unity Foods, Inc.), 75 Bankr. 222 (Bankr. N.D. Ga. 1987) (decided under former Code Section 11-9-306).

**Insurance benefits considered "proceeds" and subject to lender's security interest.** — Insurance benefits payable from a third-party tortfeasor's insurer upon the destruction of a vehicle became "proceeds," subject to a lender's security interest, before payment to the victims. *JCS Enter., Inc. v. Vanliner Ins.*, 227 Ga. App. 371, 489 S.E.2d 95 (1997).

**Proceeds of collateral.** — Under former Georgia law, proceeds included insurance payable by reason of loss or damage to collateral but returned or unearned insurance premiums are in no sense a substitute for specified collateral and cannot be held to constitute its proceeds. *Blalock v. Aetna Fin. Co.*, 511 F. Supp. 33 (N.D. Ga. 1980) (decided under former Code Section 11-9-306).

**Lien attached to proceeds.** — The Farmers Home Administration, which had a prepetition security agreement extending to the livestock, farm products, increases, replacements, substitutions and additions of the bankruptcy debtors, had a lien which attached to the proceeds of the sales of milk produced and sold after the bankruptcy filing. *United States v. Hollie*, 42 Bankr. 111 (Bankr. M.D. Ga. 1984) (decided under former Code Section 11-9-306).

**Releases.** — Creditor's execution of a partial release, giving up its interest in debtor's "accounts receivable and proceeds of inventory sold in the normal course of business," eliminated any secured interest in the accounts receivable or proceeds it otherwise would have had. *Ray's Mobile Home Repair Serv., Inc. v. Presidential Fin. Corp.*, 192 Ga. App. 682, 386 S.E.2d 48 (1989) (decided under former Code Section 11-9-306).

Release of an "Assignment of Proceeds

from the Sale of Dairy Products” constituted a waiver of the lienholder’s security interest in milk products. *Thomas v. Ralston Purina Co.*, 43 Bankr. 201 (Bankr. M.D. Ga. 1984) (decided under former Code Section 11-9-306).

**Change of location.** — Where the transfer of debtor’s radio tower, consented to by

creditor, merely constituted a change of location, it was not a “sale, exchange, or other disposition” within the meaning of former subsection (2) of this section. *Tidwell v. Slocumb (In re Ga. Steel, Inc.)*, 71 Bankr. 903 (Bankr. M.D. Ga. 1987) (decided under former Code Section 11-9-306).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 68A Am. Jur. 2d, Secured Transactions, §§ 85-100, 121, 291-293, 482-486, 527, 550-554, 962-982.

**C.J.S.** — 72 C.J.S., Pledges, §§ 28, 36.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 9-315.

**ALR.** — Rights and duties of parties to conditional sales contract as to resale of repossessed property, 49 ALR2d 15.

Uniform Commercial Code: Burden of proof as to commercially reasonable disposition of collateral, 59 ALR3d 369.

Effectiveness of original financing statement under UCC Article 9 after change in debtor’s name, identity, or business structure, 99 ALR3d 1194.

Effect of UCC Article 9 upon conflict, as to funds in debtor’s bank account, between secured creditor and bank claiming right of setoff, 3 ALR4th 998.

What is “commercially reasonable” disposition of collateral required by UCC § 9-504(3), 7 ALR4th 308.

What constitutes secured party’s authorization to transfer collateral free of lien under UCC § 9-306(2), 37 ALR4th 787.

Secured transactions: government agricultural program payments as “proceeds” of agricultural products under UCC § 9-306, 79 ALR4th 903.

Causes of action governed by limitations period in UCC § 2-725, 49 ALR5th 1.

### 11-9-316. Continued perfection of security interest following change in governing law.

(a) *General rule; effect on perfection of change in governing law.* A security interest perfected pursuant to the law of the jurisdiction designated in paragraph (1) of Code Section 11-9-301 or subsection (c) of Code Section 11-9-305 remains perfected until the earliest of:

(1) The time perfection would have ceased under the law of that jurisdiction;

(2) The expiration of four months after a change of the debtor’s location to another jurisdiction; or

(3) The expiration of one year after a transfer of collateral to a person that thereby becomes a debtor and is located in another jurisdiction.

(b) *Security interest perfected or unperfected under law of new jurisdiction.* If a security interest described in subsection (a) of this Code section becomes perfected under the law of the other jurisdiction before the earliest time or event described in that subsection, it remains perfected thereafter. If the security interest does not become perfected under the law of the other jurisdiction before the earliest time or event, it becomes unperfected and is deemed never to have been perfected as against a purchaser of the collateral for value.



(c) *Possessory security interest in collateral moved to new jurisdiction.* A possessory security interest in collateral, other than goods covered by a certificate of title and as-extracted collateral consisting of goods, remains continuously perfected if:

- (1) The collateral is located in one jurisdiction and subject to a security interest perfected under the law of that jurisdiction;
- (2) Thereafter the collateral is brought into another jurisdiction; and
- (3) Upon entry into the other jurisdiction, the security interest is perfected under the law of the other jurisdiction.

(d) *Goods covered by certificate of title from this state.* Except as otherwise provided in subsection (e) of this Code section, a security interest in goods covered by a certificate of title which is perfected by any method under the law of another jurisdiction when the goods become covered by a certificate of title from this state remains perfected until the security interest would have become unperfected under the law of the other jurisdiction had the goods not become so covered.

(e) *When subsection (d) of this Code section security interest becomes unperfected against purchasers.* A security interest described in subsection (d) of this Code section becomes unperfected as against a purchaser of the goods for value and is deemed never to have been perfected as against a purchaser of the goods for value if the applicable requirements for perfection under subsection (b) of Code Section 11-9-311 or Code Section 11-9-313 are not satisfied before the earlier of:

- (1) The time the security interest would have become unperfected under the law of the other jurisdiction had the goods not become covered by a certificate of title from this state; or
- (2) The expiration of four months after the goods had become so covered.

(f) *Change in jurisdiction of bank, issuer, nominated person, securities intermediary, or commodity intermediary.* A security interest in deposit accounts, letter of credit rights, or investment property which is perfected under the law of the bank's jurisdiction, the issuer's jurisdiction, a nominated person's jurisdiction, the securities intermediary's jurisdiction, or the commodity intermediary's jurisdiction, as applicable, remains perfected until the earlier of:

- (1) The time the security interest would have become unperfected under the law of that jurisdiction; or
- (2) The expiration of four months after a change of the applicable jurisdiction to another jurisdiction.

(g) *Subsection (f) of this Code section security interest perfected or unperfected under law of new jurisdiction.* If a security interest described in subsection (f)

of this Code section becomes perfected under the law of the other jurisdiction before the earlier of the time or the end of the period described in that subsection, it remains perfected thereafter. If the security interest does not become perfected under the law of the other jurisdiction before the earlier of that time or the end of that period, it becomes unperfected and is deemed never to have been perfected as against a purchaser of the collateral for value. (Code 1981, § 11-9-316, enacted by Ga. L. 2001, p. 362, § 1.)

#### RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 9-316.

#### Subpart 3

#### Priority

#### **11-9-317. Interests that take priority over or take free of security interest or agricultural lien.**

(a) *Conflicting security interests and rights of lien creditors.* A security interest or agricultural lien is subordinate to the rights of:

(1) A person entitled to priority under Code Section 11-9-322; and

(2) Except as otherwise provided in subsection (e) of this Code section, a person that becomes a lien creditor before the earlier of the time:

(A) The security interest or agricultural lien is perfected; or

(B) A financing statement covering the collateral is filed.

(b) *Buyers that receive delivery.* Except as otherwise provided in subsection (e) of this Code section, a buyer, other than a secured party, of tangible chattel paper, documents, goods, instruments, or a security certificate takes free of a security interest or agricultural lien if the buyer gives value and receives delivery of the collateral without knowledge of the security interest or agricultural lien and before it is perfected.

(c) *Lessees that receive delivery.* Except as otherwise provided in subsection (e) of this Code section, a lessee of goods takes free of a security interest or agricultural lien if the lessee gives value and receives delivery of the collateral without knowledge of the security interest or agricultural lien and before it is perfected.

(d) *Licensees and buyers of certain collateral.* A licensee of a general intangible or a buyer, other than a secured party, of accounts, electronic chattel paper, general intangibles, or investment property other than a

certificated security takes free of a security interest if the licensee or buyer gives value without knowledge of the security interest and before it is perfected.

(e) *Purchase money security interest.* Except as otherwise provided in Code Sections 11-9-320 and 11-9-321, if a person files a financing statement with respect to a purchase money security interest before or within 20 days after the debtor receives delivery of the collateral, the security interest takes priority over the rights of a buyer, lessee, or lien creditor which arise between the time the security interest attaches and the time of filing. (Code 1981, § 11-9-317, enacted by Ga. L. 2001, p. 362, § 1.)

### JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Article 9 are included in the annotations of this section.

**Effect of perfection.** — Following perfection of security interest, other creditors enjoy no priority over such security interest. *General Lithographing Co. v. Sight & Sound Projectors, Inc.*, 128 Ga. App. 304, 196 S.E.2d 479 (1973) (decided under former Code Section 11-9-301).

**Knowledge of security interest.** — Where security interest in an automobile was not properly recorded and was documented only in divorce decree's incorporated agreement, the secured party failed to carry the burden of proving that buyer had actual knowledge of the secured party's interest, even assuming the buyer had knowledge of the divorce. *Freeman v. Bentley*, 205 Ga. App. 409, 422 S.E.2d 435 (1992) (decided under former Code Section 11-9-301).

**Effect of filing.** — Filing of financing statement can perfect only those interests acquired through security agreements. *Tri-County Livestock Auction Co. v. Bank of Madison*, 228 Ga. 325, 185 S.E.2d 393 (1971) (decided under former Code Section 11-9-301).

**Unperfected security interests.** — Surety, under master surety agreement in which bankrupt had signed as principal, could not assert priority over trustee with respect to equipment of bankrupt on basis of equitable lien upon retained contract funds following surety's completion of construction contract; without such equitable lien, surety, without perfected security interest, stood as general unsecured creditor which must de-

fer to trustee. *In re Merts Equip. Co.*, 438 F. Supp. 295 (M.D. Ga. 1977) (decided under former Code Section 11-9-301).

Unperfected security interest is subordinate to rights of lien creditors who acquire liens without knowledge of prior security interest and before its perfection; this operates in favor of creditor who has acquired lien on property involved by attachment, levy or the like. *Mack Trucks, Inc. v. Ryder Truck Rental, Inc.*, 110 Ga. App. 68, 137 S.E.2d 718 (1964) (decided under former Code Section 11-9-301).

**Judgment on note.** — Judgment on debt for unpaid balance on note does not in itself operate to perfect security interest in collateral listed on note, and payee's rights are subordinate to those of lien creditor who has no knowledge of security interest. *Fas-Pac, Inc. v. Fillingame*, 123 Ga. App. 203, 180 S.E.2d 243 (1971) (decided under former Code Section 11-9-301).

**Judgment liens are subordinate.** — The legislature intended to make judgment liens subordinate to purchase money security interests perfected within the grace period contained in former subsection (2) of this section. *Crossroads Bank v. Corim, Inc.*, 262 Ga. 364, 418 S.E.2d 601 (1992) (decided under former Code Section 11-9-301).

**Purchase money security interests.** — A purchase money security interest has priority over a prior judgment lien only to the extent permitted by former subsection (2) of this section, which established a 15-day grace period for filing the purchase money security interest. *Crossroads Bank v. Corim, Inc.*, 262 Ga. 364, 418 S.E.2d 601 (1992) (decided under former Code Section 11-9-301).



Unperfected and untimely-perfected purchase money security interests are subordinate to a judgment lien. *Crossroads Bank v. Corim, Inc.*, 262 Ga. 364, 418 S.E.2d 601 (1992) (decided under former Code Section 11-9-301).

**Applying Canadian law.** — to the facts of

the case, a remote purchaser could not prevail over a creditor who had perfected its purchase money security interest in a truck within the time specified by Canadian law. *Paccar Fin. Servs., Ltd. v. Johnson*, 195 Ga. App. 412, 393 S.E.2d 685 (1990).

#### RESEARCH REFERENCES

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 9-317.

### 11-9-318. No interest retained in right to payment that is sold; rights and title of seller of account or chattel paper with respect to creditors and purchasers.

(a) *Seller retains no interest.* A debtor that has sold an account, chattel paper, payment intangible, or promissory note does not retain a legal or equitable interest in the collateral sold.

(b) *Deemed rights of debtor if buyer's security interest unperfected.* For purposes of determining the rights of creditors of, and purchasers for value of an account or chattel paper from, a debtor that has sold an account or chattel paper, while the buyer's security interest is unperfected, the debtor is deemed to have rights and title to the account or chattel paper identical to those the debtor sold. (Code 1981, § 11-9-318, enacted by Ga. L. 2001, p. 362, § 1.)

**Law reviews.** — Commercial Law, see 53 Mercer L. Rev. 153 (2001).

#### RESEARCH REFERENCES

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 9-318.

### 11-9-319. Rights and title of consignee with respect to creditors and purchasers.

(a) *Consignee has consignor's rights.* Except as otherwise provided in subsection (b) of this Code section, for purposes of determining the rights of creditors of, and purchasers for value of goods from, a consignee, while the goods are in the possession of the consignee, the consignee is deemed to have rights and title to the goods identical to those the consignor had or had power to transfer.

(b) *Applicability of other law.* For purposes of determining the rights of a creditor of a consignee, law other than this article determines the rights and title of a consignee while goods are in the consignee's possession if, under

this part, a perfected security interest held by the consignor would have priority over the rights of the creditor. (Code 1981, § 11-9-319, enacted by Ga. L. 2001, p. 362, § 1.)

#### RESEARCH REFERENCES

**U.L.A.** — Uniform Commercial Code  
(U.L.A.) § 9-319.

#### **11-9-320. Buyer of goods.**

(a) *Buyer in ordinary course of business.* Except as otherwise provided in subsection (e) of this Code section, a buyer in ordinary course of business, other than a person buying farm products from a person engaged in farming operations, takes free of a security interest created by the buyer's seller, even if the security interest is perfected and the buyer knows of its existence.

(b) *Buyer of consumer goods.* Except as otherwise provided in subsection (e) of this Code section, a buyer of goods from a person who used or bought the goods for use primarily for personal, family, or household purposes takes free of a security interest, even if perfected, if the buyer buys:

- (1) Without knowledge of the security interest;
- (2) For value;
- (3) Primarily for the buyer's personal, family, or household purposes; and
- (4) Before the filing of a financing statement covering the goods.

(c) *Effectiveness of filing for subsection (b) of this Code section.* To the extent that it affects the priority of a security interest over a buyer of goods under subsection (b) of this Code section, the period of effectiveness of a filing made in the jurisdiction in which the seller is located is governed by subsections (a) and (b) of Code Section 11-9-316.

(d) *Buyer in ordinary course of business at wellhead or minehead.* A buyer in ordinary course of business buying oil, gas, or other minerals at the wellhead or minehead or after extraction takes free of an interest arising out of an encumbrance.

(e) *Possessory security interest not affected.* Subsections (a) and (b) of this Code section do not affect a security interest in goods in the possession of the secured party under Code Section 11-9-313. (Code 1981, § 11-9-320, enacted by Ga. L. 2001, p. 362, § 1.)

**Law reviews.** — For article surveying developments in Georgia commercial law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 33 (1981).

For note, "U.C.C. Section 9-307(1) and the Non-Possessory Buyer: Is the Good Faith Purchaser Always Right?," see 19 Ga. L. Rev. 123 (1984). For note on 1993 amendment of this section, see 10 Ga. St. U.L. Rev. 41 (1993).

For comment on *Sherrock v. Commercial Credit Corp.*, 290 A.2d 648 (Del. S. Ct. 1972), see 10 Ga. St. B.J. 110 (1973).

### JUDICIAL DECISIONS

**Editor's notes.** — In the light of the similarity of the provisions, decisions under former Article 9 are included in the annotations for this Code section. For a table of comparable provisions, see the table at the beginning of the Article.

**Legislative intent.** — Guiding principle in former subsection (1) of this section is to protect buyer in ordinary course of business from dealer against reservation of title or other hidden interest in goods. *Commercial Credit Equip. Corp. v. Bates*, 154 Ga. App. 71, 267 S.E.2d 469 (1980) (decided under former Code Section 11-9-307).

**Statute was intended to protect buyers in the ordinary course** from the lien claims of creditors who financed floor plan arrangements for the dealer. *Superior Bank, FSB v. Human Servs. Employees Credit Union*, 252 Ga. App. 489, 556 S.E.2d 155 (2001) (decided under former Code Section 11-9-307).

**Protection of buyers.** — Buyers in ordinary course of business take free of previously perfected security interests for the sake of untrammelled commercial dealing. *United States v. McCleskey Mills, Inc.*, 409 F.2d 1216 (5th Cir. 1969) (decided under former Code Section 11-9-307).

**Applicability.** — This provision not operative where perfection of security interest is required under Ch. 3, T. 40. *First Nat'l Bank & Trust Co. v. Smithloff*, 119 Ga. 284, 167 S.E.2d 190 (1969) (decided under former Code Section 11-9-307).

**Floor-plan financed vehicle.** — Where there is floor-plan financing of vehicle, perfection of security interest in inventory would come under Uniform Commercial Code and as to such security interest created by a dealer priority is governed by former § 11-9-307 (see now § 11-9-320). *Rome Bank & Trust Co. v. Bradshaw*, 143 Ga. App. 153, 237 S.E.2d 612 (1977) (decided under former Code Section 11-9-307).

**Knowledge of violation of security interest.** — A buyer who merely knows of a

security interest of another party covering certain goods constitutes a buyer in ordinary course of business and takes free of that security interest, whereas a buyer who knows that the sale actually violates some term of the security agreement not waived by the secured party takes subject to that security interest. *First Nat'l Bank v. Atlanta Classic Cars, Inc.*, 184 Ga. App. 784, 363 S.E.2d 16 (1987) (decided under former Code Section 11-9-307).

**Purchase of used car from car-leasing business.** — Where sale of used cars upon termination of leases was merely incidental to leasing business, former subsection (1) had no application to such incidental sales and purchaser at such sale did not purchase from a person engaged in business of selling cars and was therefore not entitled to protection afforded to buyers in the ordinary course of business. *United Carolina Bank v. Capital Auto. Co.*, 163 Ga. App. 796, 294 S.E.2d 661 (1982) (decided under former Code Section 11-9-307).

**Attachment proceedings.** — Where plaintiffs in attachment proceedings are seeking refund of down payment after rescission of contract, fact that debt is to be satisfied by execution sale of attached mobile home does not make them buyers in ordinary course of business. *Troy Lumber Co. v. Williams*, 124 Ga. App. 636, 185 S.E.2d 580 (1971) (decided under former Code Section 11-9-307).

**Cited in** *Capital Auto. Co. v. GMAC*, 119 Ga. App. 186, 166 S.E.2d 584 (1969); *First Nat'l Bank & Trust Co. v. McElmurray*, 120 Ga. App. 134, 169 S.E.2d 720 (1969); *United States v. Big Z Whse.*, 311 F. Supp. 283 (S.D. Ga. 1970); *Bank of Madison v. Tri-County Livestock Auction Co.*, 123 Ga. App. 768, 182 S.E.2d 687 (1971); *Greater S. Distrib. Co. v. Usry*, 124 Ga. App. 525, 184 S.E.2d 486 (1971); *Tri-County Livestock Auction Co. v. Bank of Madison*, 228 Ga. 325, 185 S.E.2d 393 (1971); *International Harvester Credit*



Corp. v. Commercial Credit Equip. Corp., 125 Ga. App. 477, 188 S.E.2d 110 (1972); International Harvester Credit Corp. v. Associates Fin. Servs. Co., 133 Ga. App. 488, 211 S.E.2d 430 (1974); Sterling Nat'l Bank &

Trust Co. v. Southwire Co., 713 F.2d 684 (11th Cir. 1983); Owensboro Nat'l Bank v. Jenkins, 173 Ga. App. 775, 328 S.E.2d 399 (1985); Hanington v. Palmer, 103 Bankr. 348 (Bankr. M.D. Ga. 1989).

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 68A Am. Jur. 2d, Secured Transactions, §§ 70, 71, 269, 550, 780-800, 895-925.

**C.J.S.** — 72 C.J.S., Pledges, § 43.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 9-320.

**ALR.** — Rights as between holder of "trust receipt" and purchaser of goods from one who gave it, 31 ALR 937.

Chattel mortgage on live stock as including increase, 39 ALR 153.

Relative rights as between assignee of conditional seller and a subsequent buyer from

the conditional seller after repossession or the like, 72 ALR2d 342.

Who is "person in business of selling goods of that kind" within provision of UCC § 1-201(9) defining buyer in ordinary course of business for purposes of UCC § 9-307(1), 73 ALR3d 338.

Construction of UCC § 9-307(e) providing that under certain conditions a buyer, other than a buyer in the ordinary course of business, takes free of a security interest securing "future advances", 35 ALR4th 390.

### 11-9-321. Licensee of general intangible and lessee of goods in ordinary course of business.

(a) *"Licensee in ordinary course of business."* As used in this Code section, the term "licensee in ordinary course of business" means a person that becomes a licensee of a general intangible in good faith, without knowledge that the license violates the rights of another person in the general intangible, and in the ordinary course from a person in the business of licensing general intangibles of that kind. A person becomes a licensee in the ordinary course if the license to the person comports with the usual or customary practices in the kind of business in which the licensor is engaged or with the licensor's own usual or customary practices.

(b) *Rights of licensee in ordinary course of business.* A licensee in ordinary course of business takes its rights under a nonexclusive license free of a security interest in the general intangible created by the licensor, even if the security interest is perfected and the licensee knows of its existence.

(c) *Rights of lessee in ordinary course of business.* A lessee in ordinary course of business takes its leasehold interest free of a security interest in the goods created by the lessor, even if the security interest is perfected and the lessee knows of its existence. (Code 1981, § 11-9-321, enacted by Ga. L. 2001, p. 362, § 1.)

#### RESEARCH REFERENCES

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 9-321.

**11-9-322. Priorities among conflicting security interests in and agricultural liens on same collateral.**

(a) *General priority rules.* Except as otherwise provided in this Code section, priority among conflicting security interests and agricultural liens in the same collateral is determined according to the following rules:

(1) Conflicting perfected security interests and agricultural liens rank according to priority in time of filing or perfection. Priority dates from the earlier of the time a filing covering the collateral is first made or the security interest or agricultural lien is first perfected, if there is no period thereafter when there is neither filing nor perfection;

(2) A perfected security interest or agricultural lien has priority over a conflicting unperfected security interest or agricultural lien; and

(3) The first security interest or agricultural lien to attach or become effective has priority if conflicting security interests and agricultural liens are unperfected.

(b) *Time of perfection: proceeds and supporting obligations.* For the purposes paragraph (1) of subsection (a) of this Code section:

(1) The time of filing or perfection as to a security interest in collateral is also the time of filing or perfection as to a security interest in proceeds; and

(2) The time of filing or perfection as to a security interest in collateral supported by a supporting obligation is also the time of filing or perfection as to a security interest in the supporting obligation.

(c) *Special priority rules: proceeds and supporting obligations.* Except as otherwise provided in subsection (f) of this Code section, a security interest in collateral which qualifies for priority over a conflicting security interest under Code Section 11-9-327, 11-9-328, 11-9-329, 11-9-330, or 11-9-331 also has priority over a conflicting security interest in:

(1) Any supporting obligation for the collateral; and

(2) Proceeds of the collateral if:

(A) The security interest in proceeds is perfected;

(B) The proceeds are cash proceeds or of the same type as the collateral; and

(C) In the case of proceeds that are proceeds of proceeds, all intervening proceeds are cash proceeds, proceeds of the same type as the collateral, or an account relating to the collateral.

(d) *First to file priority rule for certain collateral.* Subject to subsection (e) of this Code section and except as otherwise provided in subsection (f) of this

Code section, if a security interest in chattel paper, deposit accounts, negotiable documents, instruments, investment property, or letter of credit rights is perfected by a method other than filing, conflicting perfected security interests in proceeds of the collateral rank according to priority in time of filing.

(e) *Applicability of subsection (d) of this Code section.* Subsection (d) of this Code section applies only if the proceeds of the collateral are not cash proceeds, chattel paper, negotiable documents, instruments, investment property, or letter of credit rights.

(f) *Limitations on subsections (a) through (e) of this Code section.* Subsections (a) through (e) of this Code section are subject to:

(1) Subsection (g) of this Code section and the other provisions of this part;

(2) Code Section 11-4-210 with respect to a security interest of a collecting bank;

(3) Code Section 11-5-118 with respect to a security interest of an issuer or nominated person; and

(4) Code Section 11-9-110 with respect to a security interest arising under Article 2 or 2A of this title.

(g) *Priority under agricultural lien statute.* A perfected agricultural lien on collateral has priority over a conflicting security interest in or agricultural lien on the same collateral if the statute creating the agricultural lien so provides. (Code 1981, § 11-9-322, enacted by Ga. L. 2001, p. 362, § 1.)

**Law reviews.** — For article discussing the resolution of conflicting claims to goods between an unsecured seller of goods and a creditor of a buyer claiming under an after-acquired property clause, see 28 Mercer L. Rev. 625 (1977). For article, “The Revisions to Article IX of the Uniform Commercial Code,” see 15 Ga. St. B.J. 120 (1977). For article, “The Good Faith Purchase Idea and the Uniform Commercial Code,” see 15 Ga. L. Rev. 605 (1981). For

article, “Preparing the Georgia Farmer (or Other Smaller Entrepreneur) for Bankruptcy,” see 22 Ga. State Bar J. 186 (1986).

For note examining the conflict between the floating lien in after-acquired property under the Uniform Commercial Code and the voidable preferences provisions of the Bankruptcy Act, see 9 Ga. L. Rev. 685 (1975).

For comment discussing good faith performance and priorities of secured parties, see 36 Emory L.J. 948 (1987).

## JUDICIAL DECISIONS

**Editor’s notes.** — In the light of the similarity of the provisions, decisions under former Article 9 are included in the annotations for this Code section. For a table of comparable provisions, see the table at the beginning of the Article.

**Determining priority.** — Under former subsection (5) determining priority involves

a two-prong determination: (1) how security interest is to be perfected and (2) whether security interest has in fact been so perfected. *Enterprises Now, Inc. v. Citizens & S. Dev. Corp.*, 135 Ga. App. 602, 218 S.E.2d 309 (1975) (decided under former Code Section 11-9-312).

**Order of filing determinative.** — When



competing security interests are all perfected by filing, order of filing determines priority. *Tuftco Sales Corp. v. Garrison Carpet Mills, Inc.*, 158 Ga. App. 674, 282 S.E.2d 159 (1981) (decided under former Code Section 11-9-312).

Where financing statement giving notice of interest of entruster in office machines entrusted to bankrupt is signed by debtor, incorporates security agreement, and adequately describes collateral, is filed prior to filing of bank's financing statement covering inventory, equipment, furniture, and fixtures, prior security interest must prevail. *First Nat'l Bank & Trust Co. v. Olivetti Corp. of Am.*, 130 Ga. App. 896, 204 S.E.2d 781 (1974) (decided under former Code Section 11-9-312).

**Correction of errors in financing statement.** — Once the secured party files an effective financing statement, it is relieved, to a certain extent, of the burden of correcting misleading errors, and a prospective creditor is obligated to inquire into the debtor's source of title. *Western Auto Supply Co. v. McKenzie*, 227 Ga. App. 477, 489 S.E.2d 537 (1997).

**Security interest in check exchanged for goods.** — An experienced, informed seller who has sold goods in exchange for a check and who then files a security interest in the check under the former provisions of this Code section will enjoy priority over even subsequent good faith purchasers. *Dixie Bonded Whse. & Grain Co. v. Allstate Fin. Corp.*, 755 F. Supp. 1543 (M.D. Ga.), *aff'd*, 944 F.2d 819 (11th Cir. 1991) (decided under former Code Section 11-9-312).

**Factor's interest in accounts receivable.** — Factor's interest as a good faith purchaser of a cotton buyer's accounts receivable was superior to the interests asserted by unsecured aggrieved sellers, where the factor's actions with respect to the sellers could be characterized as nothing other than honesty in fact and good faith under Article Two of the UCC. *Dixie Bonded Whse. & Grain Graniteville Co. v. Bleckley Lumber Co.*, 755 F. Supp. 1543 (M.D. Ga.), *aff'd*, 944 F.2d 819 (11th Cir. 1991) (decided under former Code Section 11-9-312).

**Possession of collateral.** — For the purposes of subsection (4), a buyer takes possession at the time of the decision to buy, not at the time of technical physical possession if physical possession was obtained earlier. *Orix Credit Alliance, Inc. v. CIT Group/Equipment Fin., Inc.*, 230 Bankr. 213 (Bankr. M.D. Ga. 1998).

**Timely perfection of interest.** — Where lease agreements with option to purchase specifically dated back to the time of delivery when debtor took possession, it was held that debtor acquired possession of three scrapers for purposes of subsection (4) at the time they were delivered by seller, rather than the time that debtor and seller entered into the lease agreements for the three scrapers, and because seller did not file its financing statement on two of the scrapers within 15 days of the time debtor took possession, as required by subsection (4), seller failed to timely perfect its purchase money security interest in these two scrapers, so bank's prior security interest in equipment, including after-acquired property, had priority over seller's purchase money security interest in these two scrapers pursuant to subsection (5)(a), but because it timely perfected its purchase money security interest in the third scraper, seller had priority over the bank pursuant to subsection (4). *Iron Peddlers, Inc. v. Ivie & Assocs.*, 84 Bankr. 882 (Bankr. N.D. Ga. 1988).

Where a bank's perfected security interest in a skidder did not qualify as a purchase money security interest because the funds it lent were not used by a logging company to purchase the skidder, and where the logging company received possession and became indebted for the purchase price on the date the purchase money lender paid the seller directly, the purchase money lender was the only creditor holding a purchase money security interest, and its perfection of that interest by filing its financing statement within 15 days after the acquisition of ownership and execution by the purchaser of the note evidencing its obligation to pay the purchase price gave that purchase money lender priority. *Citizens Bank of Americus v. Federal Fin. Servs., Inc.*, 235 Ga. App. 482, 509 S.E.2d 339 (1998).

## RESEARCH REFERENCES

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 9-322.

**ALR.** — Priority where senior instrument affecting real property is recorded after execution but before recording of junior instrument, 32 ALR 344.

Construction and effect of provisions of Uniform Conditional Sales Law regarding refiling when goods are removed from district where contract is filed, 68 ALR 554.

Priority as between holders of different notes or obligations secured by the same mortgage (or vendor's lien) or mortgages executed contemporaneously, 115 ALR 40.

Applicability of proceeds of sale of collateral security to barred portion of debt secured, 139 ALR 478.

Priority as between seller or conditional seller of personalty and claimant under after-acquired-property clause of mortgage or other instrument, 86 ALR2d 1152.

Equitable estoppel of secured party's right to assert prior, perfected security interest against other secured creditor or subsequent purchaser under Article 9 of Uniform Commercial Code, 9 ALR5th 708.

**11-9-322.1. Crops produced with new value.**

A perfected security interest in growing crops for new value given to enable the debtor to produce the crops during the production season and given not more than three months before the crops become growing crops by planting or otherwise takes priority over an earlier perfected security interest or agricultural lien to the extent that such earlier interest or lien secures obligations incurred more than six months before the crops become growing crops by planting or otherwise, even though the person giving new value had knowledge of the earlier security interest or agricultural lien. (Code 1981, § 11-9-322.1, enacted by Ga. L. 2001, p. 362, § 1; Ga. L. 2002, p. 995, § 5.)

**The 2002 amendment**, effective July 1, 2002, inserted "growing" near the beginning, inserted "or agricultural lien" and "or lien" near the middle and added "or agricultural lien" at the end.

**Editor's notes.** — Ga. L. 2002, p. 995, § 8, not codified by the General Assembly, pro-

vides that: "This Act shall become effective July 1, 2002, and shall apply to a letter of credit that is issued on or after July 1, 2002. This Act does not apply to a transaction, event, obligation, or duty arising out of or associated with a letter of credit that was issued before July 1, 2002."

## JUDICIAL DECISIONS

**Editor's notes.** — In the light of the similarity of the provisions, decisions under former Article 9 are included in the annotations for this Code section. For a table of comparable provisions, see the table at the beginning of the Article.

**Necessity for new value.** — Where additional collateral is given to secure antecede-

nt debt, new value is not necessary before security interest will attach. However, where there is purchase money security interest in crop to be grown, new value is necessary. *United States v. Big Z Whse.*, 311 F. Supp. 283 (S.D. Ga. 1970) (decided under former Code Section 11-9-312).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 68A Am. Jur. 2d, Secured Transactions, §§ 15, 70, 71, 96-100, 106, 149, 231 et seq., 248, 291, 293, 310, 311, 313, 440-467, 780-791, 836-868.

**C.J.S.** — 72 C.J.S., Pledges, § 23.

**11-9-323. Future advances.**

(a) *When priority based on time of advance.* Except as otherwise provided in subsection (b) of this Code section, for purposes of determining the priority of a perfected security interest under paragraph (1) of subsection (a) of Code Section 11-9-322, perfection of the security interest dates from the time an advance is made to the extent that the security interest secures an advance that:

(1) Is made while the security interest is perfected only:

(A) Under Code Section 11-9-309 when it attaches; or

(B) Temporarily under subsection (e), (f), or (g) of Code Section 11-9-312; and

(2) Is not made pursuant to a commitment entered into before or while the security interest is perfected by a method other than under Code Section 11-9-309 or subsection (e), (f), or (g) of Code Section 11-9-312.

(b) *Buyer of receivables.* Subsection (a) of this Code section does not apply to a security interest held by a secured party that is a buyer of accounts, chattel paper, payment intangibles, or promissory notes or a consignor.

(c) *Buyer of goods.* Except as otherwise provided in subsection (d) of this Code section, a buyer of goods other than a buyer in ordinary course of business takes free of a security interest to the extent that it secures advances made after the earlier of:

(1) The time the secured party acquires knowledge of the buyer's purchase; or

(2) Forty-five days after the purchase.

(d) *Advances made pursuant to commitment; priority of buyer of goods.* Subsection (c) of this Code section does not apply if the advance is made pursuant to a commitment entered into without knowledge of the buyer's purchase and before the expiration of the 45 day period.

(e) *Lessee of goods.* Except as otherwise provided in subsection (f) of this Code section, a lessee of goods, other than a lessee in ordinary course of business, takes the leasehold interest free of a security interest to the extent that it secures advances made after the earlier of:

(1) The time the secured party acquires knowledge of the lease; or



(2) Forty-five days after the lease contract becomes enforceable.

(f) *Advances made pursuant to commitment; priority of lessee of goods.* Subsection (e) of this Code section does not apply if the advance is made pursuant to a commitment entered into without knowledge of the lease and before the expiration of the 45 day period. (Code 1981, § 11-9-323, enacted by Ga. L. 2001, p. 362, § 1.)

#### RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 9-323.

#### 11-9-324. Priority of purchase money security interests.

(a) *General rule; purchase money priority.* Except as otherwise provided in subsection (g) of this Code section, a perfected purchase money security interest in goods other than inventory or livestock has priority over a conflicting security interest in the same goods, and, except as otherwise provided in Code Section 11-9-327, a perfected security interest in its identifiable proceeds also has priority if the purchase money security interest is perfected when the debtor receives possession of the collateral or within 20 days thereafter.

(b) *Inventory purchase money priority.* Subject to subsection (c) of this Code section and except as otherwise provided in subsection (g) of this Code section, a perfected purchase money security interest in inventory has priority over a conflicting security interest in the same inventory, has priority over a conflicting security interest in chattel paper or an instrument constituting proceeds of the inventory and in proceeds of the chattel paper, if so provided in Code Section 11-9-330, and, except as otherwise provided in Code Section 11-9-327, also has priority in identifiable cash proceeds of the inventory to the extent the identifiable cash proceeds are received on or before the delivery of the inventory to a buyer, if:

(1) The purchase money security interest is perfected when the debtor receives possession of the inventory;

(2) The purchase money secured party sends an authenticated notification to the holder of the conflicting security interest;

(3) The holder of the conflicting security interest receives the notification within five years before the debtor receives possession of the inventory; and

(4) The notification states that the person sending the notification has or expects to acquire a purchase money security interest in inventory of the debtor and describes the inventory.

(c) *Holders of conflicting inventory security interests to be notified.* Paragraphs (2) through (4) of subsection (b) of this Code section apply only if the holder of the conflicting security interest had filed a financing statement covering the same types of inventory:

(1) If the purchase money security interest is perfected by filing, before the date of the filing; or

(2) If the purchase money security interest is temporarily perfected without filing or possession under subsection (f) of Code Section 11-9-312, before the beginning of the 20 day period thereunder.

(d) *Livestock purchase money priority.* Subject to subsection (e) of this Code section and except as otherwise provided in subsection (g) of this Code section, a perfected purchase money security interest in livestock that are farm products has priority over a conflicting security interest in the same livestock, and, except as otherwise provided in Code Section 11-9-327, a perfected security interest in their identifiable proceeds and identifiable products in their unmanufactured states also has priority, if:

(1) The purchase money security interest is perfected when the debtor receives possession of the livestock;

(2) The purchase money secured party sends an authenticated notification to the holder of the conflicting security interest;

(3) The holder of the conflicting security interest receives the notification within six months before the debtor receives possession of the livestock; and

(4) The notification states that the person sending the notification has or expects to acquire a purchase money security interest in livestock of the debtor and describes the livestock.

(e) *Holders of conflicting livestock security interests to be notified.* Paragraphs (2) through (4) of subsection (d) of this Code section apply only if the holder of the conflicting security interest had filed a financing statement covering the same types of livestock:

(1) If the purchase money security interest is perfected by filing, before the date of the filing; or

(2) If the purchase money security interest is temporarily perfected without filing or possession under subsection (f) of Code Section 11-9-312, before the beginning of the 20 day period thereunder.

(f) *Software purchase money priority.* Except as otherwise provided in subsection (g) of this Code section, a perfected purchase money security interest in software has priority over a conflicting security interest in the same collateral, and, except as otherwise provided in Code Section 11-9-327, a perfected security interest in its identifiable proceeds also has

priority, to the extent that the purchase money security interest in the goods in which the software was acquired for use has priority in the goods and proceeds of the goods under this Code section.

(g) *Conflicting purchase money security interests.* If more than one security interest qualifies for priority in the same collateral under subsection (a), (b), (d), or (f) of this Code section:

(1) A security interest securing an obligation incurred as all or part of the price of the collateral has priority over a security interest securing an obligation incurred for value given to enable the debtor to acquire rights in or the use of collateral; and

(2) In all other cases, subsection (a) of Code Section 11-9-322 applies to the qualifying security interests. (Code 1981, § 11-9-324, enacted by Ga. L. 2001, p. 362, § 1.)

**Law reviews.** — For article discussing the resolution of conflicting claims to goods between an unsecured seller of goods and a creditor of a buyer claiming under an after-acquired property clause, see 28 Mercer L. Rev. 625 (1977). For article, “The Revisions to Article IX of the Uniform Commercial Code,” see 15 Ga. St. B.J. 120 (1977). For article “The Good Faith Purchase Idea and the Uniform Commercial Code,” see 15 Ga. L. Rev. 605 (1981). For

article, “Preparing the Georgia Farmer (or Other Smaller Entrepreneur) for Bankruptcy,” see 22 Ga. State Bar J. 186 (1986).

For note examining the conflict between the floating lien in after-acquired property under the Uniform Commercial Code and the voidable preferences provisions of the Bankruptcy Act, see 9 Ga. L. Rev. 685 (1975).

For comment discussing good faith performance and priorities of secured parties, see 36 Emory L.J. 948 (1987).

## JUDICIAL DECISIONS

**Editor’s notes.** — In the light of the similarity of the provisions, decisions under former Article 9 are included in the annotations for this Code section. For a table of comparable provisions, see the table at the beginning of the Article.

**Time of notification.** — While 1978 “amendments” to former section made changes in notification procedure they did not effectuate change in timing of notification; that notification need not precede filing is clear, if for no other reason than that former paragraph (3)(d) contemplates that notification may state that purchase money security interest “has” been acquired in debtor’s inventory. *King’s Appliance & Elecs., Inc. v. Citizens & S. Bank*, 157 Ga. App. 857, 278 S.E.2d 733 (1981) (decided under former Code Section 11-9-312).

**Filing may precede notification envisioned under former subsection (3) of section.** *King’s Appliance & Elecs., Inc. v. Citizens & S. Bank*, 157 Ga. App. 857, 278 S.E.2d 733

(1981) (decided under former Code Section 11-9-312).

Under former paragraph (3)(c) of section, notification is timely if holder of conflicting prior security interest receives it no more than five years before date debtor receives possession of inventory. *King’s Appliance & Elecs., Inc. v. Citizens & S. Bank*, 157 Ga. App. 857, 278 S.E.2d 733 (1981) (decided under former Code Section 11-9-312).

**Limitation on floating liens.** — “Floating lien” theory, by which all subsequently acquired property comes under earlier security instrument, has been approved by former § 11-9-204, however, former paragraph (4) of this section provides seller of noninventory goods under purchase money contract with right to retain priority provided the seller perfects the security interest before delivery or within ten days (now 15 days) after delivery. *Babson Credit Plan, Inc. v. Cordele Prod. Credit Ass’n*, 146 Ga. App.



266, 246 S.E.2d 354 (1978) (decided under former Code Section 11-9-312).

**Priority between perfected and unperfected interests.** — Where seller of personal property which is later affixed to realty retains security interest in the goods, which is not perfected, seller's security interest attaches upon delivery and is superior to another creditor's prior perfected security interest in the personalty and "after-acquired" "personal property" and "equipment of every description" of the common debtor, when such "after-acquired" personalty is affixed to realty as fixtures. *Babson Credit Plan, Inc. v. Cordele Prod. Credit Ass'n*, 146 Ga. App. 266, 246 S.E.2d 354 (1978) (decided under former Code Section 11-9-312).

**When status of "debtor" attaches.** — Buyer of cows who had milked and cared for the cows for several weeks prior to obtaining a loan for their purchase, but who did not finally decide to purchase the cows until after obtaining the loan, was not a "debtor," and did not take possession, until the loan was closed. *United States v. Hooks*, 40 Bankr. 715 (Bankr. M.D. Ga. 1984) (decided under former Code Section 11-9-312).

**Possession of collateral.** — For the purposes of former subsection (4), a buyer takes possession at the time of the decision to buy, not at the time of technical physical possession if physical possession was obtained earlier. *Orix Credit Alliance, Inc. v. CIT Group/Equipment Fin., Inc.*, 230 Bankr. 213 (Bankr. M.D. Ga. 1998) (decided under former Code Section 11-9-312).

**Timely perfection of interest.** — Where lease agreements with option to purchase specifically dated back to the time of delivery when debtor took possession, it was held that debtor acquired possession of three scrapers

for purposes of former subsection (4) at the time they were delivered by seller, rather than the time that debtor and seller entered into the lease agreements for the three scrapers, and because seller did not file its financing statement on two of the scrapers within 15 days of the time debtor took possession, as required by former subsection (4), seller failed to timely perfect its purchase money security interest in these two scrapers, so bank's prior security interest in equipment, including after-acquired property, had priority over seller's purchase money security interest in these two scrapers pursuant to former subsection (5)(a), but because it timely perfected its purchase money security interest in the third scraper, seller had priority over the bank pursuant to former subsection (4). *Iron Peddlers, Inc. v. Ivie & Assocs.*, 84 Bankr. 882 (Bankr. N.D. Ga. 1988) (decided under former Code Section 11-9-312).

Where a bank's perfected security interest in a skidder did not qualify as a purchase money security interest because the funds it lent were not used by a logging company to purchase the skidder, and where the logging company received possession and became indebted for the purchase price on the date the purchase money lender paid the seller directly, the purchase money lender was the only creditor holding a purchase money security interest, and its perfection of that interest by filing its financing statement within 15 days after the acquisition of ownership and execution by the purchaser of the note evidencing its obligation to pay the purchase price gave that purchase money lender priority. *Citizens Bank of Americus v. Federal Fin. Servs., Inc.*, 235 Ga. App. 482, 509 S.E.2d 339 (1998).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 68A Am. Jur. 2d, Secured Transactions, §§ 15, 70, 71, 96-100, 106, 149, 231 et seq., 248, 291, 293, 310, 311, 313, 440-467, 780-791, 836-868.

**C.J.S.** — 72 C.J.S., Pledges, § 23.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 9-324.

**ALR.** — Priority where senior instrument affecting real property is recorded after ex-

ecution but before recording of junior instrument, 32 ALR 344.

Construction and effect of provisions of Uniform Conditional Sales Law regarding refileing when goods are removed from district where contract is filed, 68 ALR 554.

Priority as between holders of different notes or obligations secured by the same mortgage (or vendor's lien) or mortgages

executed contemporaneously, 115 ALR 40.

Applicability of proceeds of sale of collateral security to barred portion of debt secured, 139 ALR 478.

Priority as between seller or conditional seller of personalty and claimant under after-acquired-property clause of mortgage

or other instrument, 86 ALR2d 1152.

Equitable estoppel of secured party's right to assert prior, perfected security interest against other secured creditor or subsequent purchaser under Article 9 of Uniform Commercial Code, 9 ALR5th 708.

### **11-9-325. Priority of security interests in transferred collateral.**

(a) *Subordination of security interest in transferred collateral.* Except as otherwise provided in subsection (b) of this Code section, a security interest created by a debtor is subordinate to a security interest in the same collateral created by another person if:

(1) The debtor acquired the collateral subject to the security interest created by the other person;

(2) The security interest created by the other person was perfected when the debtor acquired the collateral; and

(3) There is no period thereafter when the security interest is unperfected.

(b) *Limitation of subsection (a) of this Code section subordination.* Subsection (a) of this Code section subordinates a security interest only if the security interest:

(1) Otherwise would have priority solely under subsection (a) of Code Section 11-9-322 or Code Section 11-9-324; or

(2) Arose solely under subsection (3) of Code Section 11-2-711 or subsection (5) of Code Section 11-2A-508. (Code 1981, § 11-9-325, enacted by Ga. L. 2001, p. 362, § 1.)

### **RESEARCH REFERENCES**

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 9-325.

### **11-9-326. Priority of security interests created by new debtor.**

(a) *Subordination of security interest created by new debtor.* Subject to subsection (b) of this Code section, a security interest created by a new debtor which is perfected by a filed financing statement that is effective solely under Code Section 11-9-508 in collateral in which a new debtor has or acquires rights is subordinate to a security interest in the same collateral which is perfected other than by a filed financing statement that is effective solely under Code Section 11-9-508.

(b) *Priority under other provisions; multiple original debtors.* The other provisions of this part determine the priority among conflicting security

interests in the same collateral perfected by filed financing statements that are effective solely under Code Section 11-9-508. However, if the security agreements to which a new debtor became bound as debtor were not entered into by the same original debtor, the conflicting security interests rank according to priority in time of the new debtor's having become bound. (Code 1981, § 11-9-326, enacted by Ga. L. 2001, p. 362, § 1.)

#### RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 9-326.

#### **11-9-327. Priority of security interests in deposit account.**

The following rules govern priority among conflicting security interests in the same deposit account:

(1) A security interest held by a secured party having control of the deposit account under Code Section 11-9-104 has priority over a conflicting security interest held by a secured party that does not have control;

(2) Except as otherwise provided in paragraphs (3) and (4) of this Code section, security interests perfected by control under Code Section 11-9-314 rank according to priority in time of obtaining control;

(3) Except as otherwise provided in paragraph (4) of this Code section, a security interest held by the bank with which the deposit account is maintained has priority over a conflicting security interest held by another secured party; and

(4) A security interest perfected by control under paragraph (3) of subsection (a) of Code Section 11-9-104 has priority over a security interest held by the bank with which the deposit account is maintained. (Code 1981, § 11-9-327, enacted by Ga. L. 2001, p. 362, § 1.)

#### RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 9-327.

#### **11-9-328. Priority of security interests in investment property.**

The following rules govern priority among conflicting security interests in the same investment property:

(1) A security interest held by a secured party having control of investment property under Code Section 11-9-106 has priority over a security interest held by a secured party that does not have control of the investment property;



(2) Except as otherwise provided in paragraphs (3) and (4) of this Code section, conflicting security interests held by secured parties each of which has control under Code Section 11-9-106 rank according to priority in time of:

(A) If the collateral is a security, obtaining control;

(B) If the collateral is a security entitlement carried in a securities account and:

(i) If the secured party obtained control under paragraph (1) of subsection (d) of Code Section 11-8-106, the secured party's becoming the person for which the securities account is maintained;

(ii) If the secured party obtained control under paragraph (2) of subsection (d) of Code Section 11-8-106, the securities intermediary's agreement to comply with the secured party's entitlement orders with respect to security entitlements carried or to be carried in the securities account; or

(iii) If the secured party obtained control through another person under paragraph (3) of subsection (d) of Code Section 11-8-106, the time on which priority would be based under this paragraph if the other person were the secured party; or

(C) If the collateral is a commodity contract carried with a commodity intermediary, the satisfaction of the requirement for control specified in paragraph (2) of subsection (b) of Code Section 11-9-106 with respect to commodity contracts carried or to be carried with the commodity intermediary;

(3) A security interest held by a securities intermediary in a security entitlement or a securities account maintained with the securities intermediary has priority over a conflicting security interest held by another secured party;

(4) A security interest held by a commodity intermediary in a commodity contract or a commodity account maintained with the commodity intermediary has priority over a conflicting security interest held by another secured party;

(5) A security interest in a certificated security in registered form which is perfected by taking delivery under subsection (a) of Code Section 11-9-313 and not by control under Code Section 11-9-314 has priority over a conflicting security interest perfected by a method other than control;

(6) Conflicting security interests created by a broker, securities intermediary, or commodity intermediary which are perfected without control under Code Section 11-9-106 rank equally; and

(7) In all other cases, priority among conflicting security interests in investment property is governed by Code Sections 11-9-322 and 11-9-323. (Code 1981, § 11-9-328, enacted by Ga. L. 2001, p. 362, § 1.)

#### RESEARCH REFERENCES

**U.L.A.** — Uniform Commercial Code  
(U.L.A.) § 9-328.

#### **11-9-329. Priority of security interests in letter of credit right.**

The following rules govern priority among conflicting security interests in the same letter of credit right:

(1) A security interest held by a secured party having control of the letter of credit right under Code Section 11-9-107 has priority to the extent of its control over a conflicting security interest held by a secured party that does not have control; and

(2) Security interests perfected by control under Code Section 11-9-314 rank according to priority in time of obtaining control. (Code 1981, § 11-9-329, enacted by Ga. L. 2001, p. 362, § 1.)

#### RESEARCH REFERENCES

**U.L.A.** — Uniform Commercial Code  
(U.L.A.) § 9-329.

#### **11-9-330. Priority of purchaser of chattel paper or instrument.**

(a) *Purchaser's priority; security interest claimed merely as proceeds.* A purchaser of chattel paper has priority over a security interest in the chattel paper which is claimed merely as proceeds of inventory subject to a security interest if:

(1) In good faith and in the ordinary course of the purchaser's business, the purchaser gives new value and takes possession of the chattel paper or obtains control of the chattel paper under Code Section 11-9-105; and

(2) The chattel paper does not indicate that it has been assigned to an identified assignee other than the purchaser.

(b) *Purchaser's priority; other security interests.* A purchaser of chattel paper has priority over a security interest in the chattel paper which is claimed other than merely as proceeds of inventory subject to a security interest if the purchaser gives new value and takes possession of the chattel paper or obtains control of the chattel paper under Code Section 11-9-105 in good faith, in the ordinary course of the purchaser's business, and without knowledge that the purchase violates the rights of the secured party.

(c) *Chattel paper purchaser's priority in proceeds.* Except as otherwise provided in Code Section 11-9-327, a purchaser having priority in chattel paper under subsection (a) or (b) of this Code section also has priority in proceeds of the chattel paper to the extent that:

(1) Code Section 11-9-322 provides for priority in the proceeds; or

(2) The proceeds consist of the specific goods covered by the chattel paper or cash proceeds of the specific goods, even if the purchaser's security interest in the proceeds is unperfected.

(d) *Instrument purchaser's priority.* Except as otherwise provided in subsection (a) of Code Section 11-9-331, a purchaser of an instrument has priority over a security interest in the instrument perfected by a method other than possession if the purchaser gives value and takes possession of the instrument in good faith and without knowledge that the purchase violates the rights of the secured party.

(e) *Holder of purchase money security interest gives new value.* For purposes of subsections (a) and (b) of this Code section, the holder of a purchase money security interest in inventory gives new value for chattel paper constituting proceeds of the inventory.

(f) *Indication of assignment gives knowledge.* For purposes of subsections (b) and (d) of this Code section, if chattel paper or an instrument indicates that it has been assigned to an identified secured party other than the purchaser, a purchaser of the chattel paper or instrument has knowledge that the purchase violates the rights of the secured party. (Code 1981, § 11-9-330, enacted by Ga. L. 2001, p. 362, § 1.)

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 68A Am. Jur. 2d, Secured Transactions, §§ 43-55, 85-100, 550, 796-807, 819, 895-930.      **U.L.A.** — Uniform Commercial Code (U.L.A.) § 9-330.

**C.J.S.** — 6A C.J.S., Assignments, §§ 79, 80, 85. 72 C.J.S., Pledges, § 42.

**11-9-331. Priority of rights of purchasers of instruments, documents, and securities under other articles; priority of interests in financial assets and security entitlements under Article 8 of this title.**

(a) *Rights under Articles 3, 7, and 8 of this title not limited.* This article does not limit the rights of a holder in due course of a negotiable instrument, a holder to which a negotiable document of title has been duly negotiated, or a protected purchaser of a security. These holders or purchasers take priority over an earlier security interest, even if perfected, to the extent provided in Articles 3, 7, and 8 of this title.



(b) *Protection under Article 8 of this title.* This article does not limit the rights of or impose liability on a person to the extent that the person is protected against the assertion of a claim under Article 8 of this title.

(c) *Filing not notice.* Filing under this article does not constitute notice of a claim or defense to the holders or purchasers or persons described in subsections (a) and (b) of this Code section. (Code 1981, § 11-9-331, enacted by Ga. L. 2001, p. 362, § 1.)

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 68A Am. Jur. 2d, Secured Transactions, §§ 49, 55, 109, 225-230, 269, 444-455, 550, 895-909.

**C.J.S.** — 6A C.J.S., Assignments, § 101. 72 C.J.S., Pledges, § 43.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 9-331.

**ALR.** — Rights as between holder of 'trust receipt' and purchaser of goods from one who gave it, 31 ALR 937.

### 11-9-332. Transfer of money; transfer of funds from deposit account.

(a) *Transferee of money.* A transferee of money takes the money free of a security interest unless the transferee acts in collusion with the debtor in violating the rights of the secured party.

(b) *Transferee of funds from deposit account.* A transferee of funds from a deposit account takes the funds free of a security interest in the deposit account unless the transferee acts in collusion with the debtor in violating the rights of the secured party. (Code 1981, § 11-9-332, enacted by Ga. L. 2001, p. 362, § 1.)

#### RESEARCH REFERENCES

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 9-332.

### 11-9-333. Priority of certain liens.

(a) *Year's support; property taxes; other state taxes; other taxes or judgments.* Except as is expressly provided to the contrary elsewhere in this article and in subsection (b) of this Code section, a perfected security interest in collateral takes priority over each and all of the liens, claims, and rights described in Code Section 44-14-320, relating to the establishment of certain liens, as now or hereafter amended, and Code Section 53-7-91 of the "Pre-1998 Probate Code," if applicable, or Code Section 53-7-40 of the "Revised Probate Code of 1998," relating to the priority of debts against the estate of a decedent, as now or hereafter amended, provided, nevertheless, that:

(1) Year's support to the family, duly set apart in the collateral prior to the perfection of the subject security interest, takes priority over such security interest;

(2) A lien for property taxes duly assessed upon the subject collateral, either prior or subsequent to the perfection of the subject security interest, takes priority over security interest;

(3) A lien for all other state taxes takes priority over such security interest, except where such security interest is perfected by filing a financing statement relative thereto prior to such time as the execution for such state taxes shall be entered on the execution docket in the place and in the manner provided by law; provided, nevertheless, that, with respect to priority rights between such tax liens and security interests where under this article the same are perfected other than by filing a financing statement, the same shall be determined as provided by law prior to January 1, 1964; and

(4) A lien for other unpaid taxes or a duly rendered judgment of a court having jurisdiction shall have the same priority with regard to a security interest as it would have if the tax lien or judgment were a conflicting security interest within the meaning of Code Section 11-9-322 or an encumbrance within the meaning of Code Section 11-9-334, which conflicting security interest was perfected by filing or which encumbrance arose at the time the tax lien or judgment was duly recorded in the place designated by statute applicable thereto.

(b) *Mechanics' liens on farm machinery.* A mechanics' lien on farm machinery or equipment arising on or after July 1, 1985, shall have priority over any perfected security interest in such farm machinery or equipment unless a financing statement has been filed as provided in Code Section 11-9-501 and unless the financing statement describes the particular piece of farm machinery or equipment to which the perfected security interest applies. Such description may include the make, model, and serial number of the piece of farm machinery or equipment. However, such description shall be sufficient whether or not it is specific if it reasonably identifies what is described and a mistake in such description shall not invalidate the description if it provides a key to identifying the farm machinery or equipment. (Code 1981, § 11-9-333, enacted by Ga. L. 2001, p. 362, § 1.)

**Law reviews.** — For article on the 1963 amendment to the Georgia Uniform Commercial Code, see 14 Mercer L. Rev. 378 (1963). For annual survey of state and local tax law, see 35 Mercer L. Rev. 281 (1983). For annual survey of commercial law, see 43 Mercer L. Rev. 119 (1991). For survey article on commercial law, see 44 Mercer L. Rev. 99 (1992).

For comment on *United States v. Crittenden*, 563 F.2d 678 (5th Cir. 1977), see 12 Ga. L. Rev. 692 (1977). For comment on *United States v. Crittenden*, 600 F.2d 478 (5th Cir. 1979), discussing the priority of a mechanic's lien in Georgia, see 14 Ga. L. Rev. 628 (1980).

## JUDICIAL DECISIONS

**Editor's notes.** — In the light of the similarity of the provisions, decisions under former Article 9 are included in the annotations for this Code section. For a table of

comparable provisions, see the table at the beginning of the Article.

**Subordinate security interests.** — Unperfected and untimely-perfected purchase money security interests are subordinate to a judgment lien. *Crossroads Bank v. Corim, Inc.*, 262 Ga. 364, 418 S.E.2d 601 (1992) (decided under former Code Section 11-9-310).

**Priority over prior judgment liens.** — A purchase money security interest has priority over a prior judgment lien only to the extent permitted by subsection (2) of former § 11-9-301, which established a 15-day grace period for filing the purchase money security interest. *Crossroads Bank v. Corim, Inc.*, 262 Ga. 364, 418 S.E.2d 601 (1992) (decided under former Code Section 11-9-310).

A bank's security interest in the inventory of a carpet manufacturer took priority over a mechanic's lien. *Nationsbank v. Hardwick Carpets Int'l, Inc.*, 233 Ga. App. 894, 506 S.E.2d 174 (1998) (decided under former Code Section 11-9-310).

**Identification of collateral.** — All that former subsection (2) required is a reasonable identification, and even a mistaken description will suffice so long as a key to identification is provided. *Goodwin v. South Atl. Prod. Credit Ass'n*, 201 Ga. App. 35, 410 S.E.2d 159 (1991) (decided under former Code Section 11-9-310).

Financing statement which identified the collateral as "all farm machinery and equipment, tractors, tilling and harvesting tools of every kind and description owned by debt-

ors" satisfied the requirements of former subsection (2). *Goodwin v. South Atl. Prod. Credit Ass'n*, 201 Ga. App. 35, 410 S.E.2d 159 (1991) (decided under former Code Section 11-9-310).

**Priority of year's support award.** — In the absence of evidence that defendants had a perfected security interest in corporate stock prior to the death of the owner, where the stock had been set aside as year's support for the owner's wife by order of the probate court, defendants' interest in the stock was extinguished at the time the year's support award was made. *Auto Alignment Servs., Inc. v. Bray*, 214 Ga. App. 53, 446 S.E.2d 753 (1994).

**Cited in** *Mack Trucks, Inc. v. Ryder Truck Rental, Inc.*, 110 Ga. App. 68, 137 S.E.2d 718 (1964); *Troy Lumber Co. v. Williams*, 124 Ga. App. 636, 185 S.E.2d 580 (1971); *Park Ave. Bank v. Bassford*, 232 Ga. 216, 205 S.E.2d 861 (1974); *Amoco Oil Co. v. G. Sims & Assocs.*, 162 Ga. App. 307, 291 S.E.2d 128 (1982); *Davidson v. Smith Can. Peat, Inc.*, 163 Ga. App. 367, 294 S.E.2d 582 (1982); *Newton Ford Tractor Co. v. JI Case Credit Corp.*, 163 Ga. App. 497, 294 S.E.2d 723 (1982); *GECC v. Capital Ford Truck Sales, Inc.*, 164 Ga. App. 468, 298 S.E.2d 159 (1982); *Tuggle v. IRS*, 22 Bankr. 439 (Bankr. N.D. Ga. 1982); *Sterling Nat'l Bank & Trust Co. v. Southwire Co.*, 713 F.2d 684 (11th Cir. 1983); *State v. Mozley*, 171 Ga. App. 1, 318 S.E.2d 647 (1984); *First Bulloch Bank & Trust Co. v. Inca Materials, Inc.*, 880 F.2d 1307 (11th Cir. 1989).

## OPINIONS OF THE ATTORNEY GENERAL

**Ad valorem tax lien on mobile home follows it into hands of bona fide purchaser.** — Ad valorem tax lien attaches to property, a mobile home being no exception; the lien

follows property even into hands of bona fide purchaser for value and attempted transfer of mobile home to evade tax would be void. 1970 Op. Att'y Gen. No. U70-208.

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 68A Am. Jur. 2d, Secured Transactions, §§ 138, 139, 167, 168, 811-816, 869-894, 931-941.

**C.J.S.** — 8 C.J.S., Bailments, §§ 80-85. 56 C.J.S., Mechanics' Liens, § 220. 72 C.J.S., Pledges, § 23.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 9-333.

**ALR.** — Priority as between federal tax

lien and mortgage to secure future advances or expenditures by mortgagee, 90 ALR2d 1179.

Secured transactions: priorities as between previously perfected security interest and repairman's lien on motor vehicle under Uniform Commercial Code, 69 ALR3d 1162.

Secured transactions: Priority as between statutory landlord's lien and security interest



perfected in accordance with Uniform Commercial Code, 99 ALR3d 1006.

**11-9-334. Priority of security interests in fixtures and crops.**

(a) *Security interest in fixtures under this article.* A security interest under this article may be created in goods that are fixtures or may continue in goods that become fixtures. A security interest does not exist under this article in ordinary building materials incorporated into an improvement on land.

(b) *Security interest in fixtures under real property law.* This article does not prevent creation of an encumbrance upon fixtures under real property law.

(c) *General rule; subordination of security interest in fixtures.* In cases not governed by subsections (d) through (h) of this Code section, a security interest in fixtures is subordinate to a conflicting interest of an encumbrancer or owner of the related real property other than the debtor.

(d) *Fixtures purchase money priority.* Except as otherwise provided in subsection (h) of this Code section, a perfected security interest in fixtures has priority over a conflicting interest of an encumbrancer or owner of the real property if the debtor has an interest of record in or is in possession of the real property and:

(1) The security interest is a purchase money security interest;

(2) The interest of the encumbrancer or owner arises before the goods become fixtures; and

(3) The security interest is perfected by a fixture filing before the goods become fixtures or within 20 days thereafter.

(e) *Priority of security interest in fixtures over interests in real property.* A perfected security interest in fixtures has priority over a conflicting interest of an encumbrancer or owner of the real property if:

(1) The debtor has an interest of record in the real property or is in possession of the real property and the security interest:

(A) Is perfected by a fixture filing before the interest of the encumbrancer or owner is of record; and

(B) Has priority over any conflicting interest of a predecessor in title of the encumbrancer or owner;

(2) Before the goods become fixtures, the security interest is perfected by any method permitted by this article and the fixtures are readily removable:

(A) Factory or office machines;

(B) Equipment that is not primarily used or leased for use in the operation of the real property; or

(C) Replacements of domestic appliances that are consumer goods;  
or

(3) The conflicting interest is a lien on the real property obtained by legal or equitable proceedings after the security interest was perfected by any method permitted by this article.

(f) *Priority based on consent, disclaimer, or right to remove.* A security interest in fixtures, whether or not perfected, has priority over a conflicting interest of an encumbrancer or owner of the real property if:

(1) The encumbrancer or owner has, in an authenticated record, consented to the security interest or disclaimed an interest in the goods as fixtures; or

(2) The debtor has a right to remove the goods as against the encumbrancer or owner.

(g) *Continuation of subsection (f) of this Code section priority.* The priority of the security interest under paragraph (2) of subsection (f) of this Code section continues for a reasonable time if the debtor's right to remove the goods as against the encumbrancer or owner terminates.

(h) *Priority of construction mortgage.* A mortgage is a construction mortgage to the extent that it secures an obligation incurred for the construction of an improvement on land, including the acquisition cost of the land, if a recorded record of the mortgage so indicates. Except as otherwise provided in subsections (e) and (f) of this Code section, a security interest in fixtures is subordinate to a construction mortgage if a record of the mortgage is recorded before the goods become fixtures and the goods become fixtures before the completion of the construction. A mortgage has this priority to the same extent as a construction mortgage to the extent that it is given to refinance a construction mortgage.

(i) *Priority of security interest in crops.* A perfected security interest in or agricultural lien upon crops growing on real property has priority over a conflicting interest of an encumbrancer or owner of the real property if the debtor has an interest of record in or is in possession of the real property. (Code 1981, § 11-9-334, enacted by Ga. L. 2001, p. 362, § 1.)

**Law reviews.** — For article discussing U.C.C. provisions establishing a security interest in fixtures as a means of protecting sellers, see 16 Mercer L. Rev. 404 (1965). For article, "The Revisions to Article IX of the Uniform Commercial Code," see 15 Ga. St. B.J. 120 (1977). For article surveying recent judicial developments in commercial law, see 31 Mercer L. Rev. 13 (1979). For article,

"Fixture Financing Under Georgia's New Article 9" (Part 1), see 16 Ga. St. B.J. 110 (1980). For article, "Fixture Financing Under Georgia's New Article 9" (Part 2), see 16 Ga. St. B.J. 160 (1980).

For note, "Limits on Residential Mortgage Lender Protection Section 1322(b) of the Bankruptcy Code," see 9 Ga. St. U.L. Rev. 647 (1993).

## JUDICIAL DECISIONS

**Editor's notes.** — In the light of the similarity of the provisions, decisions under former Article 9 are included in the annotations for this Code section. For a table of comparable provisions, see the table at the beginning of the Article.

**General rule.** — The general rule in Georgia is that personal property which is actually or constructively attached to real property is considered part of the realty so that an interest arises in it under real estate law. *Wright v. C & S Family Credit, Inc.*, 128 Bankr. 838 (Bankr. N.D. Ga. 1991) (decided under former Code Section 11-9-313).

**Nature of fixtures.** — Fixture is not a separate, exclusive classification of goods, but rather a unique category of property. *Williams v. Western Pac. Fin. Corp.*, 643 F.2d 331 (5th Cir. 1981) (decided under former Code Section 11-9-313).

Section clearly recognized that fixtures may be subject to two different types of security interest: a chattel interest and a real estate interest; and this recognition is in accord with dual nature of a fixture, a chattel which has become real property; indeed, existence of both chattel interest and real estate interest in fixtures gives rise to need for this former section which attempted to equitably resolve conflicts between these two interests. *Williams v. Western Pac. Fin. Corp.*, 643 F.2d 331 (5th Cir. 1981) (decided under former Code Section 11-9-313).

**Priority of real estate interests.** — Section dealt with priority of real estate interest vis-a-vis chattel interest in fixtures. *Williams v. Western Pac. Fin. Corp.*, 643 F.2d 331 (5th Cir. 1981) (decided under former Code Section 11-9-313).

**Creation of real estate interests in fixtures.** — The former provisions of this section did not apply to creation of real estate interests in fixtures; that is a matter left to real estate law. *Williams v. Western Pac. Fin. Corp.*, 643 F.2d 331 (5th Cir. 1981) (decided under former Code Section 11-9-313).

**Consumer goods may be fixtures.** — Former provisions of Article 9 applied to transactions creating security interests in fixtures, but only to extent that provision was made for fixtures in this section, and, considering Uniform Commercial Code's definition and classification of goods, it appears

that it contemplates that consumer goods may also be fixtures at least insofar as fixtures are subject to Uniform Commercial Code under this section. *Williams v. Western Pac. Fin. Corp.*, 643 F.2d 331 (5th Cir. 1981) (decided under former Code Section 11-9-313).

**Radio tower as personal property, not fixture.** — Where the intention of the parties was unclear as to whether a radio tower was to be a fixture and the radio tower was bolted to concrete slabs with bolts in each of the radio tower's three legs, no guy wires secured the radio tower, the radio tower apparently could be removed from the realty without damage to the land or to the radio tower by removing these bolts and disassembling the radio tower, and the radio tower had already been removed once, the radio tower was personal property rather than a fixture. *Tidwell v. Slocumb (In re Ga. Steel, Inc.)*, 71 Bankr. 903 (Bankr. M.D. Ga. 1987) (decided under former Code Section 11-9-313).

**Unperfected security interest in fixtures was superior.** — Where seller of personal property which is later affixed to realty retains security interest in goods, which is not perfected, seller's security interest attaches upon delivery and is superior to another creditor's prior deed to secure debt on same realty which has been perfected, to extent of advances made by prior creditor to common debtor before attachment of security interest of seller of personalty, but not to advances made after attachment of latter security interest. *Babson Credit Plan, Inc. v. Cordele Prod. Credit Ass'n*, 146 Ga. App. 266, 246 S.E.2d 354 (1978) (decided under former Code Section 11-9-313).

**Character of personalty after annexation to realty.** — Personalty purchased under retail installment contract, which is to be attached to realty, may by specific agreement of parties retain personalty classification where it is intent of seller and the purchaser that personalty is not to become a fixture, but an "accession." *Babson Credit Plan, Inc. v. Cordele Prod. Credit Ass'n*, 146 Ga. App. 266, 246 S.E.2d 354 (1978) (decided under former Code Section 11-9-313).

**Conflict on whether goods are to become fixtures.** — Where personalty is sold under



contract which provides that goods are to remain personal property and not become fixture, but seller checks block on financing statement that described goods are affixed or are to be affixed to certain real estate, question of intent of parties and whether goods remain personalty or became fixtures upon affixation is for the trier of fact.

Babson Credit Plan, Inc. v. Cordele Prod. Credit Ass'n, 146 Ga. App. 266, 246 S.E.2d 354 (1978) (decided under former Code Section 11-9-313).

**Cited in** Stokes v. First Ga. Bank, 500 F.2d 393 (5th Cir. 1974); Goger v. United States, 4 Bankr. 4 (N.D. Ga. 1979); Brown v. United States, 512 F. Supp. 24 (N.D. Ga. 1980).

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 68A Am. Jur. 2d, Secured Transactions, §§ 54, 155 et seq., 304, 607-614, 942-954.

**C.J.S.** — 36A C.J.S., Fixtures, §§ 1, 42, 43, 44, 49, 51.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 9-334.

**ALR.** — Rights of seller of fixtures retaining title thereto, or a lien thereon, as against purchasers or encumbrancers of the realty, 13 ALR 448; 73 ALR 748; 88 ALR 1318; 111 ALR 362; 141 ALR 1283.

Pavement, flooring, platform, walks, and the like as fixtures, 13 ALR 1454.

Right as between landlord and condi-

tional seller of property to tenant, 45 ALR 967; 98 ALR 628.

Storage tank or other apparatus of gasoline station as fixture, 52 ALR 798; 99 ALR 69.

Right of conditional seller of chattels attached to realty to claim lien on the realty, 58 ALR 1121.

Chattel annexed to realty as subject to prior mortgage, 99 ALR 144.

Doctrine of constructive annexation as applied to plumbing material and heating apparatus delivered to premises but not installed, 10 ALR2d 207.

#### 11-9-335. Accessions.

(a) *Creation of security interest in accession.* A security interest may be created in an accession and continues in collateral that becomes an accession.

(b) *Perfection of security interest.* If a security interest is perfected when the collateral becomes an accession, the security interest remains perfected in the collateral.

(c) *Priority of security interest.* Except as otherwise provided in subsection (d) of this Code section, the other provisions of this part determine the priority of a security interest in an accession.

(d) *Compliance with certificate of title statute.* A security interest in an accession is subordinate to a security interest in the whole which is perfected by compliance with the requirements of a certificate of title statute under subsection (b) of Code Section 11-9-311.

(e) *Removal of accession after default.* After default, subject to Part 6 of this article, a secured party may remove an accession from other goods if the security interest in the accession has priority over the claims of every person having an interest in the whole.

(f) *Reimbursement following removal.* A secured party that removes an accession from other goods under subsection (e) of this Code section shall

promptly reimburse any holder of a security interest or other lien on, or owner of, the whole or of the other goods, other than the debtor, for the cost of repair of any physical injury to the whole or the other goods. The secured party need not reimburse the holder or owner for any diminution in value of the whole or the other goods caused by the absence of the accession removed or by any necessity for replacing it. A person entitled to reimbursement may refuse permission to remove until the secured party gives adequate assurance for the performance of the obligation to reimburse. (Code 1981, § 11-9-335, enacted by Ga. L. 2001, p. 362, § 1.)

**Law reviews.** — For article discussing the resolution of conflicting claims to goods between an unsecured seller of goods and a creditor of a buyer claiming under an after-acquired property clause, see 28 Mer-

cer L. Rev. 625 (1977). For article surveying developments in the Georgia torts law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 247 (1981).

### JUDICIAL DECISIONS

**Editor's notes.** — In the light of the similarity of the provisions, decisions under former Article 9 are included in the annotations for this Code section. For a table of comparable provisions, see the table at the beginning of the Article.

**Nature of accessions.** — Accessions are goods of such nature as to form "integral part" of whole good and are so attached to it, that they are one and the same thing under the accession rule. *Glenn v. Trust Co.*, 152 Ga. App. 314, 262 S.E.2d 590 (1979); *Stratton Indus., Inc. v. Northwest Ga. Bank*, 191 Ga. App. 683, 382 S.E.2d 721 (1989) (decided under former Code Section 11-9-314).

Lesser chattel must form such an integral part of greater chattel and must be so attached to it as to constitute one and the same thing in order to constitute an accession. *Mixon v. Georgia Bank & Trust Co.*, 154 Ga. App. 32, 267 S.E.2d 483 (1980) (decided under former Code Section 11-9-314).

**Personalty annexed to realty may retain**

**character as personalty.** — Personalty purchased under retail installment contract, which is to be attached to realty, may by specific agreement of the parties, retain the personalty classification for the property where it is the intent of the seller and the purchaser that the personalty is not to become a fixture, but an "accession." *Babson Credit Plan, Inc. v. Cordele Prod. Credit Ass'n*, 146 Ga. App. 266, 246 S.E.2d 354 (1978) (decided under former Code Section 11-9-314).

**Interests exceeding "accessions" contemplated by section.** — Since a security agreement endowed a loan company with a security interest broader than that created under former subsection (1) of this section, the company was obligated under federal law to reveal in its disclosure statement the extent to which its interests exceeded the scope of "accessions" contemplated by this statutory provision. *Varner v. Century Fin. Co.*, 738 F.2d 1143 (11th Cir. 1984) (decided under former Code Section 11-9-314).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 68A Am. Jur. 2d, Secured Transactions, §§ 101, 102, 155 et seq., 607-614, 955-958.

**C.J.S.** — 1 C.J.S., Accession, §§ 9, 10.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 9-335.

**ALR.** — Accession to property which is the subject of a conditional sale or chattel mortgage, 68 ALR 1242.

**11-9-336. Commingled goods.**

(a) *“Commingled goods.”* As used in this Code section, the term “commingled goods” means goods that are physically united with other goods in such a manner that their identity is lost in a product or mass.

(b) *No security interest in commingled goods as such.* A security interest does not exist in commingled goods as such. However, a security interest may attach to a product or mass that results when goods become commingled goods.

(c) *Attachment of security interest to product or mass.* If collateral becomes commingled goods, a security interest attaches to the product or mass.

(d) *Perfection of security interest.* If a security interest in collateral is perfected before the collateral becomes commingled goods, the security interest that attaches to the product or mass under subsection (c) of this Code section is perfected.

(e) *Priority of security interest.* Except as otherwise provided in subsection (f) of this Code section, the other provisions of this part determine the priority of a security interest that attaches to the product or mass under subsection (c) of this Code section.

(f) *Conflicting security interests in product or mass.* If more than one security interest attaches to the product or mass under subsection (c) of this Code section, the following rules determine priority:

(1) A security interest that is perfected under subsection (d) of this Code section has priority over a security interest that is unperfected at the time the collateral becomes commingled goods; and

(2) If more than one security interest is perfected under subsection (d) of this Code section, the security interests rank equally in proportion to the value of the collateral at the time it became commingled goods. (Code 1981, § 11-9-336, enacted by Ga. L. 2001, p. 362, § 1.)

**JUDICIAL DECISIONS**

**Editor’s notes.** — In the light of the similarity of the provisions, decisions under former Article 9 are included in the annotations for this Code section. For a table of comparable provisions, see the table at the beginning of the Article.

**Applicability of section.** — The former provisions of this section applied to combined inventory where one business is merged with another. *Sowards v. State*, 137 Ga. App. 423, 224 S.E.2d 85 (1976) (decided under former Code Section 11-9-315).

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 68A Am. Jur. 2d, Secured Transactions, §§ 58, 955-961.

**C.J.S.** — 15A C.J.S., Confusion of Goods, §§ 3-9.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 9-336.



**11-9-337. Priority of security interests in goods covered by certificate of title.**

If, while a security interest in goods is perfected by any method under the law of another jurisdiction, this state issues a certificate of title that does not show that the goods are subject to the security interest or contain a statement that they may be subject to security interests not shown on the certificate:

(1) A buyer of the goods, other than a person in the business of selling goods of that kind, takes free of the security interest if the buyer gives value and receives delivery of the goods after issuance of the certificate and without knowledge of the security interest; and

(2) The security interest is subordinate to a conflicting security interest in the goods that attaches and is perfected under subsection (b) of Code Section 11-9-311, after issuance of the certificate and without the conflicting secured party's knowledge of the security interest. (Code 1981, § 11-9-337, enacted by Ga. L. 2001, p. 362, § 1.)

**RESEARCH REFERENCES**

**U.L.A.** — Uniform Commercial Code  
(U.L.A.) § 9-337.

**11-9-338. Priority of security interest or agricultural lien perfected by filed financing statement providing certain incorrect information.**

If a security interest or agricultural lien is perfected by a filed financing statement providing information described in paragraph (5) of subsection (b) of Code Section 11-9-516 which is incorrect at the time the financing statement is filed:

(1) The security interest or agricultural lien is subordinate to a conflicting perfected security interest in the collateral to the extent that the holder of the conflicting security interest gives value in reasonable reliance upon the incorrect information; and

(2) A purchaser, other than a secured party, of the collateral takes free of the security interest or agricultural lien to the extent that, in reasonable reliance upon the incorrect information, the purchaser gives value and, in the case of chattel paper, documents, goods, instruments, or a security certificate, receives delivery of the collateral. (Code 1981, § 11-9-338, enacted by Ga. L. 2001, p. 362, § 1.)

**RESEARCH REFERENCES**

**U.L.A.** — Uniform Commercial Code  
(U.L.A.) § 9-338.

**11-9-339. Priority subject to subordination.**

This article does not preclude subordination by agreement by a person entitled to priority. (Code 1981, § 11-9-339, enacted by Ga. L. 2001, p. 362, § 1.)

**Cross references.** — Subordination of obligations, § 11-1-209.

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 68A Am. Jur. 2d, Secured Transactions, §§ 160 et seq., 792-795.      **U.L.A.** — Uniform Commercial Code (U.L.A.) § 9-339.  
**C.J.S.** — 72 C.J.S., Pledges, § 23.

## Subpart 4

## Rights of Bank

**11-9-340. Effectiveness of right of recoupment or set-off against deposit account.**

(a) *Exercise of recoupment or set-off.* Except as otherwise provided in subsection (c) of this Code section, a bank with which a deposit account is maintained may exercise any right of recoupment or set-off against a secured party that holds a security interest in the deposit account.

(b) *Recoupment or set-off not affected by security interest.* Except as otherwise provided in subsection (c) of this Code section, the application of this article to a security interest in a deposit account does not affect a right of recoupment or set-off of the secured party as to a deposit account maintained with the secured party.

(c) *When set-off ineffective.* The exercise by a bank of a set-off against a deposit account is ineffective against a secured party that holds a security interest in the deposit account which is perfected by control under paragraph (3) of subsection (a) of Code Section 11-9-104, if the set-off is based on a claim against the debtor. (Code 1981, § 11-9-340, enacted by Ga. L. 2001, p. 362, § 1.)

**RESEARCH REFERENCES**

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 9-340.

**11-9-341. Bank's rights and duties with respect to deposit account.**

Except as otherwise provided in subsection (c) of Code Section 11-9-340, and unless the bank otherwise agrees in an authenticated record, a bank's

rights and duties with respect to a deposit account maintained with the bank are not terminated, suspended, or modified by:

- (1) The creation, attachment, or perfection of a security interest in the deposit account;
- (2) The bank's knowledge of the security interest; or
- (3) The bank's receipt of instructions from the secured party. (Code 1981, § 11-9-341, enacted by Ga. L. 2001, p. 362, § 1.)

#### RESEARCH REFERENCES

**U.L.A.** — Uniform Commercial Code  
(U.L.A.) § 9-341.

#### **11-9-342. Bank's right to refuse to enter into or disclose existence of control agreement.**

This article does not require a bank to enter into an agreement of the kind described in paragraph (2) of subsection (a) of Code Section 11-9-104, even if its customer so requests or directs. A bank that has entered into such an agreement is not required to confirm the existence of the agreement to another person unless requested to do so by its customer. (Code 1981, § 11-9-342, enacted by Ga. L. 2001, p. 362, § 1.)

#### RESEARCH REFERENCES

**U.L.A.** — Uniform Commercial Code  
(U.L.A.) § 9-342.

### PART 4

## RIGHTS OF THIRD PARTIES

**Law reviews.** — For annual survey of commercial law, see 38 Mercer L. Rev. 85 (1986).

#### RESEARCH REFERENCES

**C.J.S.** — 79 C.J.S., Secured Transactions, .  
§§ 25, 63 et seq., 134.

#### **11-9-401. Alienability of debtor's rights.**

(a) *Other law governs alienability; exceptions.* Except as otherwise provided in subsection (b) of this Code section and Code Sections 11-9-406, 11-9-407, 11-9-408, and 11-9-409, whether a debtor's rights in collateral may be voluntarily or involuntarily transferred is governed by law other than this article.



(b) *Agreement does not prevent transfer.* An agreement between the debtor and secured party which prohibits a transfer of the debtor's rights in collateral or makes the transfer a default does not prevent the transfer from taking effect. (Code 1981, § 11-9-401, enacted by Ga. L. 2001, p. 362, § 1.)

**Law reviews.** — For note discussing procedures required to effect a levy of execution, see 12 Ga. L. Rev. 814 (1978).

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 68A Am. Jur. 2d, Secured Transactions, §§ 121, 122, 269, 510, 550, 553.

**C.J.S.** — 72 C.J.S., Pledges, § 43.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 9-401.

**ALR.** — Rights of pledgor of collateral note as affected by its transfer by the pledgee

to the maker, 99 ALR 26.

Uniform Commercial Code: Burden of proof as to commercially reasonable disposition of collateral, 59 ALR3d 369.

Construction and effect of UCC § 9-311 giving debtor right to transfer his interest in collateral, 45 ALR4th 411.

### 11-9-402. Secured party not obligated on contract of debtor or in tort.

The existence of a security interest, agricultural lien, or authority given to a debtor to dispose of or use collateral, without more, does not subject a secured party to liability in contract or tort for the debtor's acts or omissions. (Code 1981, § 11-9-402, enacted by Ga. L. 2001, p. 362, § 1.)

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 68A Am. Jur. 2d, Secured Transactions, §§ 510, 554, 926-930.

**C.J.S.** — 77A C.J.S., Sales, § 291.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 9-402.

### 11-9-403. Agreement not to assert defenses against assignee.

(a) “*Value.*” As used in this Code section, the term “value” has the meaning provided in subsection (a) of Code Section 11-3-303.

(b) *Agreement not to assert claim or defense.* Except as otherwise provided in this Code section, an agreement between an account debtor and an assignor not to assert against an assignee any claim or defense that the account debtor may have against the assignor is enforceable by an assignee that takes an assignment:

(1) For value;

(2) In good faith;

(3) Without notice of a claim of a property or possessory right to the property assigned; and

(4) Without notice of a defense or claim in recoupment of the type that may be asserted against a person entitled to enforce a negotiable instrument under subsection (a) of Code Section 11-3-305.

(c) *When subsection (b) of this Code section not applicable.* Subsection (b) of this Code section does not apply to defenses of a type that may be asserted against a holder in due course of a negotiable instrument under subsection (b) of Code Section 11-3-305.

(d) *Omission of required statement in consumer transaction.* In a consumer transaction, if a record evidences the account debtor's obligation, law other than this article requires that the record include a statement to the effect that the rights of an assignee are subject to claims or defenses that the account debtor could assert against the original obligee, and the record does not include such a statement:

(1) The record has the same effect as if the record included such a statement; and

(2) The account debtor may assert against an assignee those claims and defenses that would have been available if the record included such a statement.

(e) *Rule for individual under other law.* This Code section is subject to law other than this article which establishes a different rule for an account debtor who is an individual and who incurred the obligation primarily for personal, family, or household purposes.

(f) *Other law not displaced.* Except as otherwise provided in subsection (d) of this Code section, this Code section does not displace law other than this article which gives effect to an agreement by an account debtor not to assert a claim or defense against an assignee. (Code 1981, § 11-9-403, enacted by Ga. L. 2001, p. 362, § 1.)

**Law reviews.** — For article supporting the retention of waiver of defense clauses in credit card agreements, see 10 Ga. St. B.J. 17 (1973). For article discussing the implied warranty of fitness for a particular purpose, see 9 Ga. L. Rev. 149 (1974). For article, "The Good Faith Purchase Idea and the Uniform Commercial Code," see 15 Ga. L. Rev. 605 (1981).

For note analyzing consumer protection

in retail installment contracts with reference to waiver of defenses by purchaser and the denial of holder in due course status to assignee of contract, in light of *Geiger Fin. Co. v. Graham*, 123 Ga. App. 771, 182 S.E.2d 521 (1971), see 23 Mercer L. Rev. 673 (1972).

For comment on *Geiger Fin. Co. v. Graham*, 123 Ga. App. 771, 182 S.E.2d 521 (1971), see 8 Ga. St. B.J. 400 (1972).

## JUDICIAL DECISIONS

**Editor's notes.** — In the light of the similarity of the provisions, decisions under former Article 9 are included in the annotations for this Code section. For a table of

comparable provisions, see the table at the beginning of the Article.

**Applicability of section.** — Former Section 11-9-206 is applicable to all transactions

unless there is a different provision for consumer goods. *Massey-Ferguson Credit Corp. v. Wiley*, 655 F. Supp. 655 (M.D. Ga. 1987) (decided under former Code Section 11-9-206).

**Assignment of security interest.** — Former Section 11-9-206 created holder in due course status for an assignee who takes a security agreement with a “waiver of defenses” clause even if the security agreement is assigned in the absence of the assignment of an Article III negotiable instrument in the same transaction. *Massey-Ferguson Credit Corp. v. Wiley*, 655 F. Supp. 655 (M.D. Ga. 1987) (decided under former Code Section 11-9-206).

**Breach of warranty.** — Claim for breach of warranty is assertable only against the manufacturer and not against an assignee. *Harrison v. Massey-Ferguson Credit Corp.*, 168 Ga. App. 788, 310 S.E.2d 544 (1983) (decided under former Code Section 11-9-206).

**Sale-lease back agreements.** — Fact that sale-lease back agreement was not a secured transaction did not preclude application of the former provisions of this section. *United*

*Counties Trust Co. v. Mac Lum, Inc.*, 643 F.2d 1140 (5th Cir. 1981) (decided under former Code Section 11-9-206).

**Common law governs waiver of defense clauses in leases.** — Georgia’s version of § 9-206 (former § 11-9-206, see now § 11-9-406) of Uniform Commercial Code does not include phrases “or lessee(s)” and “or lessor” because Georgia did not adopt 1962 revision of Uniform Commercial Code which extended § 9-206 (former § 11-9-206, see now § 11-9-406) to leases; thus, in Georgia, common law rather than § 9-206 (former § 11-9-206, see now § 11-9-406) governs effect of waiver of defense clauses in leases. *United Counties Trust Co. v. Mac Lum, Inc.*, 643 F.2d 1140 (5th Cir. 1981) (decided under former Code Section 11-9-206).

**Party-to-the-transaction rule.** — For a discussion of the party-to-the-transaction rule as a defense to the holder in due course status, see *Design Eng’g, Constr. Int’l, Inc. v. Cessna Fin. Corp.*, 164 Ga. App. 159, 296 S.E.2d 195 (1982) (decided under former Code Section 11-9-206).

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 68A Am. Jur. 2d, Secured Transactions, §§ 13, 14, 65-67, 106, 110-112, 145, 192 et seq., 282-284, 514, 538 et seq.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 9-403.

**ALR.** — Validity, in contract for installment sale of consumer goods, or commercial paper given in connection therewith, of provision waiving, as against assignee, defenses good against seller, 39 ALR3d 518.

#### 11-9-404. Rights acquired by assignee; claims and defenses against assignee.

(a) *Assignee’s rights subject to terms, claims, and defenses; exceptions.* Unless an account debtor has made an enforceable agreement not to assert defenses or claims and subject to subsections (b) through (e) of this Code section, the rights of an assignee are subject to:

(1) All terms of the agreement between the account debtor and assignor and any defense or claim in recoupment arising from the transaction that gave rise to the contract; and

(2) Any other defense or claim of the account debtor against the assignor which accrues before the account debtor receives a notification of the assignment authenticated by the assignor or the assignee.

(b) *Account debtor’s claim reduces amount owed to assignee.* Subject to subsection (c) of this Code section and except as otherwise provided in



subsection (d) of this Code section, the claim of an account debtor against an assignor may be asserted against an assignee under subsection (a) of this Code section only to reduce the amount the account debtor owes.

(c) *Rule for individual under other law.* This Code section is subject to law other than this article which establishes a different rule for an account debtor who is an individual and who incurred the obligation primarily for personal, family, or household purposes.

(d) *Omission of required statement in consumer transaction.* In a consumer transaction, if a record evidences the account debtor's obligation, law other than this article requires that the record include a statement to the effect that the account debtor's recovery against an assignee with respect to claims and defenses against the assignor may not exceed amounts paid by the account debtor under the record, and the record does not include such a statement, the extent to which a claim of an account debtor against the assignor may be asserted against an assignee is determined as if the record included such a statement.

(e) *Inapplicability to health care insurance receivable.* This Code section does not apply to an assignment of a health care insurance receivable. (Code 1981, § 11-9-404, enacted by Ga. L. 2001, p. 362, § 1.)

**Law reviews.** — For article, "The Good Faith Purchase Idea and the Uniform Commercial Code," see 15 Ga. L. Rev. 605 (1981).

### JUDICIAL DECISIONS

**Notice of assignment sufficient.** — Under former O.C.G.A. § 11-9-318(3), appellee assignee's notice to appellant county that a third party providing custodial services to appellant had assigned its invoice payments to appellee was sufficient to inform appellant that it was required to make invoice payments to appellee and any further payments made to the third party were made at appellant's peril. *Fulton County v. American Factors of Nashville, Inc.*, 250 Ga. App. 366, 551 S.E.2d 781 (2001).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 68A Am. Jur. 2d, Secured Transactions, §§ 39-53, 539-554, 796-800.

**C.J.S.** — 6A C.J.S., Assignments, §§ 65, 66, 99, 72 C.J.S., Pledges, § 41.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 9-404.

**ALR.** — Payment of judgment by debtor

without notice of its assignment, 32 ALR 1021.

Waiver or estoppel with respect to debtor's assertion, as to setoff or counterclaim against assignee, of claim valid as against assignor, 51 ALR2d 886.

### 11-9-405. Modification of assigned contract.

(a) *Effect of modification on assignee.* A modification of or substitution for an assigned contract is effective against an assignee if made in good faith. The assignee acquires corresponding rights under the modified or substituted contract. The assignment may provide that the modification or

substitution is a breach of contract by the assignor. This subsection is subject to subsections (b) through (d) of this Code section.

(b) *Applicability of subsection (a) of this Code section.* Subsection (a) of this Code section applies to the extent that:

(1) The right to payment or a part thereof under an assigned contract has not been fully earned by performance; or

(2) The right to payment or a part thereof has been fully earned by performance and the account debtor has not received notification of the assignment under subsection (a) of Code Section 11-9-406.

(c) *Rule for individual under other law.* This Code section is subject to law other than this article which establishes a different rule for an account debtor who is an individual and who incurred the obligation primarily for personal, family, or household purposes.

(d) *Inapplicability to health care insurance receivable.* This Code section does not apply to an assignment of a health care insurance receivable. (Code 1981, § 11-9-405, enacted by Ga. L. 2001, p. 362, § 1.)

**Law reviews.** — For article, “The Good Faith Purchase Idea and the Uniform Commercial Code,” see 15 Ga. L. Rev. 605 (1981).

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 68A Am. Jur. 2d, Secured Transactions, §§ 39-53, 539-554, 796-800.

**C.J.S.** — 6A C.J.S., Assignments, §§ 65, 66, 99, 72 C.J.S., Pledges, § 41.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 9-405.

**ALR.** — Payment of judgment by debtor

without notice of its assignment, 32 ALR 1021.

Waiver or estoppel with respect to debtor’s assertion, as to setoff or counterclaim against assignee, of claim valid as against assignor, 51 ALR2d 886.

**11-9-406. Discharge of account debtor; notification of assignment; identification and proof of assignment; restrictions on assignment of accounts, chattel paper, payment intangibles, and promissory notes ineffective.**

(a) *Discharge of account debtor; effect of notification.* Subject to subsections (b) through (i) of this Code section, an account debtor on an account, chattel paper, or a payment intangible may discharge its obligation by paying the assignor until, but not after, the account debtor receives a notification, authenticated by the assignor or the assignee, that the amount due or to become due has been assigned and that payment is to be made to the assignee. After receipt of the notification, the account debtor may discharge its obligation by paying the assignee and may not discharge the obligation by paying the assignor.

(b) *When notification ineffective.* Subject to subsection (h) of this Code section, notification is ineffective under subsection (a) of this Code section:

(1) If it does not reasonably identify the rights assigned;

(2) To the extent that an agreement between an account debtor and a seller of a payment intangible limits the account debtor's duty to pay a person other than the seller and the limitation is effective under law other than this article; or

(3) At the option of an account debtor, if the notification notifies the account debtor to make less than the full amount of any installment or other periodic payment to the assignee, even if:

(A) Only a portion of the account, chattel paper, or payment intangible has been assigned to that assignee;

(B) A portion has been assigned to another assignee; or

(C) The account debtor knows that the assignment to that assignee is limited.

(c) *Proof of assignment.* Subject to subsection (h) of this Code section, if requested by the account debtor, an assignee shall seasonably furnish reasonable proof that the assignment has been made. Unless the assignee complies, the account debtor may discharge its obligation by paying the assignor, even if the account debtor has received a notification under subsection (a) of this Code section.

(d) *Term restricting assignment generally ineffective.* Except as otherwise provided in subsection (e) of this Code section and Code Sections 11-2A-303, 11-9-407, and 53-12-28 and subject to subsection (h) of this Code section, a term in an agreement between an account debtor and an assignor or in a promissory note is ineffective to the extent that it:

(1) Prohibits, restricts, or requires the consent of the account debtor or person obligated on the promissory note to the assignment or transfer of, or the creation, attachment, perfection, or enforcement of a security interest in, the account, chattel paper, payment intangible, or promissory note; or

(2) Provides that the assignment, transfer, creation, attachment, perfection, or enforcement of the security interest may give rise to a default, breach, right of recoupment, claim, defense, termination, right of termination, or remedy under the account, chattel paper, payment intangible, or promissory note.

(e) *Inapplicability of subsection (d) of this Code section to certain sales.* Subsection (d) of this Code section does not apply to the sale of a payment intangible or promissory note.

(f) *Legal restrictions on assignment generally ineffective.* Except as otherwise provided in Code Sections 11-2A-303 and 11-9-407 and subject to subsec-



tions (h) and (i) of this Code section, a rule of law, statute, or regulation that prohibits, restricts, or requires the consent of a government, governmental body or official, or account debtor to the assignment or transfer of, or creation of a security interest in, an account or chattel paper is ineffective to the extent that the rule of law, statute, or regulation:

(1) Prohibits, restricts, or requires the consent of the government, governmental body or official, or account debtor to the assignment or transfer of, or the creation, attachment, perfection, or enforcement of a security interest, in the account or chattel paper; or

(2) Provides that the assignment, transfer, creation, attachment, perfection, or enforcement of the security interest may give rise to a default, breach, right of recoupment, claim, defense, termination, right of termination, or remedy under the account or chattel paper.

(g) *Paragraph (3) of subsection (b) not waivable.* Subject to subsection (h) of this Code section, an account debtor may not waive or vary its option under paragraph (3) of subsection (b) of this Code section.

(h) *Rule for individual under other law.* This Code section is subject to law other than this article which establishes a different rule for an account debtor who is an individual and who incurred the obligation primarily for personal, family, or household purposes.

(i) *Inapplicability to health care insurance receivable.* This Code section does not apply to an assignment of a health care insurance receivable. (Code 1981, § 11-9-406, enacted by Ga. L. 2001, p. 362, § 1.)

**Law reviews.** — For article, “Commercial Law,” see 53 Mercer L. Rev. 153 (2001).

#### RESEARCH REFERENCES

**U.L.A.** — Uniform Commercial Code  
(U.L.A.) § 9-406.

#### **11-9-407. Restrictions on creation or enforcement of security interest in leasehold interest or in lessor’s residual interest.**

(a) *Term restricting assignment generally ineffective.* Except as otherwise provided in subsection (b) of this Code section, a term in a lease agreement is ineffective to the extent that it:

(1) Prohibits, restricts, or requires the consent of a party to the lease to the assignment, transfer, creation, attachment, perfection, or enforcement of a security interest in an interest of a party under the lease contract or in the lessor’s residual interest in the goods; or

(2) Provides that the assignment, transfer, creation, attachment, perfection, or enforcement of the security interest may give rise to a default,

breach, right of recoupment, claim, defense, termination, right of termination, or remedy under the lease.

(b) *Effectiveness of certain terms.* Except as otherwise provided in subsection (7) of Code Section 11-2A-303, a term described in paragraph (2) of subsection (a) of this Code section is effective to the extent that there is:

(1) A transfer by the lessee of the lessee's right of possession or use of the goods in violation of the term; or

(2) A delegation of a material performance of either party to the lease contract in violation of the term.

(c) *Security interest not material impairment.* The creation, attachment, perfection, or enforcement of a security interest in the lessor's interest under the lease contract or the lessor's residual interest in the goods is not a transfer that materially impairs the lessee's prospect of obtaining return performance or materially changes the duty of or materially increases the burden or risk imposed on the lessee within the purview of subsection (4) of Code Section 11-2A-303 unless, and then only to the extent that, enforcement actually results in a delegation of material performance of the lessor. (Code 1981, § 11-9-407, enacted by Ga. L. 2001, p. 362, § 1.)

#### RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 9-407.

#### **11-9-408. Restrictions on assignment of promissory notes, health care insurance receivables, and certain general intangibles ineffective.**

(a) *Term restricting assignment generally ineffective.* Except as otherwise provided in subsection (b) of this Code section or in Code Section 53-12-28, a term in a promissory note or in an agreement between an account debtor and a debtor which relates to a health care insurance receivable or a general intangible, including a contract, permit, license, or franchise, and which term prohibits, restricts, or requires the consent of the person obligated on the promissory note or the account debtor to the assignment or transfer of, or creation, attachment, or perfection of a security interest in, the promissory note, health care insurance receivable, or general intangible, is ineffective to the extent that the term:

(1) Would impair the creation, attachment, or perfection of a security interest; or

(2) Provides that the assignment, transfer, creation, attachment, or perfection of the security interest may give rise to a default, breach, right of recoupment, claim, defense, termination, right of termination, or remedy under the promissory note, health care insurance receivable, or general intangible.

(b) *Applicability of subsection (a) of this Code section to sales of certain rights to payment.* Subsection (a) of this Code section applies to a security interest in a payment intangible or promissory note only if the security interest arises out of a sale of the payment intangible or promissory note.

(c) *Legal restrictions on assignment generally ineffective.* Except as otherwise provided in Code Section 53-12-28, a rule of law, statute, or regulation that prohibits, restricts, or requires the consent of a government, governmental body or official, person obligated on a promissory note, or account debtor to the assignment or transfer of, or creation of a security interest in, a promissory note, health care insurance receivable, or general intangible, including a contract, permit, license, or franchise between an account debtor and a debtor, is ineffective to the extent that the rule of law, statute, or regulation:

(1) Would impair the assignment, transfer, creation, attachment, or perfection of a security interest; or

(2) Provides that the creation, attachment, or perfection of the security interest may give rise to a default, breach, right of recoupment, claim, defense, termination, right of termination, or remedy under the promissory note, health care insurance receivable, or general intangible.

(d) *Limitation on ineffectiveness under subsections (a) and (c) of this Code section.* To the extent that a term in a promissory note or in an agreement between an account debtor and a debtor which relates to a health care insurance receivable or general intangible or a rule of law, statute, or regulation described in subsection (c) of this Code section would be effective under law other than this article but is ineffective under subsection (a) or (c) of this Code section, the creation, attachment, or perfection of a security interest in the promissory note, health care insurance receivable, or general intangible:

(1) Is not enforceable against the person obligated on the promissory note or the account debtor;

(2) Does not impose a duty or obligation on the person obligated on the promissory note or the account debtor;

(3) Does not require the person obligated on the promissory note or the account debtor to recognize the security interest, pay or render performance to the secured party, or accept payment or performance from the secured party;

(4) Does not entitle the secured party to use or assign the debtor's rights under the promissory note, health care insurance receivable, or general intangible, including any related information or materials furnished to the debtor in the transaction giving rise to the promissory note, health care insurance receivable, or general intangible;



(5) Does not entitle the secured party to use, assign, possess, or have access to any trade secrets or confidential information of the person obligated on the promissory note or the account debtor; and

(6) Does not entitle the secured party to enforce the security interest in the promissory note, health care insurance receivable, or general intangible. (Code 1981, § 11-9-408, enacted by Ga. L. 2001, p. 362, § 1.)

#### RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 9-408.

#### 11-9-409. Restrictions on assignment of letter of credit rights ineffective.

(a) *Term or law restricting assignment generally ineffective.* A term in a letter of credit or a rule of law, statute, regulation, custom, or practice applicable to the letter of credit which prohibits, restricts, or requires the consent of an applicant, issuer, or nominated person to a beneficiary's assignment of or creation of a security interest in a letter of credit right is ineffective to the extent that the term or rule of law, statute, regulation, custom, or practice:

(1) Would impair the creation, attachment, or perfection of a security interest in the letter of credit right; or

(2) Provides that the assignment, transfer, creation, attachment, or perfection of the security interest may give rise to a default, breach, right of recoupment, claim, defense, termination, right of termination, or remedy under the letter of credit right.

(b) *Limitation on ineffectiveness under subsection (a) of this Code section.* To the extent that a term in a letter of credit is ineffective under subsection (a) of this Code section but would be effective under law other than this article or a custom or practice applicable to the letter of credit, to the transfer of a right to draw or otherwise demand performance under the letter of credit, or to the assignment of a right to proceeds of the letter of credit, the creation, attachment, or perfection of a security interest in the letter of credit right:

(1) Is not enforceable against the applicant, issuer, nominated person, or transferee beneficiary;

(2) Imposes no duties or obligations on the applicant, issuer, nominated person, or transferee beneficiary; and

(3) Does not require the applicant, issuer, nominated person, or transferee beneficiary to recognize the security interest, pay or render performance to the secured party, or accept payment or other performance from the secured party. (Code 1981, § 11-9-409, enacted by Ga. L. 2001, p. 362, § 1.)

## RESEARCH REFERENCES

**U.L.A.** — Uniform Commercial Code  
(U.L.A.) § 9-409.

## PART 5

## FILING

**Cross references.** — Applicability of part to default by buyer of goods sold in “home solicitation sale,” as defined in § 10-1-2, § 10-1-10. Respective rights of buyer, seller, etc., following repossession of motor vehicle sold under retail installment contract, § 10-1-36.

**Law reviews.** — For article discussing se-

cured creditors’ legal and equitable remedies and debtors’ protections under the Uniform Commercial Code, see 3 Ga. L. Rev. 198 (1968). For annual survey of commercial law, see 38 Mercer L. Rev. 85 (1986). For article, “Nonjudicial Foreclosures in Georgia: Fresh Doubts, Issues and Strategies,” see 23 Ga. St. B.J. 123 (1987).

## JUDICIAL DECISIONS

**Prerequisites for deficiency claim allowable under this article.** — O.C.G.A. § 10-1-36 provides cumulative additional rights and remedies which must be fulfilled before any deficiency claim under this

former article and former part will lie against a buyer. *Georgia Cent. Credit Union v. Coleman*, 155 Ga. App. 547, 271 S.E.2d 681 (1980).

## RESEARCH REFERENCES

**C.J.S.** — 79 C.J.S., Secured Transactions, § 144 et seq.

## Subpart 1

## Filing Office; Contents and Effectiveness of Financing Statement

**11-9-501. Filing office.**

(a) *Filing offices.* Except as otherwise provided in subsection (b) of this Code section, if the law of this state governs perfection of a security interest or agricultural lien, the office in which to file a financing statement to perfect the security interest or agricultural lien is:

(1) The office designated for the filing or recording of a record of a mortgage on the related real property, if:

(A) The collateral is as-extracted collateral, growing crops, or timber to be cut; or

(B) The financing statement is filed as a fixture filing and the collateral is goods that are or are to become fixtures; or

(2) The office of the clerk of the superior court of any county of this state, in all other cases, including a case in which the collateral is goods

that are or are to become fixtures and the financing statement is not filed as a fixture filing.

(b) *Filing office for transmitting utilities.* The office in which to file a financing statement to perfect a security interest in collateral, including fixtures, of a transmitting utility is the office of the clerk of the superior court of any county of this state. The financing statement also constitutes a fixture filing as to the collateral indicated in the financing statement which is or is to become fixtures. (Code 1981, § 11-9-501, enacted by Ga. L. 2001, p. 362, § 1; Ga. L. 2002, p. 995, § 6.)

**The 2002 amendment,** effective July 1, 2002, inserted “growing” in the middle of subparagraph (a)(1)(A).

**Editor’s notes.** — Ga. L. 2002, p. 995, § 8, not codified by the General Assembly, provides that: “This Act shall become effective July 1, 2002, and shall apply to a letter of credit that is issued on or after July 1, 2002. This Act does not apply to a transaction, event, obligation, or duty arising out of or associated with a letter of credit that was issued before July 1, 2002.”

**Law reviews.** — For article, “Real Property and the Federal Tax Lien Act of 1966,” see 3 Ga. St. B.J. 459 (1967). For article, “The Revisions to Article IX of the Uniform Com-

mercial Code,” see 15 Ga. St. B.J. 120 (1977). For article surveying developments in Georgia commercial law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 33 (1981). For survey article on commercial law, see 34 Mercer L. Rev. 31 (1982). For annual survey article discussing central filing system, see 46 Mercer L. Rev. 95 (1994).

For comment on *In re Carmichael Enters., Inc.*, 334 F. Supp. 94 (N.D. Ga. 1971), *aff’d per curiam*, 460 F.2d 1405 (5th Cir. 1972), holding that the proper place for debtor corporation to file financial statement is the “factual” principal place of business, see 9 Ga. St. B.J. 388 (1973).

## JUDICIAL DECISIONS

**Editor’s notes.** — In the light of the similarity of the provisions, decisions under former Article 9 are included in the annotations for this Code section. For a table of comparable provisions, see the table at the beginning of the Article.

**Underlying purpose** of this section was the establishment of purely local filing system. *In re Carmichael Enters., Inc.*, 334 F. Supp. 94 (N.D. Ga. 1971), *aff’d*, 460 F.2d 1405 (5th Cir. 1972) (decided under former Code Section 11-9-401).

**Purpose of former subsection (1)(b).** — Policy of former subsection (1)(b) of this section was to require filing in place or places where creditor would normally look for information concerning interests created by debtor. *In re Carmichael Enters., Inc.*, 334 F. Supp. 94 (N.D. Ga. 1971), *aff’d*, 460 F.2d 1405 (5th Cir. 1972) (decided under former Code Section 11-9-401).

**Apparent intent of words “not an individual”** is to differentiate individual proprietorships from other business entities.

*Retreading Equip., Inc. v. Murphy*, 5 Bankr. 596 (N.D. Ga. 1980) (decided under former Code Section 11-9-401).

**Proper place to file financing statement.** — The proper place to file financing statement under former subsection (1)(b) of this section was county of debtor corporation’s factual principal place of business. *In re Carmichael Enters., Inc.*, 334 F. Supp. 94 (N.D. Ga. 1971), *aff’d*, 460 F.2d 1405 (5th Cir. 1972) (decided under former Code Section 11-9-401).

**Meaning of “principal place of business”.** — Failure of legislature in enacting this section to make specific reference to “principal office” concept indicates it did not intend that “principal office” of corporate charter should be equivalent to “principal place of business.” *In re Carmichael Enters., Inc.*, 334 F. Supp. 94 (N.D. Ga. 1971), *aff’d*, 460 F.2d 1405 (5th Cir. 1972) (decided under former Code Section 11-9-401).

By using term “principal place of business” in this section, legislature intended



that proper place for filing of financing statement be the "factual" principal place of business and not "principal office" as designated in corporate charter. In re Carmichael Enters., Inc., 334 F. Supp. 94 (N.D. Ga. 1971), aff'd, 460 F.2d 1405 (5th Cir. 1972) (decided under former Code Section 11-9-401).

**Knowledge of contents of financing statement.** — Knowledge of claimed security interest is not equivalent to knowledge of contents of financing statement. United States v. Waterford No. 2 Office Center, 246 Ga. 475, 271 S.E.2d 790 (1980) (decided under former Code Section 11-9-401).

**Preservation of chattel interest in fixtures.** — This former section and §§ 11-9-402 and 11-9-403 (see now §§ 11-9-502 et seq. and 11-9-601 et seq.) provide for fixture filing to enable secured party with chattel interest in goods which are or are to become fixtures to preserve that interest. Williams v. Western Pac. Fin. Corp., 643 F.2d 331 (5th Cir. 1981) (decided under former Code Section 11-9-401).

**Liability of negligent title researcher.** — Failure of law firm's title researcher to find improperly indexed deed to secure debt in personalty docket, or a Uniform Commercial Code financing statement not

cross-indexed to realty docket does not make law firm for title insurer a joint tort-feasor with grantor who breaches warranty of title to grantee, as the tort is the breach of warranty and causation for such breach of warranty lies solely at hands of defendants. The law firm's delict, if any, was failure to detect defendants' delict. Pease & Elliman Realty Trust v. Gaines, 160 Ga. App. 125, 286 S.E.2d 448 (1981) (decided under former Code Section 11-9-401).

**Harvested peanut crops.** -- Plaintiffs' filing of their financing statement in the proper county gave defendant legal notice of plaintiffs' security interests and liens in peanut crops defendant purchased, even though the clerk incorrectly recorded the financing statement, and the perfected security interests remained effective even though the crops were harvested. Bartolan, Inc. v. Columbian Peanut Co., 727 F. Supp. 1444 (M.D. Ga. 1989) (decided under former Code Section 11-9-401).

**The effective date** for the statewide filing and central indexing system for financing statements was January 1, 1995. Trust Co. Bank v. Georgia Superior Court Clerks' Coop. Auth., 265 Ga. 390, 456 S.E.2d 571 (1995) (decided under former Code Section 11-9-401).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 68A Am. Jur. 2d, Secured Transactions, §§ 304, 323, 378 et seq.

**C.J.S.** — 6A C.J.S., Assignments, § 52. 72 C.J.S., Pledges, § 14.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 9-501.

**ALR.** — Withdrawal of paper after delivery to proper officer as affecting question

whether it is filed, 37 ALR 670.

What amounts to notice which will subject one's rights to an unrecorded conditional sale contract, 159 ALR 669.

Necessity that mortgage covering oil and gas lease be recorded as real-estate mortgage, and/or filed or recorded as chattel mortgage, 34 ALR2d 902.

## 11-9-502. Contents of financing statement; real estate mortgages as fixture filings; time of filing financing statement.

(a) *Sufficiency of financing statement.* Subject to subsection (b) of this Code section, a financing statement is sufficient only if it:

- (1) Provides the name of the debtor;
- (2) Provides the name of the secured party or a representative of the secured party;
- (3) Indicates the collateral covered by the financing statement; and

(4) Where both (A) the collateral described consists only of consumer goods as defined in paragraph (24) of subsection (a) of Code Section 11-9-102 and (B) the secured obligation is originally \$5,000.00 or less, gives the maturity date of the secured obligation or specifies that such obligation is not subject to a maturity date.

(b) *Real property related financing statements.* Except as otherwise provided in subsection (b) of Code Section 11-9-501, to be sufficient, a financing statement that covers as-extracted collateral, growing crops, or timber to be cut, or which is filed as a fixture filing and covers goods that are or are to become fixtures, must satisfy subsection (a) of this Code section and also:

(1) Indicate that it covers this type of collateral;

(2) Indicate that it is to be filed for record in the real property records;

(3) Provide a description of the real property to which the collateral is related sufficient to give constructive notice of a mortgage under the law of this state if the description were contained in a record of the mortgage of the real property; and

(4) If the debtor does not have an interest of record in the real property, provide the name of a record owner.

(c) *Real estate mortgages as fixture filings.* A real estate mortgage may not be filed as a fixture filing, but one filed prior to January 1, 1995, which was effective as a fixture filing when filed, remains effective as a fixture filing until the mortgage is released or satisfied of record or its effectiveness otherwise terminates as to the real estate.

(d) *Filing before security agreement or attachment.* A financing statement may be filed before a security agreement is made or a security interest otherwise attaches. (Code 1981, § 11-9-502, enacted by Ga. L. 2001, p. 362, § 1; Ga. L. 2002, p. 995, § 7.)

**The 2002 amendment,** effective July 1, 2002, inserted “growing” near the middle of the introductory language of subsection (b).

**Editor’s notes.** — Ga. L. 2002, p. 995, § 8, not codified by the General Assembly, provides that: “This Act shall become effective July 1, 2002, and shall apply to a letter of credit that is issued on or after July 1, 2002. This Act does not apply to a transaction, event, obligation, or duty arising out of or associated with a letter of credit that was issued before July 1, 2002.”

**Law reviews.** — For article discussing Uniform Commercial Code provisions establishing a security interest in fixtures as a means of protecting sellers, see 16 Mercer L. Rev. 404 (1965). For article discussing the Uni-

form Commercial Code provisions regarding the sufficiency of “The Description of Collateral in Security Agreements and Financing Statements,” see 28 Mercer L. Rev. 611 (1977). For article, “The Revisions to Article IX of the Uniform Commercial Code,” see 15 Ga. St. B.J. 120 (1977). For article, “Fixture Financing Under Georgia’s New Article 9,” see 16 Ga. St. B.J. 110 (1980). For article, “H.B. 712: New Requirements for Financing Statements and Continuation Statements Filed in Georgia,” see 22 Ga. St. B.J. 6 (1985). For article, “H.B. 1364: Revised Requirements for Financing Statements and Continuation Statements Filed in Georgia,” see 23 Ga. St. B.J. 50 (1986). For annual survey of law of real property, see 38

Mercer L. Rev. 319 (1986). For annual survey article on commercial law, see 50 Mercer L. Rev. 193 (1998).

For comment on *United States v.*

Crittenden, 563, F.2d 678 (5th Cir. 1977), appearing below, see 12 Ga. L. Rev. 692 (1977).

### JUDICIAL DECISIONS

**Editor's notes.** — In the light of the similarity of the provisions, decisions under former Article 9 are included in the annotations for this Code section. For a table of comparable provisions, see the table at the beginning of the Article.

**Applicability to financing statements, not security agreements.** — Requirement that identification of collateral indicate type of collateral is applicable to financing statements, not security agreements. *Personal Thrift Plan of Perry, Inc. v. Georgia Power Co.*, 242 Ga. 388, 249 S.E.2d 72 (1978) (decided under former Code Section 11-9-402).

**"Type" of collateral construed.** — This section allowed a secured party to file a financing statement which describes the property only by its "type." A type of collateral is, for example, goods, accounts, chattel paper, general intangibles, etc. *Woodrum v. Ford Motor Credit Co.*, 940 F.2d 1507 (11th Cir. 1991) (decided under former Code Section 11-9-402).

**Serial number alone** does not "indicate the type" of collateral. *Personal Thrift Plan of Perry, Inc. v. Georgia Power Co.*, 242 Ga. 388, 249 S.E.2d 72 (1978) (decided under former Code Section 11-9-402).

### OPINIONS OF THE ATTORNEY GENERAL

**Editor's notes.** — In the light of the similarity of the provisions, opinions under former Article 9 are included in the annotations for this Code section. For a table of comparable provisions, see the table at the beginning of the Article.

**Duty of superior court clerks.** — Clerks of superior court are not required to determine that property subject to a U.C.C. financing statement is properly described before recording the statement. 1982 Op. Att'y Gen. No. U82-38.

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 68A Am. Jur. 2d, Secured Transactions, §§ 32, 192 et seq., 310, 311, 329 et seq., 352-354, 365, 395.

**C.J.S.** — 76 C.J.S., Records, § 4.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 9-502.

**ALR.** — What amounts to a conditional sale, 17 ALR 1421; 43 ALR 1247; 92 ALR 304; 175 ALR 1366.

Violation of statute as to form of, or terms to be included in, conditional sale contract, as invalidating entire transaction or merely its effect to reserve title in vendor, 144 ALR 1103.

Priority as between federal tax lien and mortgage to secure future advances or expenditures by mortgagee, 90 ALR2d 1179.

Sufficiency of description of crops under UCC §§ 9-203(1)(b) and 9-402(1), 67 ALR3d 308; 100 ALR3d 10; 100 ALR3d 940.

Sufficiency of designation of debtor or secured party in security agreement or financing statement under UCC § 9-402, 99 ALR3d 478.

Sufficiency of address of debtor in financing statement required by UCC § 9-402(1), 99 ALR3d 807.

Sufficiency of address of secured party in financing statement required under UCC § 9-402(1), 99 ALR3d 1080.

Effectiveness of original financing statement under UCC Article 9 after change in debtor's name, identity, or business structure, 99 ALR3d 1194.

Sufficiency of secured party's signature on financing statement or security agreement under UCC § 9-402, 100 ALR3d 390.

Sufficiency of debtor's signature on security agreement or financing statement under UCC §§ 9-203 and 9-402, 3 ALR4th 502.



**11-9-503. Name of debtor and secured party.**

(a) *Sufficiency of debtor's name.* A financing statement sufficiently provides the name of the debtor:

(1) If the debtor is a registered organization, only if the financing statement provides the name of the debtor indicated on the public record of the debtor's jurisdiction of organization which shows the debtor to have been organized;

(2) If the debtor is a decedent's estate, only if the financing statement provides the name of the decedent and indicates that the debtor is an estate;

(3) If the debtor is a trust or a trustee acting with respect to property held in trust, only if the financing statement:

(A) Provides the name specified for the trust in its organic documents or, if no name is specified, provides the name of the settlor and additional information sufficient to distinguish the debtor from other trusts having one or more of the same settlors; and

(B) Indicates, in the debtor's name or otherwise, that the debtor is a trust or is a trustee acting with respect to property held in trust; and

(4) In other cases:

(A) If the debtor has a name, only if it provides the individual or organizational name of the debtor; and

(B) If the debtor does not have a name, only if it provides the names of the partners, members, associates, or other persons comprising the debtor.

(b) *Additional debtor related information.* A financing statement that provides the name of the debtor in accordance with subsection (a) of this Code section is not rendered ineffective by the absence of:

(1) A trade name or other name of the debtor; or

(2) Unless required under subparagraph (a)(4)(B) of this Code section, names of partners, members, associates, or other persons comprising the debtor.

(c) *Debtor's trade name insufficient.* A financing statement that provides only the debtor's trade name does not sufficiently provide the name of the debtor.

(d) *Representative capacity.* Failure to indicate the representative capacity of a secured party or representative of a secured party does not affect the sufficiency of a financing statement.

(e) *Multiple debtors and secured parties.* A financing statement may provide the name of more than one debtor and the name of more than one secured party. (Code 1981, § 11-9-503, enacted by Ga. L. 2001, p. 362, § 1.)

**Law reviews.** — For article discussing Uniform Commercial Code provisions establishing a security interest in fixtures as a means of protecting sellers, see 16 Mercer L. Rev. 404 (1965). For article discussing the Uniform Commercial Code provisions regarding the sufficiency of “The Description of Collateral in Security Agreements and Financing Statements,” see 28 Mercer L. Rev. 611 (1977). For article, “The Revisions to Article IX of the Uniform Commercial Code,” see 15 Ga. St. B.J. 120 (1977). For article, “Fixture Financing Under Georgia’s New Article 9,” see 16 Ga. St. B.J. 110 (1980). For article, “H.B. 712: New Require-

ments for Financing Statements and Continuation Statements Filed in Georgia,” see 22 Ga. St. B.J. 6 (1985). For article, “H.B. 1364: Revised Requirements for Financing Statements and Continuation Statements Filed in Georgia,” see 23 Ga. St. B.J. 50 (1986). For annual survey of law of real property, see 38 Mercer L. Rev. 319 (1986). For annual survey article on commercial law, see 50 Mercer L. Rev. 193 (1998).

For comment on *United States v. Crittenden*, 563, F.2d 678 (5th Cir. 1977), appearing below, see 12 Ga. L. Rev. 692 (1977).

## JUDICIAL DECISIONS

**Editor’s notes.** — In the light of the similarity of the provisions, decisions under former Article 9 are included in the annotations for this Code section. For a table of comparable provisions, see the table at the beginning of the Article.

**Name of debtor required.** — *Citizens Bank v. Ansley*, 467 F. Supp. 51 (M.D. Ga.), aff’d, 604 F.2d 669 (5th Cir. 1979) (decided under former Code Section 11-9-402).

**Debtor’s name only in trade name form.** — Financing statement showing debtor’s name only in unregistered trade name form is not legally sufficient to create security interest. *In re Firth*, 363 F. Supp. 369 (M.D. Ga. 1973) (decided under former Code Section 11-9-402).

Filing of a financing statement under a corporate debtor’s trade name, was sufficient, where business was done under the trade name and any reasonably prudent creditor would have searched the records under that name. *In re Simpson Motor Co.*, 101 Bankr. 813 (Bankr. N.D. Ga. 1989) (decided under former Code Section 11-9-402).

Creditor’s filing of a financing statement on the debtor’s automobiles in the debtor’s trade name rather than its legal name was sufficient, even though the creditor knew the legal name but decided not to file under it, where the debtor did business only under one trade name. *Willson v. Habersham*

*Bank*, 111 Bankr. 368 (N.D. Ga. 1990) (decided under former Code Section 11-9-402).

**Signature material aspect of financing statement.** — Unless former subsection (2) of this section applies, the debtor’s signature is a material aspect of the financing statement. *USI Capital & Leasing v. Medical Oxygen Serv., Inc.*, 36 Bankr. 341 (Bankr. N.D. Ga. 1984) (decided under former Code Section 11-9-402).

**Signature by real debtor in individual capacity on behalf of fictitious entity.** — Where real debtor has not signed financing statement in his individual capacity, but only on behalf of fictitious business entity, it is conceptually insufficient since signature of real debtor in his real name does not appear thereon. *In re Firth*, 363 F. Supp. 369 (M.D. Ga. 1973) (decided under former Code Section 11-9-402).

**Fictitious signature is insufficient notice to subsequent creditors.** — While this section has effect of binding those persons who contract in fictitious names to contracts, so executed, it does not have effect of saying that financing statements given in fictitious names are sufficient to notify subsequent creditors of identity of party using the fictitious name. Were a court to hold otherwise, the purpose of statutory scheme of requiring security interest to be perfected by filing a financing statement — to give notice to

future creditors of debtor — would be seriously undermined. *In re Firth*, 363 F. Supp. 369 (M.D. Ga. 1973) (decided under former Code Section 11-9-402).

**Signatures required for amendments.** — Section was amended in 1978 specifically to require signatures of debtors to amendments to financing statements. *Walter E. Heller & Co. v. Aetna Bus. Credit, Inc.*, 158 Ga. App. 249, 280 S.E.2d 144 (1981) (decided under former Code Section 11-9-402).

**Failure to file amended financing statement.** — Where creditor failed to file an amended financing statement reflecting debtor's name change, its original filing was not effective to perfect a security interest in collateral acquired by debtor more than four

months after it changed its name. *Pettigrew v. Consultants United, Inc. (In re Specialcare, Inc.)*, 209 Bankr. 13 (Bankr. N.D. Ga. 1997) (decided under former Code Section 11-9-503).

**First lienholder still protected despite error in financing statement.** — Even assuming a financing statement became seriously misleading due to a change in the debtor's name after dissolution of the corporation, the first lienholder was still protected as to collateral acquired through that time and up to four months thereafter. *Western Auto Supply Co. v. McKenzie*, 227 Ga. App. 477, 489 S.E.2d 537 (1997) (decided under former Code Section 11-9-503).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 68A Am. Jur. 2d, Secured Transactions, §§ 32, 192 et seq., 310, 311, 329 et seq., 352-354, 365, 395.

**C.J.S.** — 76 C.J.S., Records, § 4.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 9-503.

**ALR.** — What amounts to a conditional sale, 17 ALR 1421; 43 ALR 1247; 92 ALR 304; 175 ALR 1366.

Violation of statute as to form of, or terms to be included in, conditional sale contract, as invalidating entire transaction or merely its effect to reserve title in vendor, 144 ALR 1103.

Priority as between federal tax lien and mortgage to secure future advances or expenditures by mortgagee, 90 ALR2d 1179.

Sufficiency of description of crops under UCC §§ 9-203(1)(b) and 9-402(1), 67 ALR3d 308; 100 ALR3d 10; 100 ALR3d 940.

Sufficiency of designation of debtor or secured party in security agreement or financing statement under UCC § 9-402, 99 ALR3d 478.

Sufficiency of address of debtor in financing statement required by UCC § 9-402(1), 99 ALR3d 807.

Sufficiency of address of secured party in financing statement required under UCC § 9-402(1), 99 ALR3d 1080.

Effectiveness of original financing statement under UCC Article 9 after change in debtor's name, identity, or business structure, 99 ALR3d 1194.

Sufficiency of secured party's signature on financing statement or security agreement under UCC § 9-402, 100 ALR3d 390.

Sufficiency of debtor's signature on security agreement or financing statement under UCC §§ 9-203 and 9-402, 3 ALR4th 502.

### 11-9-504. Indication of collateral.

A financing statement sufficiently indicates the collateral that it covers if the financing statement provides:

(1) A description of the collateral pursuant to Code Section 11-9-108; or

(2) An indication that the financing statement covers all assets or all personal property. (Code 1981, § 11-9-504, enacted by Ga. L. 2001, p. 362, § 1.)



**Law reviews.** — For article discussing Uniform Commercial Code provisions establishing a security interest in fixtures as a means of protecting sellers, see 16 Mercer L. Rev. 404 (1965). For article discussing the Uniform Commercial Code provisions regarding the sufficiency of "The Description of Collateral in Security Agreements and Financing Statements," see 28 Mercer L. Rev. 611 (1977). For article, "The Revisions to Article 1X of the Uniform Commercial Code," see 15 Ga. St. B.J. 120 (1977). For article, "Fixture Financing Under Georgia's New Article 9," see 16 Ga. St. B.J. 110 (1980). For article, "H.B. 712: New Require-

ments for Financing Statements and Continuation Statements Filed in Georgia," see 22 Ga. St. B.J. 6 (1985). For article, "H.B. 1364: Revised Requirements for Financing Statements and Continuation Statements Filed in Georgia," see 23 Ga. St. B.J. 50 (1986). For annual survey of law of real property, see 38 Mercer L. Rev. 319 (1986). For annual survey article on commercial law, see 50 Mercer L. Rev. 193 (1998).

For comment on *United States v. Crittenden*, 563, F.2d 678 (5th Cir. 1977), appearing below, see 12 Ga. L. Rev. 692 (1977).

### JUDICIAL DECISIONS

**Editor's notes.** — In the light of the similarity of the provisions, decisions under former Article 9 are included in the annotations for this Code section. For a table of comparable provisions, see the table at the beginning of the Article.

**Applicability to financing statements, not security agreements.** — Requirement that identification of collateral indicate type of collateral is applicable to financing statements, not security agreements. *Personal Thrift Plan of Perry, Inc. v. Georgia Power Co.*, 242 Ga. 388, 249 S.E.2d 72 (1978) (decided under former Code Section 11-9-402).

**"Type" of collateral construed.** — This section allows a secured party to file a financing statement which describes the property only by its "type." A type of collateral is, for example, goods, accounts, chattel paper, general intangibles, etc. *Woodrum v. Ford Motor Credit Co.*, 940 F.2d 1507 (11th Cir. 1991) (decided under former Code Section 11-9-402).

**Serial number alone** does not "indicate the type" of collateral. *Personal Thrift Plan of Perry, Inc. v. Georgia Power Co.*, 242 Ga. 388, 249 S.E.2d 72 (1978) (decided under former Code Section 11-9-402).

### OPINIONS OF THE ATTORNEY GENERAL

**Duty of superior court clerks.** — Clerks of superior court are not required to determine that property subject to a U.C.C. financing statement is properly described be-

fore recording the statement. 1982 Op. Att'y Gen. No. U82-38. (decided under former Code Section 11-9-402).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 68A Am. Jur. 2d, Secured Transactions, §§ 32, 192 et seq., 310, 311, 329 et seq., 352-354, 365, 395.

**C.J.S.** — 76 C.J.S., Records, § 4.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 9-504.

**ALR.** — What amounts to a conditional sale, 17 ALR 1421; 43 ALR 1247; 92 ALR 304; 175 ALR 1366.

Violation of statute as to form of, or terms to be included in, conditional sale contract,

as invalidating entire transaction or merely its effect to reserve title in vendor, 144 ALR 1103.

Priority as between federal tax lien and mortgage to secure future advances or expenditures by mortgagee, 90 ALR2d 1179.

Sufficiency of description of crops under UCC §§ 9-203(1)(b) and 9-402(1), 67 ALR3d 308; 100 ALR3d 10; 100 ALR3d 940.

Sufficiency of designation of debtor or secured party in security agreement or fi-

financing statement under UCC § 9-402, 99 ALR3d 478.

Sufficiency of address of debtor in financing statement required by UCC § 9-402(1), 99 ALR3d 807.

Sufficiency of address of secured party in financing statement required under UCC § 9-402(1), 99 ALR3d 1080.

Effectiveness of original financing state-

ment under UCC Article 9 after change in debtor's name, identity, or business structure, 99 ALR3d 1194.

Sufficiency of secured party's signature on financing statement or security agreement under UCC § 9-402, 100 ALR3d 390.

Sufficiency of debtor's signature on security agreement or financing statement under UCC §§ 9-203 and 9-402, 3 ALR4th 502.

### **11-9-505. Filing and compliance with other statutes and treaties for consignments, leases, other bailments, and other transactions.**

(a) *Use of terms other than "debtor" and "secured party."* A consignor, lessor, or other bailor of goods, a licensor, or a buyer of a payment intangible or promissory note may file a financing statement, or may comply with a statute or treaty described in subsection (a) of Code Section 11-9-311, using the terms "consignor," "consignee," "lessor," "lessee," "bailor," "bailee," "licensor," "licensee," "owner," "registered owner," "buyer," "seller," or words of similar import, instead of the terms "secured party" and "debtor".

(b) *Effect of financing statement under subsection (a) of this Code section.* This part applies to the filing of a financing statement under subsection (a) of this Code section and, as appropriate, to compliance that is equivalent to filing a financing statement under subsection (b) of Code Section 11-9-311, but the filing or compliance is not of itself a factor in determining whether the collateral secures an obligation. If it is determined for another reason that the collateral secures an obligation, a security interest held by the consignor, lessor, bailor, licensor, owner, or buyer which attaches to the collateral is perfected by the filing or compliance. (Code 1981, § 11-9-505, enacted by Ga. L. 2001, p. 362, § 1.)

### **RESEARCH REFERENCES**

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 9-505.

### **11-9-506. Effect of errors or omissions.**

(a) *Minor errors and omissions.* A financing statement substantially satisfying the requirements of this part is effective, even if it has minor errors or omissions, unless the errors or omissions make the financing statement seriously misleading.

(b) *Financing statement seriously misleading.* Except as otherwise provided in subsection (c) of this Code section, a financing statement that fails sufficiently to provide the name of the debtor in accordance with subsection (a) of Code Section 11-9-503 is seriously misleading.

(c) *Financing statement not seriously misleading.* If a search of the records of the filing office under the debtor's correct name, using the filing office's standard search logic, if any, would disclose a financing statement that fails sufficiently to provide the name of the debtor in accordance with subsection (a) of Code Section 11-9-503, the name provided does not make the financing statement seriously misleading.

(d) *"Debtor's correct name."* For purposes of subsection (b) of Code Section 11-9-508, the "debtor's correct name" as used in subsection (c) of this Code section means the correct name of the new debtor. (Code 1981, § 11-9-506, enacted by Ga. L. 2001, p. 362, § 1.)

**Law reviews.** — For article discussing Uniform Commercial Code provisions establishing a security interest in fixtures as a means of protecting sellers, see 16 Mercer L. Rev. 404 (1965). For article discussing the Uniform Commercial Code provisions regarding the sufficiency of "The Description of Collateral in Security Agreements and Financing Statements," see 28 Mercer L. Rev. 611 (1977). For article, "The Revisions to Article IX of the Uniform Commercial Code," see 15 Ga. St. B.J. 120 (1977). For article, "Fixture Financing Under Georgia's New Article 9," see 16 Ga. St. B.J. 110 (1980). For article, "H.B. 712: New Require-

ments for Financing Statements and Continuation Statements Filed in Georgia," see 22 Ga. St. B.J. 6 (1985). For article, "H.B. 1364: Revised Requirements for Financing Statements and Continuation Statements Filed in Georgia," see 23 Ga. St. B.J. 50 (1986). For annual survey of law of real property, see 38 Mercer L. Rev. 319 (1986). For annual survey article on commercial law, see 50 Mercer L. Rev. 193 (1998).

For comment on *United States v. Crittenden*, 563, F.2d 678 (5th Cir. 1977), appearing below, see 12 Ga. L. Rev. 692 (1977).

## JUDICIAL DECISIONS

**Editor's notes.** — In the light of the similarity of the provisions, decisions under former Article 9 are included in the annotations for this Code section. For a table of comparable provisions, see the table at the beginning of the Article.

**Listing name of debtor's farm, not debtor's name.** — Erroneously listing name of debtor's purported farm, rather than debtor's name, on security agreement is seriously misleading to subsequent creditors, and, as such, renders creditor's security interest in property so listed unperfected. *Citizens Bank v. Ansley*, 467 F. Supp. 51 (M.D. Ga.), aff'd, 604 F.2d 669 (5th Cir. 1979) (decided under former Code Section 11-9-402).

**Erroneous listing of agent, rather than owner.** — Financing statement which erroneously listed the agent of the owner of rented land upon which secured crops were grown, rather than listing the actual owner, was not seriously misleading, and was therefore effective. *United States v. Georgia Vegetables Co.*, 123 Bankr. 456 (M.D. Ga. 1990)

(decided under former Code Section 11-9-402).

**Creditor's filing of financing statements under debtor's trade name only** rather than under the debtor's legal, corporate name was seriously misleading and insufficient to perfect a security interest, where potential creditors would have been misled due to the name by which the debtor was listed in the financing statements. *United States Cylinders, Inc. v. Vital Breathing Prods., Inc.*, 98 Bankr. 97 (Bankr. N.D. Ga. 1988) (decided under former Code Section 11-9-402).

**Failure to file amended financing statement.** — Where creditor failed to file an amended financing statement reflecting debtor's name change, its original filing was not effective to perfect a security interest in collateral acquired by debtor more than four months after it changed its name. *Pettigrew v. Consultants United, Inc.* (In re Specialcare, Inc.), 209 Bankr. 13 (Bankr. N.D. Ga. 1997).

**First lienholder still protected despite er-**



**ror in financing statement.** — Even assuming a financing statement became seriously misleading due to a change in the debtor's name after dissolution of the corporation, the first lienholder was still protected as to collateral acquired through that time and up to four months thereafter. *Western Auto Supply Co. v. McKenzie*, 227 Ga. App. 477, 489 S.E.2d 537 (1997).

**Transfer of collateral.** — Where the financing statement was effective when it named “King’s Tuft” as the debtor but the collateral was subsequently transferred to “Cohutta Mills,” the statement became seriously misleading: because the two names were completely dissimilar, a searcher of

“Cohutta Mills’” interests would not be alerted to inquire into “King’s Tuft’s” interests. *Jones v. Small Bus. Admin. (In re Cohutta Mills, Inc.)*, 108 Bankr. 815 (N.D. Ga. 1989) (decided under former Code Section 11-9-402).

**Filing continuation statement.** — Upon the lapse of a seriously misleading, though partially effective, financing statement, the secured party, acting in good faith, must file a continuation statement under the new debtor's name if it wishes to sustain its perfected status. *Jones v. Small Bus. Admin. (In re Cohutta Mills, Inc.)*, 108 Bankr. 815 (N.D. Ga. 1989) (decided under former Code Section 11-9-402).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 68A Am. Jur. 2d, Secured Transactions, §§ 32, 192 et seq., 310, 311, 329 et seq., 352-354, 365, 395.

**C.J.S.** — 76 C.J.S., Records, § 4.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 9-506.

**ALR.** — What amounts to a conditional sale, 17 ALR 1421; 43 ALR 1247; 92 ALR 304; 175 ALR 1366.

Violation of statute as to form of, or terms to be included in, conditional sale contract, as invalidating entire transaction or merely its effect to reserve title in vendor, 144 ALR 1103.

Priority as between federal tax lien and mortgage to secure future advances or expenditures by mortgagee, 90 ALR2d 1179.

Sufficiency of description of crops under UCC §§ 9-203(1)(b) and 9-402(1), 67 ALR3d 308; 100 ALR3d 10; 100 ALR3d 940.

Sufficiency of designation of debtor or secured party in security agreement or financing statement under UCC § 9-402, 99 ALR3d 478.

Sufficiency of address of debtor in financing statement required by UCC § 9-402(1), 99 ALR3d 807.

Sufficiency of address of secured party in financing statement required under UCC § 9-402(1), 99 ALR3d 1080.

Effectiveness of original financing statement under UCC Article 9 after change in debtor's name, identity, or business structure, 99 ALR3d 1194.

Sufficiency of secured party's signature on financing statement or security agreement under UCC § 9-402, 100 ALR3d 390.

Sufficiency of debtor's signature on security agreement or financing statement under UCC §§ 9-203 and 9-402, 3 ALR4th 502.

### 11-9-507. Effect of certain events on effectiveness of financing statement.

(a) *Disposition.* A filed financing statement remains effective with respect to collateral that is sold, exchanged, leased, licensed, or otherwise disposed of and in which a security interest or agricultural lien continues, even if the secured party knows of or consents to the disposition.

(b) *Information becoming seriously misleading.* Except as otherwise provided in subsection (c) of this Code section and Code Section 11-9-508, a financing statement is not rendered ineffective if, after the financing statement is filed, the information provided in the financing statement becomes seriously misleading under Code Section 11-9-506.

(c) *Change in debtor's name.* If a debtor so changes its name that a filed financing statement becomes seriously misleading under Code Section 11-9-506:

(1) The financing statement is effective to perfect a security interest in collateral acquired by the debtor before, or within four months after, the change; and

(2) The financing statement is not effective to perfect a security interest in collateral acquired by the debtor more than four months after the change, unless an amendment to the financing statement which renders the financing statement not seriously misleading is filed within four months after the change. (Code 1981, § 11-9-507, enacted by Ga. L. 2001, p. 362, § 1.)

#### RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 9-507.

#### **11-9-508. Effectiveness of financing statement if new debtor becomes bound by security agreement.**

(a) *Financing statement naming original debtor.* Except as otherwise provided in this Code section, a filed financing statement naming an original debtor is effective to perfect a security interest in collateral in which a new debtor has or acquires rights to the extent that the financing statement would have been effective had the original debtor acquired rights in the collateral.

(b) *Financing statement becoming seriously misleading.* If the difference between the name of the original debtor and that of the new debtor causes a filed financing statement that is effective under subsection (a) of this Code section to be seriously misleading under Code Section 11-9-506:

(1) The financing statement is effective to perfect a security interest in collateral acquired by the new debtor before, and within four months after, the new debtor becomes bound under subsection (d) of Code Section 11-9-203; and

(2) The financing statement is not effective to perfect a security interest in collateral acquired by the new debtor more than four months after the new debtor becomes bound under subsection (d) of Code Section 11-9-203 unless an initial financing statement providing the name of the new debtor is filed before the expiration of that time.

(c) *When Code section not applicable.* This Code section does not apply to collateral as to which a filed financing statement remains effective against the new debtor under subsection (a) of Code Section 11-9-507. (Code 1981, § 11-9-508, enacted by Ga. L. 2001, p. 362, § 1.)

## RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 9-508.

**11-9-509. Persons entitled to file a record.**

(a) *Person entitled to file record.* A person may file an initial financing statement, amendment that adds collateral covered by a financing statement, or amendment that adds a debtor to a financing statement only if:

(1) The debtor authorizes the filing in an authenticated record or pursuant to subsection (b) or (c) of this Code section; or

(2) The person holds an agricultural lien that has become effective at the time of filing and the financing statement covers only collateral in which the person holds an agricultural lien.

(b) *Security agreement as authorization.* By authenticating or becoming bound as debtor by a security agreement, a debtor or new debtor authorizes the filing of an initial financing statement, and an amendment, covering:

(1) The collateral described in the security agreement; and

(2) Property that becomes collateral under paragraph (2) of subsection (a) of Code Section 11-9-315, whether or not the security agreement expressly covers proceeds.

(c) *Acquisition of collateral as authorization.* By acquiring collateral in which a security interest or agricultural lien continues under paragraph (1) of subsection (a) of Code Section 11-9-315, a debtor authorizes the filing of an initial financing statement, and an amendment, covering the collateral and property that becomes collateral under paragraph (2) of subsection (a) of Code Section 11-9-315.

(d) *Person entitled to file certain amendments.* A person may file an amendment other than an amendment that adds collateral covered by a financing statement or an amendment that adds a debtor to a financing statement only if:

(1) The secured party of record authorizes the filing; or

(2) The amendment is a termination statement for a financing statement as to which the secured party of record has failed to file or send a termination statement as required by subsection (a) or (c) of Code Section 11-9-513, the debtor authorizes the filing, and the termination statement indicates that the debtor authorized it to be filed.

(e) *Multiple secured parties of record.* If there is more than one secured party of record for a financing statement, each secured party of record may authorize the filing of an amendment under subsection (d) of this Code section. (Code 1981, § 11-9-509, enacted by Ga. L. 2001, p. 362, § 1.)



## RESEARCH REFERENCES

**U.L.A.** — Uniform Commercial Code  
(U.L.A.) § 9-509.

**11-9-510. Effectiveness of filed record.**

(a) *Filed record effective if authorized.* A filed record is effective only to the extent that it was filed by a person that may file it under Code Section 11-9-509.

(b) *Authorization by one secured party of record.* A record authorized by one secured party of record does not affect the financing statement with respect to another secured party of record.

(c) *Continuation statement not timely filed.* A continuation statement that is not filed within the six-month period prescribed by subsection (c) of Code Section 11-9-515 is ineffective. (Code 1981, § 11-9-510, enacted by Ga. L. 2001, p. 362, § 1.)

**Law reviews.** — For article on the 1963 amendment to the Georgia Uniform Commercial Code, see 14 Mercer L. Rev. 378 (1963). For article, “The Revisions to Article IX of the Uniform Commercial Code,” see 15 Ga. St. B.J. 120 (1977). For article, “H.B. 712: New Requirements for Financing Statements and Continuation Statements Filed in Georgia,” see 22 Ga. St. B.J. 6 (1985). For

article surveying commercial law in 1984-1985, see 37 Mercer L. Rev. 139 (1985). For article, “H.B. 1364: Revised Requirements for Financing Statements and Continuation Statements Filed in Georgia,” see 23 Ga. St. B.J. 50 (1986). For annual survey of law of real property, see 38 Mercer L. Rev. 319 (1986). For survey article on commercial law, see 44 Mercer L. Rev. 99 (1992).

## JUDICIAL DECISIONS

**Editor’s notes.** — In the light of the similarity of the provisions, decisions under former Article 9 are included in the annotations for this Code section. For a table of comparable provisions, see the table at the beginning of the Article.

**Harvested peanut crops.** — Plaintiffs’ filing of their financing statement in the proper county gave defendant legal notice of plaintiffs’ security interests and liens in peanut crops defendant purchased, even though the clerk incorrectly recorded the financing statement, and the perfected security interests remained effective even though the crops were harvested. *Bartolan, Inc. v. Columbian Peanut Co.*, 727 F. Supp. 1444 (M.D. Ga. 1989).

**Document identified in handwriting as an “amendment,”** which contained a property description that varied markedly from that contained in the original financing state-

ment and was signed by both the secured party’s representative and the debtor’s representative, was not merely mislabeled due to clerical error and was not legally effective as a continuation statement. *Kubota Tractor Corp. v. Citizens & S. Nat’l Bank*, 198 Ga. App. 830, 403 S.E.2d 218 (1991).

**Filing of continuation statements.** — Former subsection (3) worked to allow filing officers (Superior Court Clerks) to refuse to accept continuation statements until the last 6 months of the previous filing’s effectiveness. Once the new filing is accepted, however, it is in force for a period of five years, not from the filing date of the financing statement, but from the date of the filing of the new statement, under former subsection (8). *In re Rainbow Mfg. Co.*, 150 Bankr. 857 (M.D. Ga. 1993).

Continuation statement filed by a secured creditor prior to the six-month period set

forth in former subsection (3) was effective for five years from the date of filing and extended the creditor's security interest in certain assets of the debtor beyond the original period of protection. *Coats Am., Inc. v. Summit Nat'l Bank*, 211 Bankr. 771 (N.D. Ga. 1997).

**Second financing statement considered back-up, not continuation or amendment of original.** — A second financing statement filed by the same creditor covering the same collateral could not be considered a contin-

uation statement under this section, or an amendment to the original under former § 11-9-402 (see now § 11-9-502 et seq.), but was deemed to be a back-up financing statement with its own separately established priority, and, where the debtor's bankruptcy petition was filed while the first financing statement was still effective, creditor's first-in time priority status under the original statement was preserved. *Giddens v. Pioneer Credit*, 205 Bankr. 349 (Bankr. M.D. Ga. 1997).

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 68A Am. Jur. 2d, Secured Transactions, §§ 310-314, 318, 405-419.

**C.J.S.** — 76 C.J.S., Records, § 4.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 9-510.

**ALR.** — Coverage of "nonrecording" or "nonfiling" insurance against loss from fail-

ure to record chattel mortgage, conditional sale, or other security instrument, 51 ALR2d 325.

Effectiveness of original financing statement under UCC Article 9 after change in debtor's name, identity, or business structure, 99 ALR3d 1194.

#### 11-9-511. Secured party of record.

(a) *Secured party of record.* A secured party of record with respect to a financing statement is a person whose name is provided as the name of the secured party or a representative of the secured party in an initial financing statement that has been filed. If an initial financing statement is filed under subsection (a) of Code Section 11-9-514, the assignee named in the initial financing statement is the secured party of record with respect to the financing statement.

(b) *Amendment naming secured party of record.* If an amendment of a financing statement which provides the name of a person as a secured party or a representative of a secured party is filed, the person named in the amendment is a secured party of record. If an amendment is filed under subsection (b) of Code Section 11-9-514, the assignee named in the amendment is a secured party of record.

(c) *Amendment deleting secured party of record.* A person remains a secured party of record until the filing of an amendment of the financing statement which deletes the person. (Code 1981, § 11-9-511, enacted by Ga. L. 2001, p. 362, § 1.)

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 68A Am. Jur. 2d, Secured Transactions, §§ 310-314, 318, 405-419.

**C.J.S.** — 76 C.J.S., Records, § 4.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 9-511.

**ALR.** — Coverage of "nonrecording" or

“nonfiling” insurance against loss from failure to record chattel mortgage, conditional sale, or other security instrument, 51 ALR2d 325.

Effectiveness of original financing statement under UCC Article 9 after change in debtor’s name, identity, or business structure, 99 ALR3d 1194.

### 11-9-512. Amendment of financing statement.

(a) *Amendment of information in financing statement.* Subject to Code Section 11-9-509, a person may add or delete collateral covered by, continue or terminate the effectiveness of, or, subject to subsection (e) of this Code section, otherwise amend the information provided in a financing statement by filing an amendment that:

(1) Identifies, by its file number, the initial financing statement to which the amendment relates; and

(2) If the amendment relates to an initial financing statement filed or recorded in a filing office described in paragraph (1) of subsection (a) of Code Section 11-9-501, provides the information specified in subsection (b) of Code Section 11-9-502.

(b) *Period of effectiveness not affected.* Except as otherwise provided in Code Section 11-9-515, the filing of an amendment does not extend the period of effectiveness of the financing statement.

(c) *Effectiveness of amendment adding collateral.* A financing statement that is amended by an amendment that adds collateral is effective as to the added collateral only from the date of the filing of the amendment.

(d) *Effectiveness of amendment adding debtor.* A financing statement that is amended by an amendment that adds a debtor is effective as to the added debtor only from the date of the filing of the amendment.

(e) *Certain amendments ineffective.* An amendment is ineffective to the extent it:

(1) Purports to delete all debtors and fails to provide the name of a debtor to be covered by the financing statement; or

(2) Purports to delete all secured parties of record and fails to provide the name of a new secured party of record. (Code 1981, § 11-9-512, enacted by Ga. L. 2001, p. 362, § 1.)

### RESEARCH REFERENCES

**U.L.A.** — Uniform Commercial Code  
(U.L.A.) § 9-512.



**11-9-513. Termination statement.**

(a) *Consumer goods.* A secured party shall cause the secured party of record for a financing statement to file a termination statement for the financing statement if the financing statement covers consumer goods and:

(1) There is no obligation secured by the collateral covered by the financing statement and no commitment to make an advance, incur an obligation, or otherwise give value; or

(2) The debtor did not authorize the filing of the initial financing statement.

(b) *Time for compliance with subsection (a) of this Code section.* To comply with subsection (a) of this Code section, a secured party shall cause the secured party of record to file the termination statement:

(1) Within one month after there is no obligation secured by the collateral covered by the financing statement and no commitment to make an advance, incur an obligation, or otherwise give value; or

(2) If earlier, within 20 days after the secured party receives an authenticated demand from a debtor.

(c) *Other collateral.* In cases not governed by subsection (a) of this Code section, within 90 days after there is no obligation secured by the collateral covered by or described in the financing statement and no commitment to make an advance, incur an obligation, or otherwise give value or, if earlier, within 20 days after a secured party receives an authenticated demand from a debtor, the secured party shall cause the secured party of record for a financing statement to send to the debtor a termination statement for the financing statement or file the termination statement in the filing office if:

(1) Except in the case of a financing statement covering accounts or chattel paper that has been sold or goods that are the subject of a consignment, there is no obligation secured by the collateral covered by the financing statement and no commitment to make an advance, incur an obligation, or otherwise give value;

(2) The financing statement covers accounts or chattel paper that has been sold but as to which the account debtor or other person obligated has discharged its obligation;

(3) The financing statement covers goods that were the subject of a consignment to the debtor but are not in the debtor's possession; or

(4) The debtor did not authorize the filing of the initial financing statement.

(d) *Effect of filing termination statement.* Except as otherwise provided in Code Section 11-9-510, upon the filing of a termination statement with the filing office, the financing statement to which the termination statement relates ceases to be effective. (Code 1981, § 11-9-513, enacted by Ga. L. 2001, p. 362, § 1.)

**Law reviews.** — For article on the 1963 amendment to the Georgia Uniform Commercial Code, see 14 Mercer L. Rev. 378 (1963). For article, "Security Transfers by Secured Parties," see 4 Ga. L. Rev. 527 (1970). For article, "The Revisions to Article

IX of the Uniform Commercial Code," see 15 Ga. St. B.J. 120 (1977). For survey article on commercial law, see 34 Mercer L. Rev. 31 (1982). For survey article on recent developments in Georgia law of remedies, see 34 Mercer L. Rev. 397 (1982).

### JUDICIAL DECISIONS

**Editor's notes.** — In the light of the similarity of the provisions, decisions under former Article 9 are included in the annotations for this Code section. For a table of comparable provisions, see the table at the beginning of the Article.

**A loan, null and void as a matter of law,** creates no "outstanding secured obligation," whether or not declared to be null and void by order of court. *United States Life Credit Corp. v. Johnson*, 248 Ga. 852, 287 S.E.2d 1 (1982).

**Loan agreement language held insufficient to terminate.** — Although the provisions of a subsequent loan agreement stated: "It is understood that this Loan Agreement supersedes and cancels any previous Loan Agreements," this language did not cancel the security agreements or financial statements previously executed by the parties, but merely served to consolidate the previous loan agreements between the parties, and

where instead of filing a termination statement, creditor filed a continuation statement, continuing the earlier financing statement, the creditor's security interest, perfected earlier in debtor's equipment, was still valid and effective. *Tidwell v. Slocumb* (In re Ga. Steel, Inc.), 71 Bankr. 903 (Bankr. M.D. Ga. 1987) (decided under former Code Section 11-9-404).

**Award of damages held proper.** — Where industrial loan was void from its inception as usurious, it created no "outstanding secured obligation," and an order by the trial court awarding damages under this section was proper where the lender refused to provide a termination statement that he no longer claimed a security interest under the financing statement. *United States Life Credit Corp. v. Johnson*, 161 Ga. App. 864, 290 S.E.2d 280 (1982) (decided under former Code Section 11-9-404).

### OPINIONS OF THE ATTORNEY GENERAL

**Editor's notes.** — In the light of the similarity of the provisions, opinions under former Article 9 are included in the annotations for this Code section. For a table of comparable provisions, see the table at the beginning of the Article.

**Person obligated to pay filing fee.** — Either secured party or debtor may file termination statement under the former provisions of Code Section 11-9-404; whoever files it is obligated for filing fee. 1970 Op. Att'y Gen. No. U70-178.

**Clerk must obtain written authorization** executed by or on behalf of grantee in order to cancel a security instrument and in case of real property may require additional formalities such as attestations to assure against forgery. 1981 Op. Att'y Gen. No. U81-50.

**Sufficiency of release of corporate security interests under UCC.** — See 1986 Op. Att'y Gen. No. U86-17.

RESEARCH REFERENCES

**Am. Jur. 2d.** — 68A Am. Jur. 2d, Secured Transactions, §§ 419-420, 426-432.

**C.J.S.** — 72 C.J.S., Pledges, § 44. 76 C.J.S., Records, § 27.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 9-513.

11-9-514. Assignment of powers of secured party of record.

- (a) *Assignment reflected on initial financing statement.* An initial financing statement may reflect an assignment of all of the secured party’s power to authorize an amendment to the financing statement by providing the name and mailing address of the assignee as the name and address of the secured party.
- (b) *Assignment of filed financing statement.* A secured party of record may assign of record all or part of its power to authorize an amendment to a financing statement by filing in the filing office an amendment of the financing statement which:
- (1) Identifies, by its file number, the initial financing statement to which it relates;
  - (2) Provides the name of the assignor; and
  - (3) Provides the name and mailing address of the assignee. (Code 1981, § 11-9-514, enacted by Ga. L. 2001, p. 362, § 1.)
- Law reviews.** — For article on the 1963 amendment to the Georgia Uniform Commercial Code, see 14 Mercer L. Rev. 378 (1963). For article, “Security Transfers by Secured Parties,” see 4 Ga. L. Rev. 527 (1970).

RESEARCH REFERENCES

**Am. Jur. 2d.** — 68A Am. Jur. 2d, Secured Transactions, §§ 283, 284, 420, 462.

**C.J.S.** — 72 C.J.S., Pledges, §§ 41-44.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 9-514.

**ALR.** — Validity of assignment of future book accounts, 72 ALR 856.

Recording laws as applied to assignments

of mortgages on real estate, 104 ALR 1301.

Assignability of contemplated debt before execution of agreement by which it is to be created, 116 ALR 955.

Federal government or agencies of federal government as subject to payment of tax or fee imposed upon, or for, recording or filing instrument, 124 ALR 1267.

11-9-515. Duration and effectiveness of financing statement; effect of lapsed financing statement.

- (a) *Five-year effectiveness.* Except as otherwise provided in subsection (d) of this Code section, a filed financing statement is effective for a period of five years after the date of filing or until the twentieth day after any earlier maturity date required to be specified on the filed financing statement.



(b) *Lapse and continuation of financing statement.* The effectiveness of a filed financing statement lapses on the expiration of the period of its effectiveness unless before the lapse a continuation statement is filed pursuant to subsection (c) of this Code section. Upon lapse, a financing statement ceases to be effective and any security interest or agricultural lien that was perfected by the financing statement becomes unperfected, unless the security interest is perfected otherwise. If the security interest or agricultural lien becomes unperfected upon lapse, it is deemed never to have been perfected as against a purchaser of the collateral for value.

(c) *When continuation statement may be filed.* A continuation statement may be filed only within six months before the expiration of the five-year period specified in subsection (a) of this Code section or the occurrence of any earlier maturity date required to be specified on a filed financing statement.

(d) *Effect of filing continuation statement.* Except as otherwise provided in Code Section 11-9-510, upon timely filing of a continuation statement, the effectiveness of the initial financing statement continues for a period of five years commencing on the day on which the financing statement would have become ineffective in the absence of the filing or, where both (1) the collateral described consists only of consumer goods as defined in paragraph (24) of subsection (a) of Code Section 11-9-102 and (2) the secured obligation is originally \$5,000.00 or less, any earlier maturity date of the secured obligation specified on such continuation statement. Upon the expiration of the five-year period or the earlier occurrence of a required specified maturity date, the financing statement lapses in the same manner as provided in subsection (b) of this Code section, unless, before the lapse, another continuation statement is filed pursuant to subsection (c) of this Code section. Succeeding continuation statements may be filed in the same manner to continue the effectiveness of the initial financing statement. (Code 1981, § 11-9-515, enacted by Ga. L. 2001, p. 362, § 1.)

**Law reviews.** — For article on the 1963 amendment to the Georgia Uniform Commercial Code, see 14 Mercer L. Rev. 378 (1963). For article, “The Revisions to Article IX of the Uniform Commercial Code,” see 15 Ga. St. B.J. 120 (1977). For article, “H.B. 712: New Requirements for Financing Statements and Continuation Statements Filed in Georgia,” see 22 Ga. St. B.J. 6 (1985). For

article surveying commercial law in 1984-1985, see 37 Mercer L. Rev. 139 (1985). For article, “H.B. 1364: Revised Requirements for Financing Statements and Continuation Statements Filed in Georgia,” see 23 Ga. St. B.J. 50 (1986). For annual survey of law of real property, see 38 Mercer L. Rev. 319 (1986). For survey article on commercial law, see 44 Mercer L. Rev. 99 (1992).

## JUDICIAL DECISIONS

**Editor’s notes.** — In the light of the similarity of the provisions, decisions under former Article 9 are included in the annotations for this Code section. For a table of comparable provisions, see the table at the beginning of the Article.

**The five-year period begins on day of filing.** — The time computation would be made from the filing day and would expire on midnight of the day preceding the anniversary date of filing. In order to be effective, any continuation statement would have to be

filed within six months prior to expiration of the five-year period. *Harrelson Rubber Co. v. Super Treads, Inc.*, 7 Bankr. 532 (Bankr. M.D. Ga. 1980) (decided under former Code Section 11-9-403).

**Filing continuation statement.** — Upon the lapse of a seriously misleading, though partially effective, financing statement, the secured party, acting in good faith, must file a continuation statement under the new debtor's name if it wishes to sustain its perfected status. *Jones v. Small Bus. Admin.* (In re Cohutta Mills, Inc.), 108 Bankr. 815 (N.D. Ga. 1989) (decided under former Code Section 11-9-403).

**Harvested peanut crops.** — Plaintiffs' filing of their financing statement in the proper county gave defendant legal notice of plaintiffs' security interests and liens in peanut crops defendant purchased, even though the clerk incorrectly recorded the financing statement, and the perfected security interests remained effective even though the crops were harvested. *Bartolan, Inc. v. Columbian Peanut Co.*, 727 F. Supp. 1444 (M.D. Ga. 1989) (decided under former Code Section 11-9-403).

**Former subsection (8) was intended to save financing and continuation statements** that had been filed in conformity with the 1985 amendments to Article 9. Only secured parties who had failed to continue their perfected security interest, and secured creditors whose security interest had legitimately expired were not continued, or saved, by operation of law. *In re Rainbow Mfg. Co.*, 150 Bankr. 857 (M.D. Ga. 1993) (decided under former Code Section 11-9-403).

**Effect of filings under prior law.** — Bank was properly perfected as a result of the filing of its financing statement and continuation statement. Former subsection (8) continued the continuation statement for a period of five years, regardless of the stated

maturity date on the form. As a result of these acts, the bank would be perfected until five years after the continuation statement was filed. *In re Rainbow Mfg. Co.*, 150 Bankr. 857 (M.D. Ga. 1993) (decided under former Code Section 11-9-403).

**Filing of continuation statements.** — Former subsection (3) worked to allow filing officers (Superior Court Clerks) to refuse to accept continuation statements until the last 6 months of the previous filing's effectiveness. Once the new filing is accepted, however, it is in force for a period of five years, not from the filing date of the financing statement, but from the date of the filing of the new statement, under former subsection (8). *In re Rainbow Mfg. Co.*, 150 Bankr. 857 (M.D. Ga. 1993) (decided under former Code Section 11-9-403).

Continuation statement filed by a secured creditor prior to the six-month period set forth in former subsection (3) was effective for five years from the date of filing and extended the creditor's security interest in certain assets of the debtor beyond the original period of protection. *Coats Am., Inc. v. Summit Nat'l Bank*, 211 Bankr. 771 (N.D. Ga. 1997) (decided under former Code Section 11-9-403).

**Second financing statement considered back-up, not continuation or amendment of original.** — A second financing statement filed by the same creditor covering the same collateral could not be considered a continuation statement under this former section, or an amendment to the original under former § 11-9-402, but was deemed to be a back-up financing statement with its own separately established priority, and, where the debtor's bankruptcy petition was filed while the first financing statement was still effective, creditor's first-in time priority status under the original statement was preserved. *Giddens v. Pioneer Credit*, 205 Bankr. 349 (Bankr. M.D. Ga. 1997).

## OPINIONS OF THE ATTORNEY GENERAL

**Editor's notes.** — In the light of the similarity of the provisions, opinions under former Article 9 are included in the annotations for this Code section. For a table of comparable provisions, see the table at the beginning of the Article.

**Timely filing of succeeding continuation**

**statements** pursuant to this former section continues effectiveness of original statement for additional five-year period from last date to which original filing was effective. 1977 Op. Att'y Gen. No. U77-56.

**Nonrecording insurance premiums lawful if not exceeding recording fees.** — Non-

recording insurance premiums, subject otherwise to rate approvals and regulations by Insurance Department, would be lawful after January 1, 1964, provided they do not ex-

ceed amount of recording fees set out in former subsection (5) of this section. 1963-65 Op. Att'y Gen. p. 335.

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 68A Am. Jur. 2d, Secured Transactions, §§ 310-314, 318, 405-419.

**C.J.S.** — 76 C.J.S., Records, § 4.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 9-515.

**ALR.** — Coverage of “nonrecording” or “nonfiling” insurance against loss from fail-

ure to record chattel mortgage, conditional sale, or other security instrument, 51 ALR2d 325.

Effectiveness of original financing statement under UCC Article 9 after change in debtor's name, identity, or business structure, 99 ALR3d 1194.

### 11-9-516. What constitutes filing; effectiveness of filing.

(a) *What constitutes filing.* Except as otherwise provided in subsection (b) of this Code section, communication of a record to a filing office and tender of the filing fee or acceptance of the record by the filing office constitutes filing.

(b) *Refusal to accept record; filing does not occur.* Filing does not occur with respect to a record that a filing office refuses to accept because:

(1) The record is not communicated by a method or medium of communication authorized by the filing office;

(2) An amount equal to or greater than the applicable filing fee is not tendered;

(3) The authority is unable to index the record because:

(A) In the case of an initial financing statement, the record does not provide a name for the debtor;

(B) In the case of an amendment or correction statement, the record:

(i) Does not identify the initial financing statement as required by Code Section 11-9-512 or 11-9-518, as applicable;

(ii) Identifies an initial financing statement whose effectiveness has lapsed under Code Section 11-9-515;

(iii) Identifies more than one initial financing statement; or

(iv) Indicates that it is presented to accomplish more than one action, such as amendment and continuation;

(C) In the case of an initial financing statement that provides the name of a debtor identified as an individual or an amendment that provides a name of a debtor identified as an individual which was not



previously provided in the financing statement to which the record relates, the record does not identify the debtor's last name; or

(D) In the case of a record filed or recorded in the filing office described in paragraph (1) of subsection (a) of Code Section 11-9-501, the record does not provide a sufficient description of the real property to which it relates;

(4) In the case of an initial financing statement or an amendment that adds a secured party of record, the record does not provide a name and mailing address for the secured party of record;

(5) In the case of an initial financing statement or an amendment that provides a name of a debtor which was not previously provided in the financing statement to which the amendment relates, the record does not:

(A) Provide a mailing address for the debtor;

(B) Indicate whether the debtor is an individual or an organization; or

(C) If the financing statement indicates that the debtor is an organization, provide:

(i) A type of organization for the debtor; or

(ii) A jurisdiction of organization for the debtor; or

(6) In the case of an assignment reflected in an initial financing statement under subsection (a) of Code Section 11-9-514 or an amendment filed under subsection (b) of Code Section 11-9-514, the record does not provide a name and mailing address for the assignee.

(c) *Rules applicable to subsection (b) of this Code section.* For purposes of subsection (b) of this Code section:

(1) A record does not provide information if the filing office is unable to read or decipher the information; and

(2) A record that does not indicate that it is an amendment or accurately identify an initial financing statement to which it relates, as required by Code Section 11-9-512, 11-9-514, or 11-9-518, is an initial financing statement.

(d) *Refusal to accept record; record effective as filed record.* A record that is communicated to the filing office with tender of the filing fee, but which the filing office refuses to accept for a reason other than one set forth in subsection (b) of this Code section, is effective as a filed record except as against a purchaser of the collateral which gives value in reasonable reliance upon the absence of the record from the files. (Code 1981, § 11-9-516, enacted by Ga. L. 2001, p. 362, § 1.)

**Law reviews.** — For article on the 1963 amendment to the Georgia Uniform Commercial Code, see 14 Mercer L. Rev. 378 (1963). For article, "The Revisions to Article IX of the Uniform Commercial Code," see 15 Ga. St. B.J. 120 (1977). For article, "H.B. 712: New Requirements for Financing Statements and Continuation Statements Filed in Georgia," see 22 Ga. St. B.J. 6 (1985). For

article surveying commercial law in 1984-1985, see 37 Mercer L. Rev. 139 (1985). For article, "H.B. 1364: Revised Requirements for Financing Statements and Continuation Statements Filed in Georgia," see 23 Ga. St. B.J. 50 (1986). For annual survey of law of real property, see 38 Mercer L. Rev. 319 (1986). For survey article on commercial law, see 44 Mercer L. Rev. 99 (1992).

## JUDICIAL DECISIONS

**Editor's notes.** — In the light of the similarity of the provisions, decisions under former Article 9 are included in the annotations for this Code section. For a table of comparable provisions, see the table at the beginning of the Article.

**Presentation of instruments to office of clerk** constitutes proper filing. *Pease & Elliman Realty Trust v. Gaines*, 160 Ga. App. 125, 286 S.E.2d 448 (1981) (decided under former Code Section 11-9-403).

**Goods which are or are to become fixtures.** — Former §§ 11-9-401, 11-9-403 and this section (see now §§ 11-9-501 et seq., 11-9-623) provide for fixture filing to enable secured party with chattel interest in goods which are or are to become fixtures to preserve that interest. *Williams v. Western Pac. Fin. Corp.*, 643 F.2d 331 (5th Cir. 1981) (decided under former Code Section 11-9-403).

**Harvested peanut crops.** — Plaintiffs' filing of their financing statement in the proper county gave defendant legal notice of plaintiffs' security interests and liens in peanut crops defendant purchased, even though the clerk incorrectly recorded the financing statement, and the perfected security interests remained effective even though the crops were harvested. *Bartolan, Inc. v. Columbian Peanut Co.*, 727 F. Supp. 1444 (M.D. Ga. 1989) (decided under former Code Section 11-9-403).

**Former subsection (8) was intended to save financing and continuation statements** that had been filed in conformity with the 1985 amendments to this article. Only secured parties who had failed to continue their perfected security interest, and secured creditors whose security interest had legitimately expired were not continued, or saved, by operation of law. *In re Rainbow Mfg. Co.*, 150 Bankr. 857 (M.D. Ga. 1993)

(decided under former Code Section 11-9-403).

**Effect of filings under prior law.** — Bank was properly perfected as a result of the filing of its financing statement and continuation statement. Former subsection (8) continued the continuation statement for a period of five years, regardless of the stated maturity date on the form. As a result of these acts, the bank would be perfected until five years after the continuation statement was filed. *In re Rainbow Mfg. Co.*, 150 Bankr. 857 (M.D. Ga. 1993) (decided under former Code Section 11-9-403).

**Filing of continuation statements.** — Former subsection (3) works to allow filing officers (Superior Court Clerks) to refuse to accept continuation statements until the last 6 months of the previous filing's effectiveness. Once the new filing is accepted, however, it is in force for a period of five years, not from the filing date of the financing statement, but from the date of the filing of the new statement, under former subsection (8). *In re Rainbow Mfg. Co.*, 150 Bankr. 857 (M.D. Ga. 1993) (decided under former Code Section 11-9-403).

Continuation statement filed by a secured creditor prior to the six-month period set forth in former subsection (3) was effective for five years from the date of filing and extended the creditor's security interest in certain assets of the debtor beyond the original period of protection. *Coats Am., Inc. v. Summit Nat'l Bank*, 211 Bankr. 771 (N.D. Ga. 1997) (decided under former Code Section 11-9-403).

**Second financing statement considered back-up, not continuation or amendment of original.** — A second financing statement filed by the same creditor covering the same collateral could not be considered a continuation statement under this section, or an

amendment to the original under former § 11-9-402 (see now § 11-9-502 et seq.), but was deemed to be a back-up financing statement with its own separately established priority, and, where the debtor's bankruptcy petition was filed while the first financing

statement was still effective, creditor's first-in time priority status under the original statement was preserved. *Giddens v. Pioneer Credit*, 205 Bankr. 349 (Bankr. M.D. Ga. 1997).

### OPINIONS OF THE ATTORNEY GENERAL

**Editor's notes.** — In the light of the similarity of the provisions, opinions under former Article 9 are included in the annotations for this Code section. For a table of comparable provisions, see the table at the beginning of the Article.

**Timely filing of succeeding continuation statements** pursuant to this section continues effectiveness of original statement for additional five-year period from last date to which original filing was effective. 1977 Op. Att'y Gen. No. U77-56.

**Nonrecording insurance premiums lawful if not exceeding recording fees.** — Nonrecording insurance premiums, subject otherwise to rate approvals and regulations by Insurance Department would be lawful after January 1, 1964, provided they do not exceed amount of recording fees set out in former subsection (5) of this section. 1963-65 Op. Att'y Gen. p. 335.

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 68A Am. Jur. 2d, Secured Transactions, §§ 310-314, 318, 405-419.

**C.J.S.** — 76 C.J.S., Records, § 4.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 9-516.

**ALR.** — Coverage of "nonrecording" or "nonfiling" insurance against loss from fail-

ure to record chattel mortgage, conditional sale, or other security instrument, 51 ALR2d 325.

Effectiveness of original financing statement under UCC Article 9 after change in debtor's name, identity, or business structure, 99 ALR3d 1194.

### 11-9-517. Effect of indexing errors.

The failure of the filing office or authority to index a record correctly does not affect the effectiveness of the filed record. (Code 1981, § 11-9-517, enacted by Ga. L. 2001, p. 362, § 1.)

### RESEARCH REFERENCES

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 9-517.

### 11-9-518. Inaccurate or wrongfully filed record.

(a) *Correction statement.* A person may file a correction statement with respect to a record indexed under the person's name if the person believes that the record is inaccurate or was wrongfully filed. The correction statement shall be filed in the filing office of the county where the record was filed.



(b) *Sufficiency of correction statement.* A correction statement must:

(1) Identify the record to which it relates by the file number assigned to the initial financing statement to which the record relates;

(2) Indicate that it is a correction statement; and

(3) Provide the basis for the person's belief that the record is inaccurate and indicate the manner in which the person believes the record should be amended to cure any inaccuracy or provide the basis for the person's belief that the record was wrongfully filed.

(c) *Record not affected by correction statement.* The filing of a correction statement does not affect the effectiveness of an initial financing statement or other filed record. (Code 1981, § 11-9-518, enacted by Ga. L. 2001, p. 362, § 1.)

#### RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 9-518.

#### Subpart 2

#### Duties and Operation of Filing Office and Central Indexing System

#### **11-9-519. Numbering, maintaining, and indexing records; communicating information provided in records.**

(a) *Filing office duties.* For each record filed in a filing office, the filing office shall:

(1) Assign a unique number to the filed record;

(2) Create a record that bears the number assigned to the filed record and the date and time of filing;

(3) Maintain the filed record or a microfilm or other photostatic, microphotographic, photographic copy, or optical image of the filed record for public inspection;

(4) Transmit each record to the authority in such form and manner as may be required by the authority within 24 hours of filing. Weekends and holidays shall not be included in the calculation of the 24 hour period; and

(5) Promptly upon discovering any discrepancy between a filed record and the information as it appears in the central indexing system, retransmit such record to the authority with a notation as to the discrepancy and a request for correction of the central indexing system information.

(b) *Central indexing system.*

(1) The authority shall administer, maintain, and modify a central indexing system which shall contain the records transmitted to it by filing offices pursuant to paragraph (4) of subsection (a) of this Code section. The authority shall, within 24 hours after receipt of each record, include the record in the central filing system and make such information available to the public through the central index. Weekends and holidays shall not be included in the calculation of the 24 hour period.

(2) The authority may designate one or more agents who will be responsible for any or all of the duties and functions of the authority set out in this Code section.

(c) *Indexing; general.* The authority shall:

(1) Index an initial financing statement according to the name of the debtor and index all filed records relating to the initial financing statement in a manner that associates with one another an initial financing statement and all filed records relating to the initial financing statement; and

(2) Index a record that provides a name of a debtor which was not previously provided in the financing statement to which the record relates also according to the name that was not previously provided.

(d) *Indexing; real property related financing statement.* If a financing statement is filed as a fixture filing or covers as-extracted collateral, crops, or timber to be cut, it must be filed for record and the filing office shall index it:

(1) Under the names of the debtor and of each owner of record shown on the financing statement as if they were the mortgagors under a mortgage of the real property described; and

(2) To the extent that the law of this state provides for indexing of records of mortgages under the name of the mortgagee, under the name of the secured party as if the secured party were the mortgagee thereunder, or, if indexing is by description, as if the financing statement were a record of a mortgage of the real property described.

(e) *Indexing; real property related assignment.* If a financing statement is filed as a fixture filing or covers as-extracted collateral, crops, or timber to be cut, the filing office shall index an assignment filed under subsection (a) of Code Section 11-9-514 or an amendment filed under subsection (b) of Code Section 11-9-514:

(1) Under the name of the assignor as grantor; and

(2) To the extent that the law of this state provides for indexing a record of the assignment of a mortgage, under the name of the assignee.

(f) *Retrieval and association capability.* The authority and each filing office shall maintain a capability with respect to the records they are required to index:

(1) To retrieve a record by the name of the debtor and by the file number assigned to the initial financing statement to which the record relates; and

(2) To associate and retrieve with one another an initial financing statement and each filed record relating to the initial financing statement.

(g) *Removal of debtor's name.* The authority may not remove a debtor's name from the central index until one year after the effectiveness of a financing statement naming the debtor lapses under Code Section 11-9-515 with respect to all secured parties of record. (Code 1981, § 11-9-519, enacted by Ga. L. 2001, p. 362, § 1; Ga. L. 2002, p. 415, § 11.)

**The 2002 amendment,** effective April 18, 2002, part of an Act to revise, modernize, and correct the Code, revised punctuation in paragraph (e)(2).

**Law reviews.** — For article on the 1963 amendment to the Georgia Uniform Commercial Code, see 14 Mercer L. Rev. 378 (1963).

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 68A Am. Jur. 2d, Secured Transactions, §§ 412, 421-423.

**C.J.S.** — 26A C.J.S., Deeds, § 19 et seq.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 9-519.

#### 11-9-520. Acceptance and refusal to accept record.

(a) *Refusal to accept record.* A filing office may refuse to accept a record for filing only for a reason set forth in subsection (b) of Code Section 11-9-516.

(b) *Communication concerning refusal.* If a filing office refuses to accept a record for filing, it shall communicate to the person that presented the record the fact of and reason for the refusal and the date and time the record would have been filed had the filing office accepted it. The communication must be made at the time and in the manner prescribed by filing office rule but in no event more than two business days after the filing office receives the record.

(c) *When filed financing statement effective.* A filed financing statement satisfying subsections (a) and (b) of Code Section 11-9-502 is effective, even if the filing office refuses to accept it for filing under subsection (a) of this Code section. However, Code Section 11-9-338 applies to a filed financing statement providing information described in paragraph (5) of subsection (b) of Code Section 11-9-516 which is incorrect at the time the financing statement is filed.

(d) *Separate application to multiple debtors.* If a record communicated to a filing office provides information that relates to more than one debtor, this



part applies as to each debtor separately. (Code 1981, § 11-9-520, enacted by Ga. L. 2001, p. 362, § 1.)

#### RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 9-520.

#### **11-9-521. Uniform form of written financing statement and amendment; authority may prescribe forms.**

(a) *Initial financing statement form.* Except for a reason set forth in subsection (b) of Code Section 11-9-516, a filing office that accepts written records may not refuse to accept a written initial financing statement in the form and format set out in Section 9-521(a) of the Official Text of Revised Article 9, 2000 Revision, of the Uniform Commercial Code promulgated by the American Law Institute and the National Conference of Commissioners on Uniform State Laws, and such form and format are incorporated into this subsection by reference.

(b) *Amendment form.* Except for a reason set forth in subsection (b) of Code Section 11-9-516, a filing office that accepts written records may not refuse to accept a written record amending an initial financing statement if such record is in the form and format set out in Section 9-521(b) of the Official Text of Revised Article 9, 2000 Revision, of the Uniform Commercial Code promulgated by the American Law Institute and the National Conference of Commissioners on Uniform State Laws, and such form and format are incorporated into this subsection by reference.

(c) *Authority's forms.* The authority may prescribe forms for initial financing statements and amendments. Subject to the provisions of subsections (a) and (b) of this Code section, all written financing statements and amendments must be presented for filing on forms prescribed by the authority. (Code 1981, § 11-9-521, enacted by Ga. L. 2001, p. 362, § 1; Ga. L. 2002, p. 415, § 11.)

**The 2002 amendment**, effective April 18, 2002, part of an Act to revise, modernize, and correct the Code, added the catchline for subsection (c).

#### RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 9-521.

#### **11-9-522. Maintenance and destruction of records.**

(a) *Postlapse maintenance and retrieval of information.* The authority shall maintain a record of the information provided in a filed record for at least one year after the effectiveness of such record or the initial financing

statement to which such record relates has lapsed under Code Section 11-9-515 with respect to all secured parties of record. The record must be retrievable by using the name of the debtor and by using the file number assigned to the initial financing statement to which the record relates.

(b) *Destruction of written records.* Except to the extent that an applicable statute governing disposition of public records provides otherwise, the filing office or the authority immediately may destroy any written record evidencing a financing statement. However, if the filing office or the authority destroys a written record, it shall maintain another record of the financing statement which complies with subsection (a) of this Code section. (Code 1981, § 11-9-522, enacted by Ga. L. 2001, p. 362, § 1.)

#### RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 9-522.

#### **11-9-523. Information from filing office and central indexing system; sale or license of records.**

(a) *Acknowledgment of filing written record.* If a person that files a written record requests an acknowledgment of the filing, the filing office shall send to the person an image of the record showing the number assigned to the record pursuant to paragraph (1) of subsection (a) of Code Section 11-9-519 and the date and time of the filing of the record. However, if the person furnishes a copy of the record to the filing office, the filing office may instead:

(1) Note upon the copy the number assigned to the record pursuant to paragraph (1) of subsection (a) of Code Section 11-9-519 and the date and time of the filing of the record; and

(2) Send the copy to the person.

(b) *Acknowledgment of filing other record.* If a person files a record other than a written record, the filing office shall communicate to the person an acknowledgment that provides:

(1) The information in the record;

(2) The number assigned to the record pursuant to paragraph (1) of subsection (a) of Code Section 11-9-519; and

(3) The date and time of the filing of the record.

(c) *Communication of requested information.* Upon payment of a fee therefor established from time to time by the authority, the authority shall

communicate or otherwise make available in a record the following information to any person that requests it:

(1) Whether there is on file on a date and time specified by the authority, but not a date earlier than three business days before the authority receives the request, any financing statement that:

(A) Designates a particular debtor (or, if the request so states, designates a particular debtor at the address specified in the request);

(B) Has not lapsed under Code Section 11-9-515 with respect to all secured parties of record; and

(C) If the request so states, has lapsed under Code Section 11-9-515 and a record of which is maintained by the authority under subsection (a) of Code Section 11-9-522;

(2) The date and time of filing of each financing statement; and

(3) The information provided in each financing statement.

(d) *Medium for communicating information.* In complying with its duty under subsection (c) of this Code section, the authority may communicate information in any medium. However, if requested, the authority shall communicate information by issuing a record that can be admitted into evidence in the courts of this state without extrinsic evidence of its authenticity.

(e) *Timeliness of performance.* The filing office shall perform the acts required by subsections (a) and (b) of this Code section and the authority shall perform the acts required by subsections (c) and (d) of this Code section at the time and in the manner prescribed by filing office rule but not later than two business days after the filing office or the authority, as the case may be, receives the request.

(f) *Public availability of records.* At least weekly, the authority shall offer to sell or license to the public on a nonexclusive basis, upon payment of the fee therefor established from time to time by the authority, in bulk, copies of all records transmitted to it under this part, in every medium from time to time available to the authority. (Code 1981, § 11-9-523, enacted by Ga. L. 2001, p. 362, § 1.)

**Law reviews.** — For article on the 1963 amendment to the Georgia Uniform Commercial Code, see 14 Mercer L. Rev. 378 (1963).

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 68A Am. Jur. 2d, Secured Transactions, §§ 412, 421-423.

**C.J.S.** — 26A C.J.S., Deeds, § 19 et seq.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 9-523.



**11-9-524. Delay by filing office or authority.**

Delay by the filing office or authority beyond a time limit prescribed by this part is excused if:

(1) The delay is caused by interruption of communication or computer facilities, war, emergency conditions, failure of equipment, or other circumstances beyond control of the filing office or authority; and

(2) The filing office or authority exercises reasonable diligence under the circumstances. (Code 1981, § 11-9-524, enacted by Ga. L. 2001, p. 362, § 1.)

**RESEARCH REFERENCES**

**U.L.A.** — Uniform Commercial Code  
(U.L.A.) § 9-524.

**11-9-525. Fees.**

(a) *Initial financing statement; general.* Except as otherwise provided in subsection (b) of this Code section, the fees for filing a record under this part are the amounts specified in Article 2 of Chapter 6 of Title 15.

(b) *Fees of the Georgia Superior Court Clerks' Cooperative Authority.* The Georgia Superior Court Clerks' Cooperative Authority is authorized to set and collect fees for incidental services and information provided by the authority or its designated agent with respect to the central indexing system if such fees are not otherwise prescribed by law. (Code 1981, § 11-9-525, enacted by Ga. L. 2001, p. 362, § 1.)

**Law reviews.** — For article on the 1963 amendment to the Georgia Uniform Commercial Code, see 14 Mercer L. Rev. 378 (1963). For article, "Security Transfers by Secured Parties," see 4 Ga. L. Rev. 527 (1970).

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 68A Am. Jur. 2d, Secured Transactions, §§ 283, 284, 420, 434-436, 462, 539.

**C.J.S.** — 72 C.J.S., Pledges, §§ 41-44.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 9-525.

**ALR.** — Validity of assignment of future book accounts, 72 ALR 856.

Recording laws as applied to assignments of mortgages on real estate, 104 ALR 1301.

Assignability of contemplated debt before execution of agreement by which it is to be created, 116 ALR 955.

Federal government or agencies of federal government as subject to payment of tax or fee imposed upon, or for, recording or filing instrument, 124 ALR 1267.

Discharge of accommodation maker or surety by release of mortgage or other security given for note, 2 ALR2d 260.

**11-9-526. Rules.**

(a) *Adoption of filing office rules.* The authority shall adopt and publish rules to implement this article, including rules to administer, maintain, and modify the central indexing system. The filing office rules must be consistent with this article.

(b) *Harmonization of rules.* To keep the filing office rules, practices of the filing offices, and practices of the authority in harmony with the rules and practices in other jurisdictions that enact substantially this part, and to keep the technology used by the filing offices and the authority compatible with the technology used in other jurisdictions that enact substantially this part, the authority, so far as is consistent with the purposes, policies, and provisions of this article, in adopting, amending, and repealing filing office rules, shall:

(1) Consult with filing offices in other jurisdictions that enact substantially this part; and

(2) Consult the most recent version of the Model Rules promulgated by the International Association of Corporate Administrators or any successor organization; and

(3) Take into consideration the rules and practices of, and the technology used by, filing offices in other jurisdictions that enact substantially this part.

(c) *Notification system for farm products.* The authority shall not be authorized to adopt rules to implement a notification system for farm products in conformity with the requirements of Section 1324 of the federal Food Security Act of 1985, P.L. 99-198, as now in effect or as hereafter amended, and shall not be authorized to request certification of such notification system by the secretary of the United States Department of Agriculture. (Code 1981, § 11-9-526, enacted by Ga. L. 2001, p. 362, § 1.)

**U.S. Code.** — The federal Food Security Act, referred to in subsection (c), is codified at 16 U.S.C.S. § 3839aa et seq.

amendment to the Georgia Uniform Commercial Code, see 14 Mercer L. Rev. 378 (1963).

**Law reviews.** — For article on the 1963

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 68A Am. Jur. 2d, Secured Transactions, §§ 412, 421-423.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 9-526.

**C.J.S.** — 26A C.J.S., Deeds, § 19 et seq.

**PART 6****DEFAULT**

**Cross references.** — Applicability of part to default by buyer of goods sold in “home

solicitation sale,” as defined in § 10-1-2, § 10-1-10. Respective rights of buyer, seller,

etc., following repossession of motor vehicle sold under retail installment contract, § 10-1-36.

**Law reviews.** — For article discussing secured creditors' legal and equitable remedies and debtors' protections under the Uni-

form Commercial Code, see 3 Ga. L. Rev. 198 (1968). For annual survey of commercial law, see 38 Mercer L. Rev. 85 (1986). For article, "Nonjudicial Foreclosures in Georgia: Fresh Doubts, Issues and Strategies," see 23 Ga. St. B.J. 123 (1987).

### JUDICIAL DECISIONS

**Prerequisites for deficiency claim allowable under this article.** — Section 10-1-36 provides cumulative additional rights and remedies which must be fulfilled before any

deficiency claim under this article and part will lie against a buyer. *Georgia Cent. Credit Union v. Coleman*, 155 Ga. App. 547, 271 S.E.2d 681 (1980).

### Subpart 1

#### Default and Enforcement of Security Interest

#### **11-9-601. Rights after default; judicial enforcement; consignor or buyer of accounts, chattel paper, payment intangibles, or promissory notes.**

(a) *Rights of secured party after default.* After default, a secured party has the rights provided in this part and, except as otherwise provided in Code Section 11-9-602, those provided by agreement of the parties. A secured party:

(1) May reduce a claim to judgment, foreclose, or otherwise enforce the claim, security interest, or agricultural lien by any available judicial procedure; and

(2) If the collateral is documents, may proceed either as to the documents or as to the goods they cover.

(b) *Rights and duties of secured party in possession or control.* A secured party in possession of collateral or control of collateral under Code Section 11-9-104, 11-9-105, 11-9-106, or 11-9-107 has the rights and duties provided in Code Section 11-9-207.

(c) *Rights cumulative; simultaneous exercise.* The rights under subsections (a) and (b) of this Code section are cumulative and may be exercised simultaneously.

(d) *Rights of debtor and obligor.* Except as otherwise provided in subsection (g) of this Code section and Code Section 11-9-605, after default, a debtor and an obligor have the rights provided in this part and by agreement of the parties.

(e) *Lien of levy after judgment.* If a secured party has reduced its claim to judgment, the lien of any levy that may be made upon the collateral by



virtue of an execution based upon the judgment relates back to the earliest of:

- (1) The date of perfection of the security interest or agricultural lien in the collateral;
- (2) The date of filing a financing statement covering the collateral; or
- (3) Any date specified in a statute under which the agricultural lien was created.

(f) *Execution sale.* A sale pursuant to an execution is a foreclosure of the security interest or agricultural lien by judicial procedure within the meaning of this Code section. A secured party may purchase at the sale and thereafter hold the collateral free of any other requirements of this article.

(g) *Consignor or buyer of certain rights to payment.* Except as otherwise provided in subsection (c) of Code Section 11-9-607, this part imposes no duties upon a secured party that is a consignor or is a buyer of accounts, chattel paper, payment intangibles, or promissory notes. (Code 1981, § 11-9-601, enacted by Ga. L. 2001, p. 362, § 1.)

## JUDICIAL DECISIONS

### ANALYSIS

#### GENERAL CONSIDERATION

##### DEFAULT

#### General Consideration

**Editor's notes.** — In the light of the similarity of the provisions, decisions under former Article 9 are included in the annotations for this Code section. For a table of comparable provisions, see the table at the beginning of the Article.

**Nature of remedies provided in this article.** — The former provisions set forth general remedies of both creditor and debtor while remaining provisions of Art. 9 simply elaborated on the various remedies summarized herein, and as such, are neither mandatory nor mutually exclusive. *McCullough v. Mobiland, Inc.*, 139 Ga. App. 260, 228 S.E.2d 146 (1976) (decided under former Code Section 11-9-501).

**Construction of former subsection (4).** — The last clause of former subsection (4) ("in which case the provisions of this part do not apply") is itself applicable only where the creditor proceeds "as to both the real and the personal property in accordance with his rights and remedies in respect of the real property ...", where the creditor sells the

debtor's personalty pursuant to debtor's notes and security agreement and seeks to proceed against the debtor's guarantor's real estate for the balance pursuant to their deed. *United States ex rel. FHA v. Kennedy*, 256 Ga. 345, 348 S.E.2d 636 (1986) (decided under former Code Section 11-9-501).

**Filing suit after repossession without first disposing of collateral.** — Secured creditor's election to repossess collateral and then to file suit on contract without first disposing of the collateral was not improper under the terms of the sale contracts or of the UCC. *ITT Terryphone Corp. v. Modems Plus, Inc.*, 171 Ga. App. 710, 320 S.E.2d 784 (1984) (decided under former Code Section 11-9-501).

#### Default

**Standard for determining default to be determined contractually.** — Since there is no definition per se of what constitutes default within purview of Uniform Commercial Code, this is one of those standards to be determined by parties contractually.

*Borochoff Properties, Inc. v. Howard Lumber Co.*, 115 Ga. App. 691, 155 S.E.2d 651 (1967) (decided under former Code Section 11-9-501).

**Standards for determining whether there has been default.** — This title does not specifically define “default” under a security

agreement. For the most part, the security agreement itself must define standards for determining whether default occurs. *Whisenhunt v. Allen Parker Co.*, 119 Ga. App. 813, 168 S.E.2d 827 (1969) (decided under former Code Section 11-9-501).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 68A Am. Jur. 2d, Secured Transactions, §§ 109, 160 et seq., 192 et seq., 556-575, 581, 590 et seq., 637, 734.

**C.J.S.** — 72 C.J.S., Pledges, §§ 49, 50.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 9-601.

**ALR.** — Rights and remedies as between parties to a conditional sale after the seller has repossessed himself of the property, 37 ALR 91; 83 ALR 959; 99 ALR 1288; 49 ALR2d 15.

Right, upon buyer's default in payment of installment due, to recover amount not due, in absence of acceleration clause, 57 ALR 825.

Right to attorneys' fees on enforcing chattel mortgage, 63 ALR 1314.

Attachment as affected by release or modification of lien to which property was subject when attachment was levied, 128 ALR 1392.

Right of conditional seller to retake property without legal process, 146 ALR 1331.

Payment or discharge of principal obligation as affecting right of the pledgee to sue or continue pending suit against the maker of the collateral pledged, or judgment previously recovered on the collateral obligation, 157 ALR 261.

Construction of §§ 301 and 700 of Soldiers' and Sailors' Civil Relief Act of 1940, as amended, relating to instalment contracts for purchase of property, 24 ALR2d 1074.

### 11-9-602. Waiver and variance of rights and duties.

Except as otherwise provided in Code Section 11-9-624, to the extent that they give rights to a debtor or obligor and impose duties on a secured party, the debtor or obligor may not waive or vary the rules stated in the following listed sections:

(1) Subparagraph (b)(4)(C) of Code Section 11-9-207, which deals with use and operation of the collateral by the secured party;

(2) Code Section 11-9-210, which deals with requests for an accounting and requests concerning a list of collateral and statement of account;

(3) Subsection (c) of Code Section 11-9-607, which deals with collection and enforcement of collateral;

(4) Subsection (a) of Code Section 11-9-608 and subsection (c) of Code Section 11-9-615 to the extent that they deal with application or payment of noncash proceeds of collection, enforcement, or disposition;

(5) Subsection (a) of Code Section 11-9-608 and subsection (d) of Code Section 11-9-615 to the extent that they require accounting for or payment of surplus proceeds of collateral;

(6) Code Section 11-9-609 to the extent that it imposes upon a secured party that takes possession of collateral without judicial process the duty to do so without breach of the peace;

(7) Subsection (b) of Code Section 11-9-610 and Code Sections 11-9-611, 11-9-613, and 11-9-614, which deal with disposition of collateral;

(8) Subsection (f) of Code Section 11-9-615, which deals with calculation of a deficiency or surplus when a disposition is made to the secured party, a person related to the secured party, or a secondary obligor;

(9) Code Section 11-9-616, which deals with explanation of the calculation of a surplus or deficiency;

(10) Code Sections 11-9-620, 11-9-621, and 11-9-622, which deal with acceptance of collateral in satisfaction of obligation;

(11) Code Section 11-9-623, which deals with redemption of collateral;

(12) Code Section 11-9-624, which deals with permissible waivers; and

(13) Code Sections 11-9-625 and 11-9-626, which deal with the secured party's liability for failure to comply with this article. (Code 1981, § 11-9-602, enacted by Ga. L. 2001, p. 362, § 1.)

### JUDICIAL DECISIONS

**Editor's notes.** — In the light of the similarity of the provisions, decisions under former Article 9 are included in the annotations for this Code section. For a table of comparable provisions, see the table at the beginning of the Article.

**Waiver in writing after, but not before, default.** — Right to redeem collateral may be waived by written agreement after default,

but cannot be so waived before default. *Kellos v. Parker-Sharpe, Inc.*, 245 Ga. 130, 263 S.E.2d 138 (1980) (decided under former Code Section 11-9-501).

**Notice requirement** may not be waived or varied. *GEMC Fed. Credit Union v. Shoemake*, 151 Ga. App. 705, 261 S.E.2d 443 (1979) (decided under former Code Section 11-9-501).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 68A Am. Jur. 2d, Secured Transactions, §§ 109, 160 et seq., 192 et seq., 556-575, 581, 590 et seq., 637, 734.

**C.J.S.** — 72 C.J.S., Pledges, §§ 49, 50.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 9-602.

**ALR.** — Rights and remedies as between parties to a conditional sale after the seller has repossessed himself of the property, 37 ALR 91; 83 ALR 959; 99 ALR 1288; 49 ALR2d 15.

Right, upon buyer's default in payment of installment due, to recover amount not due, in absence of acceleration clause, 57 ALR 825.

Right to attorneys' fees on enforcing chattel mortgage, 63 ALR 1314.

Attachment as affected by release or modification of lien to which property was subject when attachment was levied, 128 ALR 1392.

Right of conditional seller to retake property without legal process, 146 ALR 1331.

Payment or discharge of principal obligation as affecting right of the pledgee to sue or continue pending suit against the maker of the collateral pledged, or judgment previously recovered on the collateral obligation, 157 ALR 261.

Construction of §§ 301 and 700 of Soldiers' and Sailors' Civil Relief Act of 1940, as amended, relating to installment contracts for purchase of property, 24 ALR2d 1074.



**11-9-603. Agreement on standards concerning rights and duties.**

(a) *Agreed standards.* The parties may determine by agreement the standards measuring the fulfillment of the rights of a debtor or obligor and the duties of a secured party under a rule stated in Code Section 11-9-602 if the standards are not manifestly unreasonable.

(b) *Agreed standards inapplicable to breach of peace.* Subsection (a) of this Code section does not apply to the duty under Code Section 11-9-609 to refrain from breaching the peace. (Code 1981, § 11-9-603, enacted by Ga. L. 2001, p. 362, § 1.)

**RESEARCH REFERENCES**

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 9-603.

**11-9-604. Procedure if security agreement covers real property or fixtures.**

(a) *Enforcement; personal and real property.* If a security agreement covers both personal and real property, a secured party may proceed:

(1) Under this part as to the personal property without prejudicing any rights with respect to the real property; or

(2) As to both the personal property and the real property in accordance with the rights with respect to the real property, in which case the other provisions of this part do not apply.

(b) *Enforcement; fixtures.* Subject to subsection (c) of this Code section, if a security agreement covers goods that are or become fixtures, a secured party may proceed:

(1) Under this part; or

(2) In accordance with the rights with respect to real property, in which case the other provisions of this part do not apply.

(c) *Removal of fixtures.* Subject to the other provisions of this part, if a secured party holding a security interest in fixtures has priority over all owners and encumbrancers of the real property, the secured party, after default, may remove the collateral from the real property.

(d) *Injury caused by removal.* A secured party that removes collateral shall promptly reimburse any encumbrancer or owner of the real property, other than the debtor, for the cost of repair of any physical injury caused by the removal. The secured party need not reimburse the encumbrancer or owner for any diminution in value of the real property caused by the absence of the goods removed or by any necessity of replacing them. A person entitled to reimbursement may refuse permission to remove until

the secured party gives adequate assurance for the performance of the obligation to reimburse. (Code 1981, § 11-9-604, enacted by Ga. L. 2001, p. 362, § 1.)

#### RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 9-604.

#### **11-9-605. Unknown debtor or secondary obligor.**

A secured party does not owe a duty based on its status as secured party:

(1) To a person that is a debtor or obligor, unless the secured party knows:

- (A) That the person is a debtor or obligor;
- (B) The identity of the person; and
- (C) How to communicate with the person; or

(2) To a secured party or lienholder that has filed a financing statement against a person, unless the secured party knows:

- (A) That the person is a debtor; and
- (B) The identity of the person. (Code 1981, § 11-9-605, enacted by Ga. L. 2001, p. 362, § 1.)

#### RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 9-605.

#### **11-9-606. Time of default for agricultural lien.**

For purposes of this part, a default occurs in connection with an agricultural lien at the time the secured party becomes entitled to enforce the lien in accordance with the statute under which it was created. (Code 1981, § 11-9-606, enacted by Ga. L. 2001, p. 362, § 1.)

#### RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 9-606.

#### **11-9-607. Collection and enforcement by secured party.**

(a) *Collection and enforcement generally.* If so agreed, and in any event after default, a secured party:

(1) May notify an account debtor or other person obligated on collateral to make payment or otherwise render performance to or for the benefit of the secured party;

(2) May take any proceeds to which the secured party is entitled under Code Section 11-9-315;

(3) May enforce the obligations of an account debtor or other person obligated on collateral and exercise the rights of the debtor with respect to the obligation of the account debtor or other person obligated on collateral to make payment or otherwise render performance to the debtor and with respect to any property that secures the obligations of the account debtor or other person obligated on the collateral;

(4) If it holds a security interest in a deposit account perfected by control under paragraph (1) of subsection (a) of Code Section 11-9-104, may apply the balance of the deposit account to the obligation secured by the deposit account; and

(5) If it holds a security interest in a deposit account perfected by control under paragraph (2) or (3) of subsection (a) of Code Section 11-9-104, may instruct the bank to pay the balance of the deposit account to or for the benefit of the secured party.

(b) *Nonjudicial enforcement of mortgage.* If necessary to enable a secured party to exercise under paragraph (3) of subsection (a) of this Code section the right of a debtor to enforce a mortgage nonjudicially, the secured party may record in the office in which a record of the mortgage is recorded:

(1) A copy of the security agreement that creates or provides for a security interest in the obligation secured by the mortgage; and

(2) The secured party's sworn affidavit in recordable form stating that:

(A) A default has occurred; and

(B) The secured party is entitled to enforce the mortgage nonjudicially.

(c) *Commercially reasonable collection and enforcement.* A secured party shall proceed in a commercially reasonable manner if the secured party:

(1) Undertakes to collect from or enforce an obligation of an account debtor or other person obligated on collateral; and

(2) Is entitled to charge back uncollected collateral or otherwise to full or limited recourse against the debtor or a secondary obligor.

(d) *Expenses of collection and enforcement.* A secured party may deduct from the collections made pursuant to subsection (c) of this Code section reasonable expenses of collection and enforcement, including reasonable attorney's fees and legal expenses incurred by the secured party.



(e) *Duties to secured party not affected.* This Code section does not determine whether an account debtor, bank, or other person obligated on collateral owes a duty to a secured party. (Code 1981, § 11-9-607, enacted by Ga. L. 2001, p. 362, § 1.)

**Law reviews.** — For note discussing creditor's remedy of direct collection of accounts

and instruments owed to the defaulting debtor, see 3 Ga. L. Rev. 198 (1968).

## JUDICIAL DECISIONS

**Editor's notes.** — In the light of the similarity of the provisions, decisions under former Article 9 are included in the annotations for this Code section. For a table of comparable provisions, see the table at the beginning of the Article.

**Meaning of "indebtedness".** — Although security agreement authorizing creditor to collect debtor's receivables "for application on the indebtedness hereby secured" was authorized by the former provisions of this section, the term "indebtedness" as used does not include unmatured balance of loan, since such a construction would effectively permit acceleration of indebtedness without default and at whim of the lender, at least to extent of receivables. *First Nat'l Bank v. Appalachian Indus., Inc.*, 146 Ga. App. 630, 247 S.E.2d 422 (1978), cert. denied, 243 Ga. 353, 255 S.E.2d 726 (1979) (decided under former Code Section 11-9-502).

Term "indebtedness" does not include unmatured balance of loan; such construction would effectively permit acceleration of indebtedness without default and at whim of lender, at least to extent of receivables. *Washington Loan & Banking Co. v. First Fulton Bank & Trust*, 155 Ga. App. 141, 270 S.E.2d 242 (1980) (decided under former Code Section 11-9-502).

**Duty of bank where acceleration was improper.** — In event acceleration of note is eventually determined to have been improper, bank is not authorized to retain any income from accounts receivable in excess of amount actually required to keep installments current. *Washington Loan & Banking Co. v. First Fulton Bank & Trust*, 155 Ga. App. 141, 270 S.E.2d 242 (1980) (decided under former Code Section 11-9-502).

**Action in name of holder of note as collateral security.** — When note is placed in hands of party as collateral security, the holder thereof has legal right to maintain suit thereon in the holder's own name, and to obtain judgment thereon. *Peters v. Washington Loan & Banking Co.*, 133 Ga. App. 293, 211 S.E.2d 148 (1974) (decided under former Code Section 11-9-502).

**The apparent reason for the requirement of commercial reasonableness** in former subsection (2) of this section (see O.C.G.A. § 11-9-607(c)) is to assure, where the secured assignee of receivables undertakes to collect on accounts, that the assignee act with the same degree of prudence which the original account creditor would exercise. *CC Fin., Inc. v. Ross*, 250 Ga. 832, 301 S.E.2d 262 (1983) (decided under former Code Section 11-9-502).

**Factoring agreement takes precedence over commercial reasonableness standard.** — Where an accounts receivable factor in no way undertook to collect factored accounts, but rather, by the express terms of the factoring agreement, the duty of collection was placed exclusively upon the debtor and this is an agreement between merchants dealing at arms' length, with consideration flowing to both sides, there is no obstacle to leaving the duty of collection with the debtor, and the debtor may not rely on the standard of commercial reasonableness embodied in former subsection (2) of this section (see O.C.G.A. § 11-9-607 (c)), but must look to the terms of the factoring agreement. *CC Fin., Inc. v. Ross*, 250 Ga. 832, 301 S.E.2d 262 (1983) (decided under former Code Section 11-9-502).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 68A Am. Jur. 2d, Secured Transactions, §§ 533-537, 546, 584-589, 638.

**C.J.S.** — 6A C.J.S., Assignments, § 98. 72 C.J.S., Pledges, §§ 49, 50.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 9-607.

**ALR.** — Right, upon buyer's default in payment of installment due, to recover

amount not due, in absence of acceleration clause, 57 ALR 825.

Bar of statute of limitations against debt secured by pledge as affecting rights and remedies in respect of pledge, 137 ALR 928.

Right of conditional seller to retake property without legal process, 146 ALR 1331.

**11-9-608. Application of proceeds of collection or enforcement; liability for deficiency and right to surplus.**

(a) *Application of proceeds, surplus, and deficiency if obligation secured.* If a security interest or agricultural lien secures payment or performance of an obligation, the following rules apply:

(1) A secured party shall apply or pay over for application the cash proceeds of collection or enforcement under Code Section 11-9-607 in the following order to:

(A) The reasonable expenses of collection and enforcement and, to the extent provided for by agreement and not prohibited by law, reasonable attorney's fees and legal expenses incurred by the secured party;

(B) The satisfaction of obligations secured by the security interest or agricultural lien under which the collection or enforcement is made; and

(C) The satisfaction of obligations secured by any subordinate security interest in or other lien on the collateral subject to the security interest or agricultural lien under which the collection or enforcement is made if the secured party receives an authenticated demand for proceeds before distribution of the proceeds is completed;

(2) If requested by a secured party, a holder of a subordinate security interest or other lien shall furnish reasonable proof of the interest or lien within a reasonable time. Unless the holder complies, the secured party need not comply with the holder's demand under subparagraph (C) of paragraph (1) of this subsection;

(3) A secured party need not apply or pay over for application noncash proceeds of collection and enforcement under Code Section 11-9-607 unless the failure to do so would be commercially unreasonable. A secured party that applies or pays over for application noncash proceeds shall do so in a commercially reasonable manner; and

(4) A secured party shall account to and pay a debtor for any surplus, and the obligor is liable for any deficiency.

(b) *No surplus or deficiency in sales of certain rights to payment.* If the underlying transaction is a sale of accounts, chattel paper, payment intangibles, or promissory notes, the debtor is not entitled to any surplus, and the obligor is not liable for any deficiency. (Code 1981, § 11-9-608, enacted by Ga. L. 2001, p. 362, § 1.)

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 2001, a semicolon was substituted for a period at the end of paragraph (a)(2).

#### RESEARCH REFERENCES

**U.L.A.** — Uniform Commercial Code  
(U.L.A.) § 9-608.

### 11-9-609. Secured party's right to take possession after default.

(a) *Possession; rendering equipment unusable; disposition on debtor's premises.* After default, a secured party:

(1) May take possession of the collateral; and

(2) Without removal, may render equipment unusable and dispose of collateral on a debtor's premises under Code Section 11-9-610.

(b) *Judicial and nonjudicial process.* A secured party may proceed under subsection (a) of this Code section:

(1) Pursuant to judicial process; or

(2) Without judicial process, if it proceeds without breach of the peace.

(c) *Assembly of collateral.* If so agreed, and in any event after default, a secured party may require the debtor to assemble the collateral and make it available to the secured party at a place to be designated by the secured party which is reasonably convenient to both parties. (Code 1981, § 11-9-609, enacted by Ga. L. 2001, p. 362, § 1.)

**Law reviews.** — For article discussing the resolution of conflicting claims to goods between an unsecured seller of goods and a creditor of a buyer claiming under an after-acquired property clause, see 28 Mercer L. Rev. 625 (1977). For article critically analyzing the various elements constitutionally required for pre-judgment seizure of a debtor's property, focusing on § 9-503 of the U.C.C., see 28 Mercer L. Rev. 665 (1977). For article surveying 1982 Eleventh Circuit cases involving bankruptcy law, see 34 Mer-

cer L. Rev. 1209 (1983).

For note discussing repossession and foreclosure as creditor's remedies under the Uniform Commercial Code, see 3 Ga. L. Rev. 198 (1968). For note, "Wrongful Repossession in Georgia," see 8 Ga. St. U.L. Rev. 223 (1992).

For comment on a secured party's burden of proof in seeking a deficiency judgment after resale of collateral, see 33 Mercer L. Rev. 397 (1981).



## JUDICIAL DECISIONS

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## General Consideration

**Editor's notes.** — In the light of the similarity of the provisions, decisions under former Article 9 are included in the annotations for this Code section. For a table of comparable provisions, see the table at the beginning of the Article.

**Repossession though another holds legal title by bill of sale.** — This former section, which made provision as to right of holder of security instrument to possession of chattel upon default by maker, permits one who has right of possession to recover property from one who wrongfully deprives the right holder of possession, although a third person may hold legal title by bill of sale to secure debt. *Chastain v. Consol. Credit Corp.*, 113 Ga. App. 225, 147 S.E.2d 807, later appeal, 114 Ga. App. 474, 151 S.E.2d 889 (1966) (decided under former Code Section 11-9-503).

**Right to title.** — This former section gave broad rights to a secured party to repossess the secured property in order to sell or otherwise dispose of it upon default. At the time that a secured party forecloses on the secured property, it obtains the right of possession, not absolute title. *Jeweler's Fin. Servs., Inc. v. Chapes, Ltd.*, 181 Ga. App. 872, 354 S.E.2d 200 (1987) (decided under former Code Section 11-9-503).

**Constructive possession.** — It was unnecessary for the creditor to exercise actual physical control of an automobile in order to repossess it. Rather, the creditor could, and did, repossess the automobile by taking constructive possession of it. *Avery v. Chrysler Credit Corp.*, 194 Ga. App. 682, 391 S.E.2d 410 (1990) (decided under former Code Section 11-9-503).

**Remedy for breach.** — A breach of peace by the creditor does not bar all recovery on a debt. Rather, the remedy available to the debtor for creditor's misbehavior is recovery in tort for damages incurred. *Emmons v. Burkett*, 179 Ga. App. 838, 348 S.E.2d 323 (1986), rev'd on other grounds, 256 Ga. 855,

353 S.E.2d 908 (1987) (decided under former Code Section 11-9-503).

**Suing on contract after repossession but prior to selling collateral.** — Secured creditor's election to repossess collateral and then to file suit on contract without first disposing of the collateral was not improper under the terms of the sale contracts or of the UCC. *ITT Terryphone Corp. v. Modems Plus, Inc.*, 171 Ga. App. 710, 320 S.E.2d 784 (1984) (decided under former Code Section 11-9-503).

**Breach of the peace.** — Where plaintiff's asserted abduction during the course of having plaintiff's car repossessed was unrefuted in the record, it could not be said as a matter of law that defendants' alleged conduct did not amount to a breach of the peace. *Roach v. Barclays-American/Credit, Inc.*, 164 Ga. App. 616, 298 S.E.2d 304 (1982) (decided under former Code Section 11-9-503).

The Court of Appeals could not say as a matter of law that creditor's entry into the business premises was in breach of the peace since, because debtor was not present at the time, there was no evidence of "accompanying incitement to immediate violence," nor "unequivocal oral protest of the defaulting debtor." *Emmons v. Burkett*, 179 Ga. App. 838, 348 S.E.2d 323 (1986), rev'd on other grounds, 256 Ga. 855, 353 S.E.2d 908 (1987) (decided under former Code Section 11-9-503).

In an action by a debtor against a creditor-bank, recovery service, and independent contractor hired by the recovery service to repossess the debtor's car, circumstances of debtor's resistance to the seizure by the contractor created genuine issues of material fact as to the debtor's claim for breach of the peace, and both the bank and recovery service could be held liable for damages based on a finding that the contractor breached the peace. *Fulton v. Anchor Sav. Bank*, 215 Ga. App. 456, 452 S.E.2d 208 (1994).

**Pre-default rights waiver ineffective.** — Guarantor's waiver of an affirmative defense

**General Consideration** (Cont'd)

of commercial unreasonability prior to a debtor's default on a loan made in participation with business organization was ineffective since pre-default waiver of rights under was invalid under the former provisions. *United States v. Contestabile*, 989 F.2d 463 (11th Cir. 1993) (decided under former Code Section 11-9-503).

**Cited in** *Moody v. Nides Fin. Co.*, 115 Ga. App. 859, 156 S.E.2d 310 (1967); *Barnes v. Reliable Tractor Co.*, 117 Ga. App. 777, 161 S.E.2d 918 (1968); *Atkins v. Citizens & S. Nat'l Bank*, 127 Ga. App. 348, 193 S.E.2d 187 (1972); *White Stores, Inc. v. Meadows*, 127 Ga. App. 841, 195 S.E.2d 198 (1973); *Trust Co. v. Montgomery*, 234 Ga. 187, 215 S.E.2d 8 (1975); *Trust Co. v. Montgomery*, 136 Ga. App. 742, 222 S.E.2d 196 (1975); *Ford Motor Credit Co. v. Milline*, 137 Ga. App. 585, 224 S.E.2d 437 (1976); *Philyaw v. Fulton Nat'l Bank*, 139 Ga. App. 28, 227 S.E.2d 811 (1976); *McCullough v. Mobiland, Inc.*, 139 Ga. App. 260, 228 S.E.2d 146 (1976); *First Nat'l Bank & Trust Co. v. State*, 141 Ga. App. 471, 233 S.E.2d 861 (1977); *Ford Motor Credit Co. v. Hunt*, 141 Ga. App. 612, 234 S.E.2d 112 (1977); *Ford Motor Credit Co. v. Spicer*, 144 Ga. App. 383, 241 S.E.2d 273 (1977); *Marshall v. Fulton Nat'l Bank*, 145 Ga. App. 190, 243 S.E.2d 266 (1978); *Kyburz v. Cobb Bank & Trust Co.*, 241 Ga. 298, 245 S.E.2d 275 (1978); *Ace Parts & Distribs., Inc. v. First Nat'l Bank*, 146 Ga. App. 4, 245 S.E.2d 314 (1978); *Baker v. Chrysler Credit Corp.*, 154 Ga. App. 325, 268 S.E.2d 722 (1980); *In re Bagley*, 6 Bankr. 387 (Bankr. N.D. Ga. 1980); *International Harvester Credit Corp. v. Clenny*, 505 F. Supp. 983 (M.D. Ga. 1981); *Hambrick v. Fidelity Acceptance Corp.*, 159 Ga. App. 540, 284 S.E.2d 53 (1981); *Robbins v. F & M Bank*, 161 Ga. App. 53, 289 S.E.2d 288 (1982); *Rush v. F & M Bank*, 162 Ga. App. 65, 290 S.E.2d 164 (1982); *Reis v. Ralls*, 250 Ga. 721, 301 S.E.2d 40 (1983); *Barney v. Morris*, 168 Ga. App. 426, 309 S.E.2d 420 (1983); *Barnett v. First Fed. Sav. & Loan Ass'n*, 169 Ga. App. 396, 313 S.E.2d 115 (1984); *Fidelity Nat'l Bank v. Wood*, 178 Ga. App. 171, 342 S.E.2d 350 (1986); *Moyer v. Citicorp Homeowners, Inc.*, 799 F.2d 1445 (11th Cir. 1986); *Borden v. Pope Jeep-Eagle, Inc.*, 200 Ga. App. 176, 407 S.E.2d 128 (1991); *Welch v. Ford Motor*

*Credit Co.*, 227 Ga. App. 904, 490 S.E.2d 206 (1997); *Atlantic Coast Fed. Credit Union v. Delk*, 241 Ga. App. 589, 526 S.E.2d 425 (1999).

**Self-Help Repossession**

**Self help has always been part of common law** without use of state power. *Shelton v. GECC*, 359 F. Supp. 1079 (M.D. Ga. 1973) (decided under former Code Section 11-9-503).

**Secured party responsible for tortious acts committed by agents.** — Although secured party, through its agents, has right to peacefully enter premises and obtain its property, secured party is responsible for any tortious acts committed during repossession. *Whisenhunt v. Allen Parker Co.*, 119 Ga. App. 813, 168 S.E.2d 827 (1969) (decided under former Code Section 11-9-503).

**Meaning of "breach of the peace."** — See *Deavers v. Standridge*, 144 Ga. App. 673, 242 S.E.2d 331 (1978) (decided under former Code Section 11-9-503).

Absence of the debtor's knowledge or consent to repossession does not constitute a breach of the peace unless abusive and insulting language which incites violence is used or some other violation of the public peace, order, or decorum occurs. *Hill v. Federal Employees Credit Union*, 193 Ga. App. 44, 386 S.E.2d 874 (1989) (decided under former Code Section 11-9-503).

**"Self-help" mechanism does not create an agency relationship.** *Flournoy v. City Fin. of Columbus, Inc.*, 679 F.2d 821 (11th Cir. 1982) (decided under former Code Section 11-9-503).

**Repossessor is not "custodian" under federal Bankruptcy Act.** — A secured creditor who repossesses a debtor's automobile without legal process under former subsection (3) was not a "custodian" within meaning of Bankruptcy Act of 1978, 11 U.S.C. § 101(10)(C), so as to require delivery of possession to the trustee in bankruptcy in accordance with 11 U.S.C. § 543(b). *Flournoy v. City Fin. of Columbus, Inc.*, 679 F.2d 821 (11th Cir. 1982) (decided under former Code Section 11-9-503).

**Notice**

**Notice prior to repossession.** — Notice is not required prior to repossession absent



prior agreement to the contrary. *Fulton Nat'l Bank v. Horn*, 239 Ga. 648, 238 S.E.2d 358 (1977); *Hill v. Federal Employees Credit Union*, 193 Ga. App. 44, 386 S.E.2d 874 (1989) (decided under former Code Section 11-9-503).

Creditor's right to repossess exists independently of right to accelerate indebtedness, and notice is not required prior to repossession absent provision in agreement to contrary. *Ford Motor Credit Co. v. Hunt*, 241 Ga. 342, 245 S.E.2d 295 (1978) (decided under former Code Section 11-9-503).

**Repossession by agent of lending company is not a conversion**, even though without notice to debtor. *Thurmond v. Elliott Fin. Co.*, 141 Ga. App. 574, 234 S.E.2d 153 (1977) (decided under former Code Section 11-9-503).

**Notice where creditor indicates he will accept late payments.** — If creditor has given debtor reasonable impression that late payments will be accepted or that an arrearage need not be paid immediately, then creditor may be estopped to engage in self-help repossession until the creditor has given notice, demanded payment or otherwise indicated to debtor that the debtor is considered to be in default. *Pierce v. Leasing Int'l, Inc.*, 142 Ga. App. 371, 235 S.E.2d 752, adhered to 144 Ga. App. 312, 241 S.E.2d 31 (1977) (decided under former Code Section 11-9-503).

**Notice required where contract preempted by federal law.** — A mobile home financing contract which was silent with regard to foreclosure and repossession did not permit the creditor to repossess by self help without notice, or to foreclose upon seven-days notice pursuant to a writ of possession (O.C.G.A. § 44-14-232), for the simple reason that the parties intended to enter a contract preempted by federal law, which requires 30 days notice to a defaulting debtor prior to repossession or foreclosure. *Grant v. GECC*, 764 F.2d 1404 (11th Cir. 1985), cert. denied, 476 U.S. 1124, 106 S. Ct. 1993, 90 L. Ed. 2d 673 (1985) (decided under former Code Section 11-9-503).

**Sale of property by secured party without notice.** — In action for conversion of mortgaged property, instruction that secured party had no right to sell property if no notice was given was erroneous, as the U.C.C. does not prohibit sale without notice, but rather provides that a debtor is entitled to recover any loss caused by such a sale, that is, a loss caused by a sale at a less than adequate price, and is also protected from any action by secured party to recover any deficiency between sale price and balance owing. *Trust Co. v. Kite*, 164 Ga. App. 119, 294 S.E.2d 606 (1982) (decided under former Code Section 11-9-503).

## OPINIONS OF THE ATTORNEY GENERAL

**Editor's notes.** — In the light of the similarity of the provisions, opinions under former Article 9 are included in the annotations for this Code section. For a table of comparable provisions, see the table at the beginning of the Article.

**Notice not required prior to repossession.** — Prior to taking possession of the collateral, the security interest holder is not required to give notice to the debtor absent prior agreement to the contrary. 1990 Op. Att'y Gen. No. 90-8.

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 68A Am. Jur. 2d, Secured Transactions, §§ 121, 230, 590 et seq.

**C.J.S.** — 72 C.J.S., Pledges, §§ 49, 50.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 9-609.

**ALR.** — Right of chattel mortgagee to take possession of property without legal process, 57 ALR 26.

Demand for payment or for possession as a condition of seller's right to retake prop-

erty or otherwise enforce forfeiture under conditional sale, 59 ALR 134.

Right of bank to charge depositor's indebtedness against deposit account without first exhausting collateral, 96 ALR 1240.

Rights and remedies as between parties to conditional sale after seller has repossessed himself of the property, 99 ALR 1288.

Right of conditional seller to retake property without legal process, 146 ALR 1331.



Payment or discharge of principal obligation as affecting right of the pledgee to sue or continue pending suit against the maker of the collateral pledged, or judgment previously recovered on the collateral obligation, 157 ALR 261.

Conditional sale: what amounts to waiver by buyer of seller's duty to give notice before repossessing the property, 174 ALR 1363.

Construction of §§ 301 and 700 of Soldiers' and Sailors' Civil Relief Act of 1940, as

amended, relating to instalment contracts for purchase of property, 24 ALR2d 1074.

What conduct by repossessing chattel mortgagee or conditional vendor entails tort liability, 99 ALR2d 358.

Validity, under state law, of self-help repossession of goods pursuant to UCC § 9-503, 75 ALR3d 1061.

Secured transactions: Right of secured party to take possession of collateral on default under UCC § 9-503, 25 ALR5th 696.

### 11-9-610. Disposition of collateral after default.

(a) *Disposition after default.* After default, a secured party may sell, lease, license, or otherwise dispose of any or all of the collateral in its present condition or following any commercially reasonable preparation or processing.

(b) *Commercially reasonable disposition.* Every aspect of a disposition of collateral, including the method, manner, time, place, and other terms, must be commercially reasonable. If commercially reasonable, a secured party may dispose of collateral by public or private proceedings, by one or more contracts, as a unit or in parcels, and at any time and place and on any terms.

(c) *Purchase by secured party.* A secured party may purchase collateral:

(1) At a public disposition; or

(2) At a private disposition only if the collateral is of a kind that is customarily sold on a recognized market or the subject of widely distributed standard price quotations.

(d) *Warranties on disposition.* A contract for sale, lease, license, or other disposition includes the warranties relating to title, possession, quiet enjoyment, and the like which by operation of law accompany a voluntary disposition of property of the kind subject to the contract.

(e) *Disclaimer of warranties.* A secured party may disclaim or modify warranties under subsection (d) of this Code section:

(1) In a manner that would be effective to disclaim or modify the warranties in a voluntary disposition of property of the kind subject to the contract of disposition; or

(2) By communicating to the purchaser a record evidencing the contract for disposition and including an express disclaimer or modification of the warranties.

(f) *Record sufficient to disclaim warranties.* A record is sufficient to disclaim warranties under subsection (e) of this Code section if it indicates "There

is no warranty relating to title, possession, quiet enjoyment, or the like in this disposition” or uses words of similar import. (Code 1981, § 11-9-610, enacted by Ga. L. 2001, p. 362, § 1.)

**Cross references.** — Additional provisions regarding disposition of goods repossessed after default, § 10-1-10.

**Law reviews.** — For article, “The Revisions to Article IX of the Uniform Commercial Code,” see 15 Ga. St. B.J. 120 (1977). For article surveying developments in Georgia commercial law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 33 (1981). For article, “Nonjudicial Foreclosures in Georgia: Fresh Doubts, Issues and Strate-

gies,” see 23 Ga. St. B.J. 123 (1987). For annual survey of commercial law, see 43 Mercer L. Rev. 119 (1991).

For note discussing repossession and foreclosure as creditor’s remedies under the Uniform Commercial Code, see 3 Ga. L. Rev. 198 (1968).

For comment on a secured party’s burden of proof in seeking a deficiency judgment after resale of collateral, see 33 Mercer L. Rev. 397 (1981).

## JUDICIAL DECISIONS

### ANALYSIS

#### GENERAL CONSIDERATION

##### RIGHT TO DEFICIENCY JUDGMENT

#### General Consideration

**Editor’s notes.** — In the light of the similarity of the provisions, decisions under former Article 9 are included in the annotations for this Code section. For a table of comparable provisions, see the table at the beginning of the Article.

**Section inapplicable to sales by court appointed receivers.** — Whenever sale of collateral is not by secured party, but by receiver appointed by court of equity, the former provisions were not applicable to the transaction. *Sands v. Citizens & S. Nat’l Bank*, 146 Ga. App. 853, 247 S.E.2d 544 (1978) (decided under former Code Section 11-9-504).

**Section inapplicable where debt extinguished as provided by instrument.** — Where the terms of the deed to secure debt allowed for early payment of the debt, by accepting grantor of deed’s payoff, the plaintiff simply allowed the debt evidenced by the deed to secure debt to be extinguished in a manner contemplated by that instrument, and that act does not constitute a disposition or sale of the collateral within the meaning of the former provisions. *Griffith v. First Fed. Sav. Bank*, 208 Ga. App. 863, 432 S.E.2d 606 (1993) (decided under former Code Section 11-9-504).

**Section inapplicable where no evidence of sale.** — Where neither the affidavits nor any other matter or pleading presented by the

defendants identified any specific, probative evidence of a sale by the secured party, the former provisions of this section did not apply. *Congress Fin. Corp. v. Commercial Technology, Inc.*, 910 F. Supp. 637 (N.D. Ga. 1995) (decided under former Code Section 11-9-504).

**Value of collateral customarily sold in recognized market is readily ascertainable.** — For collateral to qualify as collateral of a type customarily sold in recognized market so as to authorize purchase by secured party at private sale, it must be such that its value at any given time is readily ascertainable, as in case of stocks and bonds or other negotiable instruments. *Luxurest Furn. Mfg. Co. v. Furniture Whse. Sales, Inc.*, 132 Ga. App. 661, 209 S.E.2d 63 (1974), rev’d on other grounds sub nom. *Gurwitch v. Luxurest Furn. Mfg. Co.*, 233 Ga. 934, 214 S.E.2d 373 (1975) (decided under former Code Section 11-9-504).

**Knowledge of purchaser as prerequisite for setting aside sale.** — Allegations that sheriff misled the attorneys of plaintiff in *feria facias* as to when foreclosure sale was to be held may be insufficient grounds to set sale aside, unless it appears that purchaser knew of or had some hand in the misleading. *American Sec. Inv. Co. v. Popell*, 114 Ga. App. 268, 150 S.E.2d 697 (1966) (decided under former Code Section 11-9-504).

**General Consideration (Cont'd)**

**Charges impossible in event of default.** — Security agreement may impose various charges, not found in promissory note, in event of default. *General Fin. Corp. v. Sprouse*, 577 F.2d 989 (5th Cir. 1978) (decided under former Code Section 11-9-504).

**Remedies are cumulative.** — The remedies available to creditor under the former provisions are cumulative and creditor is not required to be reduced to the position of unsecured creditor so long as the creditor acts in a commercially reasonable manner and does not, by the creditor's actions or omissions, further impair position of debtor. *Henderson Few & Co. v. Rollins Communications, Inc.*, 148 Ga. App. 139, 250 S.E.2d 830 (1978) (decided under former Code Section 11-9-504).

**Creditor can elect either a public or private sale.** *First Nat'l Bank v. Rivercliff Hdwe., Inc.*, 161 Ga. App. 259, 287 S.E.2d 701 (1982) (decided under former Code Section 11-9-504).

**Defenses assertable.** — Surety or guarantor may assert all defenses, except personal defenses, available to principal. *Vickers v. Chrysler Credit Corp.*, 158 Ga. App. 434, 280 S.E.2d 842 (1981) (decided under former Code Section 11-9-504).

Absent waiver or estoppel there is no reason why guarantor may not assert "commercially reasonable" defense which would be available to guarantor's principal, the debtor, in an action by secured party against guarantor for deficiency judgment. *Vickers v. Chrysler Credit Corp.*, 158 Ga. App. 434, 280 S.E.2d 842 (1981); *Clay v. Presidential Fin. Corp.*, 175 Ga. App. 226, 332 S.E.2d 924 (1985), overruled on other grounds, *Branan v. Equico Lessors, Inc.*, 256 Ga. 23, 342 S.E.2d 671 (1986) (decided under former Code Section 11-9-504).

**Buyer not complying with terms of sale.** — The security interest of the mortgagee of a mobile home retail installment sales contract was not discharged by a sale to the mobile home dealer by the mortgagee following default by the purchasers where the mortgagee and the dealer agreed that the title to the mobile home was to be transferred to the dealer only after it had paid mortgagee for the mobile home, the dealer did not complete payment for the mobile

home, and there was no transfer of the certificate of title or ownership interest to the dealer, nor was there need prior to the resale of the mobile home for the mortgagee to secure a new certificate of title. *Sunnyland Employees' Fed. Credit Union v. Fort Wayne Mtg. Co.*, 182 Ga. App. 5, 354 S.E.2d 645 (1987) (decided under former Code Section 11-9-504).

**Recovery on other notes between same parties.** — Where suit on three promissory notes was not for deficiency judgment on debt for which foreclosure was had, but was action to recover on separate, subsequent and different notes, made for different debts, which were separate transactions, plaintiff-creditor's failure to give proper notice of sale of personal property listed in security agreements and bills of sale executed to secure first five promissory notes not included in instant suit did not extinguish entire debt of defendant-debtor. *Jenkins v. Savannah Valley Prod. Credit Ass'n*, 157 Ga. App. 652, 278 S.E.2d 431 (1981) (decided under former Code Section 11-9-504).

**No default occurred where no request for payment was made.** — No default occurred where, although the evidence presented at trial showed that defendant had defaulted under the terms of the note with plaintiff at the time grantor of deed sought to pay off defendant's debt, there was no evidence presented that plaintiff requested or required that grantor of deed pay off the debt evidenced by the deed to secure debt. *Griffith v. First Fed. Sav. Bank*, 208 Ga. App. 863, 432 S.E.2d 606 (1993) (decided under former Code Section 11-9-504).

**Disposition of realty.** — When a creditor disposes of realty, strict compliance with the confirmation provisions of O.C.G.A. § 44-14-160 et seq. is not required in order for a deficiency to be recovered, and the cases calling for strict compliance with former subsection (3) of the former provisions as to a creditor's disposition of personalty and dealing more specifically with the notice requirements of former subsection (3) rather than with any requirement similar to confirmation of a real property foreclosure, do not effectively overrule it. *Business Dev. Corp. v. Bickerstaff*, 73 Bankr. 421 (Bankr. N.D. Ga. 1987) (decided under former Code Section 11-9-504).



**Leases.** — The commercially reasonable sale provision and the notice provision under O.C.G.A. § 10-1-36 were not applicable to a lease which was a “true lease” rather than a disguised secured transaction. *Citizens & S. Nat'l Bank v. Thomas*, 188 Ga. App. 312, 372 S.E.2d 687 (1988) (decided under former Code Section 11-9-504).

### Right to Deficiency Judgment

**Absolute bar rule.** — These code provisions do not require the imposition of an absolute-bar rule and the absolute-bar rule is contrary to the intent of O.C.G.A. § 11-1-106 which expressly prohibits penal damages. *Emmons v. Burkett*, 256 Ga. 855, 353 S.E.2d 908 (1987) (decided under former Code Section 11-9-504).

**Notification of intent to sell at private sale prerequisite to recovery.** — Compliance with requirement of notification of debtor of intention to sell collateral at private sale is condition precedent to recovery of any deficiency between sale price of collateral and amount of unpaid balance. *Edmondson v. Air Serv. Co.*, 123 Ga. App. 263, 180 S.E.2d 589 (1971) (decided under former Code Section 11-9-504).

Where a debtor filed a petition for bankruptcy and a creditor filed a complaint for relief from the automatic stay, which was granted, and then the creditor repossessed the debtor's car, in which it held a security

interest, and sold the car but did not give prior notification of the sale to the debtor in compliance with former subsection (3) of these provisions, the creditor was not entitled to collect any deficiency. *Fidelity Nat'l Bank v. Winslow*, 39 Bankr. 869 (Bankr. N.D. Ga. 1984) (decided under former Code Section 11-9-504).

**No “deficiency” where items cannot be repossessed.** — Where the evidence showed the sum sought represented the amount advanced to defendants on those inventory items which could not be repossessed because they had been sold “out of trust,” and where these items were not, and could not have been, repossessed by plaintiff, no “deficiency” was deemed to be sought and the former provisions were not applicable. *Dixon v. Borg-Warner Acceptance Corp.*, 186 Ga. App. 843, 368 S.E.2d 800 (1988) (decided under former Code Section 11-9-504).

**Sale must allow debtor to exercise redemption right.** — Act of secured party, in selling collateral without strict compliance with notice of sale provisions of this former section precludes purchaser or owner from exercising right of redemption under former § 11-9-506, and for that reason secured party cannot recover for deficiency owed by purchaser. *Braswell v. American Nat'l Bank*, 117 Ga. App. 699, 161 S.E.2d 420 (1968) (decided under former Code Section 11-9-504).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 68A Am. Jur. 2d, Secured Transactions, §§ 556-572, 606, 624 et seq., 642-680, 685-703.

**C.J.S.** — 72 C.J.S., Pledges, §§ 49, 50.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 9-610.

**ALR.** — Seller's rights in respect of the property, or its proceeds, upon dishonor of draft or check for purchase price, on a cash sale, 31 ALR 578; 54 ALR 526.

Rights and remedies as between parties to conditional sale after seller has repossessed himself of the property, 99 ALR 1288.

Right of creditor or mortgagee to redeem from his own sale, 108 ALR 993.

Purchase by pledgee of subject of pledge, 37 ALR2d 1381.

Rights and duties of parties to conditional

sales contract as to resale of repossessed property, 49 ALR2d 15.

Uniform Commercial Code: Burden of proof as to commercially reasonable disposition of collateral, 59 ALR3d 369.

Uniform Commercial Code: failure of secured creditor to give required notice of disposition of collateral as bar to deficiency judgment, 59 ALR3d 401.

Construction of term “debtor” as used in UCC § 9-504(3), requiring secured party to give notice to debtor of sale of collateral securing obligation, 5 ALR4th 1291.

What is “commercially reasonable” disposition of collateral required by UCC § 9-504(3), 7 ALR4th 308.

Loss or modification of right to notification of sale of repossessed collateral under

Uniform Commercial Code § 9-504, 9 ALR4th 552.

Failure of secured party to make “commercially reasonable” disposition of collateral under UCC § 9-504(3) as bar to deficiency judgment, 10 ALR4th 413.

Sufficiency of secured party’s notification of sale or other intended disposition of collateral under UCC § 9-504(3), 11 ALR4th 241.

Nature of collateral which secured party

may sell or otherwise dispose of without giving notice to defaulting debtor under UCC § 9-504(3), 11 ALR4th 1060.

Secured transactions: what is “public” or “private” sale under UCC § 9-504(3), 60 ALR4th 1012.

UCC: value of trade-in taken on sale of collateral for purposes of computing surplus or deficiency, 72 ALR4th 1128.

Causes of action governed by limitations period in UCC § 2-725, 49 ALR5th 1.

### 11-9-611. Notification before disposition of collateral.

(a) “*Notification date.*” As used in this Code section, the term “notification date” means the earlier of the date on which:

- (1) A secured party sends to the debtor and any secondary obligor an authenticated notification of disposition; or
- (2) The debtor and any secondary obligor waive the right to notification.

(b) *Notification of disposition required.* Except as otherwise provided in subsection (d) of this Code section, a secured party that disposes of collateral under Code Section 11-9-610 shall send to the persons specified in subsection (c) of this Code section a reasonable authenticated notification of disposition.

(c) *Persons to be notified.* To comply with subsection (b) of this Code section, the secured party shall send an authenticated notification of disposition to:

- (1) The debtor;
- (2) Any secondary obligor; and
- (3) If the collateral is other than consumer goods:

(A) Any other person from which the secured party has received, before the notification date, an authenticated notification of a claim of an interest in the collateral;

(B) Any other secured party or lienholder that, ten days before the notification date, held a security interest in or other lien on the collateral perfected by the filing of a financing statement that:

- (i) Identified the collateral;
- (ii) Was indexed under the debtor’s name as of that date; and

(iii) Was filed in the office in which to file a financing statement against the debtor covering the collateral as of that date; and

(C) Any other secured party that, ten days before the notification date, held a security interest in the collateral perfected by compliance with a statute, regulation, or treaty described in subsection (a) of Code Section 11-9-311.

(d) *Subsection (b) of this Code section inapplicable; perishable collateral; recognized market.* Subsection (b) of this Code section does not apply if the collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market.

(e) *Compliance with subparagraph (c)(3)(B) of this Code section.* A secured party complies with the requirement for notification prescribed by subparagraph (c)(3)(B) of this Code section if:

(1) Not later than 20 days or earlier than 30 days before the notification date, the secured party requests, in a commercially reasonable manner, information concerning financing statements indexed under the debtor's name in the office indicated in subparagraph (c)(3)(B) of this Code section; and

(2) Before the notification date, the secured party:

(A) Did not receive a response to the request for information; or

(B) Received a response to the request for information and sent an authenticated notification of disposition to each secured party or other lienholder named in that response whose financing statement covered the collateral. (Code 1981, § 11-9-611, enacted by Ga. L. 2001, p. 362, § 1.)

## JUDICIAL DECISIONS

**Editor's notes.** — In the light of the similarity of the provisions, decisions under former Article 9 are included in the annotations for this Code section. For a table of comparable provisions, see the table at the beginning of the Article.

**No federal presumption.** — Section's requirement of notice of sale is not preempted by federal regulations not providing specific notice requirements and which are intended to accommodate state procedures. *United States ex rel. Farmers Home Admin. v. Kennedy*, 785 F.2d 1553 (11th Cir. 1986) (decided under former Code Section 11-9-504).

**Relation to O.C.G.A. § 10-1-36.** — O.C.G.A. § 10-1-36 complements the former provisions and provides some guidance as to

what constitutes reasonable notice. *Lacy v. General Fin. Corp.*, 651 F.2d 1026 (5th Cir. 1981) (decided under former Code Section 11-9-504).

**Effort secured party must exert in locating and notifying debtor.** — See *Henson v. Foremost Ins. Co.*, 158 Ga. App. 441, 280 S.E.2d 848 (1981) (decided under former Code Section 11-9-504).

**Section requires giving, not receipt, of reasonable notice.** — The former provisions required that seller give buyer reasonable notification of intended sale. However, requirement involved is one of creditor giving debtor reasonable notification as distinguished from debtor receiving such notification. *Friddell v. Rawlins*, 160 Ga. App. 44, 285 S.E.2d 779 (1981); *Brewer v. Trust Co.*



Bank, 205 Ga. App. 891, 424 S.E.2d 74 (1992) (decided under former Code Section 11-9-504).

**Non-misleading notice, complying with this section, is sufficient.** — Notice which was in accord with requirements of former § 11-9-504(3), and which was not such as misled or prevented debtor from exercising the right of redemption under former § 11-9-506, is sufficient to reasonably notify debtor of rights. *Motor Contract Co. v. Sawyer*, 123 Ga. App. 207, 180 S.E.2d 282 (1971) (decided under former Code Section 11-9-504).

**Notices sent to debtors by certified mail** are sufficient. *Brinson v. Commercial Bank*, 138 Ga. App. 177, 225 S.E.2d 701 (1976), overruled on other grounds, *Barbree v. Allis-Chalmers Corp.*, 250 Ga. 409, 297 S.E.2d 465 (1982) (decided under former Code Section 11-9-504).

**When notification is “sent” within meaning of section.** — These provisions relied on presumption of actual notice arising by proof that letter was written, properly stamped, properly addressed and properly mailed. Notification is not “sent” where these procedures are not observed. *Edmondson v. Air Serv. Co.*, 123 Ga. App. 263, 180 S.E.2d 589 (1971) (decided under former Code Section 11-9-504).

**Letter returned to creditor stamped “unclaimed” and “postage due.”** — Where it appears that only attempt made by secured party to notify debtor of time of private sale of repossessed collateral was by letter addressed to debtor and mailed by certified mail and that letter was returned to sender marked unclaimed and stamped “Postage Due 9 Cents,” there was no duty of debtor to show that the debtor did not willfully refuse the letter because postage was inadequate, and debtor did not receive notification required under these provisions. *Edmondson v. Air Serv. Co.*, 123 Ga. App. 263, 180 S.E.2d 589 (1971) (decided under former Code Section 11-9-504).

**Notice of time not specified.** — Notice only of intention to sell without any notification of time is not in compliance with Uniform Commercial Code as it precludes purchaser or owner from exercising right of redemption and therefore prevents the recovery of the deficiency. *Motor Contract Co. v. Sawyer*, 123 Ga. App. 207, 180 S.E.2d 282

(1971) (decided under former Code Section 11-9-504).

Former provisions did not demand that notice specify exactly when the sales would occur. It was sufficient for the creditor to notify debtor that the sales would occur only after certain dates, and so notice requirement was satisfied. *Cessna Fin. Corp. v. Wall*, 876 F. Supp. 273 (M.D. Ga. 1994) (decided under former Code Section 11-9-504).

**Notice to debtor merely that creditor intends to pursue deficiency claim.** — In suit based on defaults in payment of two notes, while defendant was notified by certified mail that in event of sale plaintiff would pursue deficiency claim, this notice did not advise defendant of any contemplated sale, either public or private, thus creditor failed to comply with the former provisions, as notice is a condition precedent to recovery of any deficiency. *GEMC Fed. Credit Union v. Shoemake*, 151 Ga. App. 705, 261 S.E.2d 443 (1979) (decided under former Code Section 11-9-504).

**Notice to secured party holding interest senior to that of selling secured party.** — Secured party who holds interest senior to one held by secured party selling property at public sale and who meets other requirements of Uniform Commercial Code must be sent notification of sale, and failure to do so gave rise to cause of action under former subsection (1). *Bank of Camilla v. Stephens*, 234 Ga. 293, 216 S.E.2d 71 (1975) (decided under former Code Section 11-9-504).

**Effect of failure to notify debtor.** — In action for conversion of mortgaged property, instruction that secured party had no right to sell property if no notice was given was erroneous, as the U.C.C. does not prohibit sale without notice, but rather provides that a debtor is entitled to recover any loss caused by such a sale, that is, a loss caused by a sale at a less than adequate price, and is also protected from any action by secured party to recover any deficiency between sale price and balance owing. *Trust Co. v. Kite*, 164 Ga. App. 119, 294 S.E.2d 606 (1982) (decided under former Code Section 11-9-504).

Where bank failed to provide notice of sale to debtor hardware store, bank was precluded from obtaining deficiency against the store. *First Nat’l Bank v. Rivercliff Hdwe., Inc.*, 161 Ga. App. 259, 287 S.E.2d 701

(1982) (decided under former Code Section 11-9-504).

A creditor who fails to comply with the provisions of the UCC as to repossessed collateral is met with two results for noncompliance: (1) It will be presumed that the value of the repossessed collateral equals the amount of the debt, and (2) even if the secured party overcomes such presumption, any recovery is subject to an offset of damages proved by the debtor resulting from the violation. *Barney v. Morris*, 168 Ga. App. 426, 309 S.E.2d 420 (1983); *Emmons v. Burkett*, 179 Ga. App. 838, 348 S.E.2d 323 (1986), rev'd on other grounds, 256 Ga. 855, 353 S.E.2d 908 (1987) (decided under former Code Section 11-9-504).

Creditor's failure to give notice in accordance with former subsection (3) did not as a matter of law preclude the creditor's right of recovery. *Emmons v. Burkett*, 179 Ga. App. 838, 348 S.E.2d 323 (1986), rev'd on other grounds, 256 Ga. 855, 353 S.E.2d 908 (1987) (decided under former Code Section 11-9-504).

The Farmers Home Administration's failure to give notice of the sale of debtors' collateral, in violation of former subsection (3), barred the administration from recovering any deficiency against the debtors based upon their second security deed. *United States ex rel. Farmers Home Admin. v. Kennedy*, 806 F.2d 1014 (11th Cir. 1986). But see *Emmons v. Burkett*, 256 Ga. 855, 353 S.E.2d 908 (1987) (decided under former Code Section 11-9-504).

**Misstatement of balance due.** — Debtor did not receive reasonable notification of the sale of repossessed property where the notice of sale understated the balance due at the time of the notice, thereby preventing the debtor from taking steps to protect its interest. *Cessna Fin. Corp. v. Design Eng'g & Constr. Int'l, Inc.*, 176 Ga. App. 206, 335 S.E.2d 625 (1985) (decided under former Code Section 11-9-504).

**Endorser entitled to notice.** — An endorser's obligation under a promissory note, including the potential liability of any deficiency, makes obvious the endorser's interest in a fair and optimal disposition of repossessed collateral, and renders the purpose of requiring notice to the actual debtor equally applicable to the endorser. *Davis v. Adel Banking Co.*, 175 Ga. App. 828, 334 S.E.2d

874 (1985) (decided under former Code Section 11-9-504).

**Accommodation endorsers were entitled to notice of sale** of promissory note maker's collateral, even if the maker had waived own rights to notice. *United States ex rel. Farmers Home Admin. v. Kennedy*, 785 F.2d 1553 (11th Cir. 1986) (decided under former Code Section 11-9-504).

**Former subsection (3) held inapplicable.** — In a suit against the defendant as endorser of a note brought by a bank after it had exercised its power of sale on the residence of the insurer of the note, former subsection (3), relating to reasonable notification of sale, was inapplicable under the facts of the case. *Breitzman v. Heritage Bank*, 180 Ga. App. 171, 348 S.E.2d 713 (1986) (decided under former Code Section 11-9-504).

**Bank's compliance with O.C.G.A. § 10-1-36 notice requirements.** Evidence of a bank's compliance with the notice requirements of O.C.G.A. § 10-1-36 was a sufficient showing of the bank's compliance with the cumulative and additional "reasonable notification" provision of former subsection (3). *Calcote v. Citizens & S. Nat'l Bank*, 179 Ga. App. 132, 345 S.E.2d 616 (1986) (decided under former Code Section 11-9-504).

Two attempts to deliver certified mail to the buyer's correct address met the requirements of O.C.G.A. § 10-1-36. *Hill v. Federal Employees Credit Union*, 193 Ga. App. 44, 386 S.E.2d 874 (1989) (decided under former Code Section 11-9-504).

**Notice to guarantor not required.** — Nothing in the Uniform Commercial Code required that notice under former subsection (3) be given to guarantor. *Brinson v. Commercial Bank*, 138 Ga. App. 177, 225 S.E.2d 701 (1976), overruled on other grounds, *Barbree v. Allis-Chalmers Corp.*, 250 Ga. 409, 297 S.E.2d 465 (1982) (decided under former Code Section 11-9-504).

A guarantor is not entitled to notice under the former provisions of this section. *McNulty v. Codd*, 157 Ga. App. 8, 276 S.E.2d 73 (1981), overruled on other grounds, *Barbree v. Allis-Chalmers Corp.*, 250 Ga. 409, 297 S.E.2d 465 (1982); *First Nat'l Bank v. Rivercliff Hdwe., Inc.*, 161 Ga. App. 259, 287 S.E.2d 701 (1982) (decided under former Code Section 11-9-504).

A guarantor is not a "debtor" and there-



fore, not required under the Uniform Commercial Code to be notified by secured party of impending sale. *Vickers v. Chrysler Credit Corp.*, 158 Ga. App. 434, 280 S.E.2d 842 (1981) (but see *Reeves v. Habersham Bank*, 254 Ga. 615, 331 S.E.2d 589 (1985), holding that a guarantor is a debtor within the meaning of former subsection (3)).

**Dealer grantor of manufacturer financing.** — One who is a seller of chattel paper, whether or not that person is the owner of the underlying collateral, with full recourse against him in the event of a deficiency is a debtor entitled to notice of the post-default proceedings disposing of the collateral. *Barbree v. Allis-Chalmers Corp.*, 250 Ga. 409, 297 S.E.2d 465 (1982) (decided under former Code Section 11-9-504).

**Seller of farm equipment who had assigned retail installment contracts** was a “debtor” entitled to notice of sale under former subsection (3). *Barbree v. Allis-Chalmers Corp.*, 250 Ga. 409, 297 S.E.2d 465 (1982) (decided under former Code Section 11-9-504).

**Claiming loss of profits due to failure to give notice.** — In an action by a debtor for damages caused by repossession of collateral after an alleged breach of an agreement between the debtor and the secured party, where the debtor is in default the debtor cannot allege that the failure of the secured party to give notice as to the retention and sale of collateral caused the debtor to be damaged by loss of profits. Such violations only raise the presumption that the value of the collateral equals the amount due on the debt. *Barney v. Morris*, 168 Ga. App. 426, 309 S.E.2d 420 (1983) (decided under former Code Section 11-9-504).

**Notice not required for transfer pursuant to standing full recourse assignment agreement.** — The last sentence in former subsection (5) made clear that a reassignment of collateral by a secured party pursuant to a standing full recourse assignment agreement was not a “sale or disposition of the collateral” that would activate the notice provisions of former subsection (3). *Turner v. Trust Co. Bank*, 210 Ga. App. 535, 436 S.E.2d 577 (1993) (decided under former Code Section 11-9-504).

**Notice requirement may not be waived or varied.** See *GEMC Fed. Credit Union v. Shoemake*, 151 Ga. App. 705, 261 S.E.2d 443 (1979).

**Guaranty subject to waiver of notice of sale.** — Where the note hypothecating the property empowered the note’s holder to “sell, assign, and deliver the whole or any part of the collateral at public or private sale, without demand, advertisement or notice of the time or place of sale or of any adjournment thereof, which are expressly waived,” and the guaranty signed by defendant made itself subject to all terms and conditions in the notes evidencing the obligations which it guaranteed, defendant waived notice of the sale. *United States v. Jones*, 707 F.2d 1334 (11th Cir. 1983).

**Showing required by debtor.** — Where debtor moves for summary judgment in deficiency proceeding where propriety of notice is in issue, debtor must show that debtor has not renounced or modified right to notification of sale under these provisions. *GEMC Fed. Credit Union v. Shoemake*, 151 Ga. App. 705, 261 S.E.2d 443 (1979).

## RESEARCH REFERENCES

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 9-611.

### 11-9-612. Timeliness of notification before disposition of collateral.

(a) *Reasonable time is question of fact.* Except as otherwise provided in subsection (b) of this Code section, whether a notification is sent within a reasonable time is a question of fact.

(b) *Ten-day period sufficient in nonconsumer transaction.* In a transaction other than a consumer transaction, a notification of disposition sent after



default and ten days or more before the earliest time of disposition set forth in the notification is sent within a reasonable time before the disposition. (Code 1981, § 11-9-612, enacted by Ga. L. 2001, p. 362, § 1.)

### JUDICIAL DECISIONS

**Definition of O.C.G.A. § 11-1-201 not of itself sufficient for making determination.** — Question of whether reasonable notification of time after which private sale or other intended disposition is to be made has been sent by secured party to debtor cannot be determined solely on definitional basis of O.C.G.A. § 11-1-201. *Geohagan v. Commercial Credit Corp.*, 130 Ga. App. 828, 204 S.E.2d 784 (1974) (decided under former Code Section 11-9-504).

**Notice stating intent to sell ten days from postmark.** — Notice sent to debtor, at address given when debtor executed security agreement, by certified mail, return receipt requested, and received by debtor two days

after mailing notifying debtor of creditor's intention to sell collateral at private sale ten days after postmark was effective, was a satisfactory and reasonable method of notification. *Motor Contract Co. v. Sawyer*, 123 Ga. App. 207, 180 S.E.2d 282 (1971) (decided under former Code Section 11-9-504).

**Conflicting evidence presents jury question.** — Where there is conflicting evidence as to nature and extent of debtor's knowledge, debtor should not be estopped from raising lack of notice as a defense. Rather, question of "reasonable notification" should be submitted to jury. *Comfort Trane Air Conditioning Co. v. Trane Co.*, 592 F.2d 1373 (5th Cir. 1979).

### RESEARCH REFERENCES

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 9-612.

### 11-9-613. Contents and form of notification before disposition of collateral; general.

Except in a consumer goods transaction, the following rules apply:

(1) The contents of a notification of disposition are sufficient if the notification:

- (A) Describes the debtor and the secured party;
- (B) Describes the collateral that is the subject of the intended disposition;
- (C) States the method of intended disposition;
- (D) States that the debtor is entitled to an accounting of the unpaid indebtedness and states the charge, if any, for an accounting; and
- (E) States the time and place of a public disposition or the time after which any other disposition is to be made;

(2) Whether the contents of a notification that lacks any of the information specified in paragraph (1) of this Code section are nevertheless sufficient is a question of fact;

(3) The contents of a notification providing substantially the information specified in paragraph (1) of this Code section are sufficient, even if the notification includes:

(A) Information not specified by that paragraph; or

(B) Minor errors that are not seriously misleading;

(4) A particular phrasing of the notification is not required; and

(5) The following form of notification and the form appearing in paragraph (3) of Code Section 11-9-614, when completed, each provides sufficient information:

#### NOTIFICATION OF DISPOSITION OF COLLATERAL

To: (Name of debtor, obligor, or other person to which the notification is sent)

From: (Name, address, and telephone number of secured party)

Name of Debtor(s): (Include only if debtor(s) is (are) not an addressee)

(For a public disposition:)

We will sell (or lease or license, as applicable) the (describe collateral) to the highest qualified bidder in public as follows:

Day and date: \_\_\_\_\_

Time: \_\_\_\_\_

Place: \_\_\_\_\_

(For a private disposition:)

We will sell (or lease or license, as applicable) the (describe collateral) privately sometime after (day and date).

You are entitled to an accounting of the unpaid indebtedness secured by the property that we intend to sell (or lease or license, as applicable) (for a charge of \$\_\_\_\_\_). You may request an accounting by calling us at (telephone number). (Code 1981, § 11-9-613, enacted by Ga. L. 2001, p. 362, § 1.)

#### RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 9-613.

**11-9-614. Contents and form of notification before disposition of collateral; consumer goods transaction.**

In a consumer goods transaction, the following rules apply:

(1) A notification of disposition must provide the following information:

(A) The information specified in paragraph (1) of Code Section 11-9-613;

(B) A description of any liability for a deficiency of the person to which the notification is sent;

(C) A telephone number from which the amount that must be paid to the secured party to redeem the collateral under Code Section 11-9-623 is available; and

(D) A telephone number or mailing address from which additional information concerning the disposition and the obligation secured is available;

(2) A particular phrasing of the notification is not required;

(3) The following form of notification, when completed, provides sufficient information:

(Name and address of secured party)

(Date) \_\_\_\_\_

**NOTICE OF OUR PLAN TO SELL PROPERTY**

(Name and address of any obligor who is also a debtor)

Subject: (Identification of transaction)

We have your (describe collateral), because you broke promises in our agreement.

(For a public disposition:)

We will sell (describe collateral) at public sale. A sale could include a lease or license. The sale will be held as follows:

Date: \_\_\_\_\_

Time: \_\_\_\_\_

Place: \_\_\_\_\_

You may attend the sale and bring bidders if you want.



(For a private disposition:)

We will sell (describe collateral) at private sale sometime after (date).  
A sale could include a lease or license.

The money that we get from the sale (after paying our costs) will reduce the amount you owe. If we get less money than you owe, you (will or will not, as applicable) still owe us the difference. If we get more money than you owe, you will get the extra money, unless we must pay it to someone else.

You can get the property back at any time before we sell it by paying us the full amount you owe (not just the past due payments), including our expenses. To learn the exact amount you must pay, call us at (telephone number).

If you want us to explain to you in writing how we have figured the amount that you owe us, you may call us at (telephone number) or write us at (secured party's address) and request a written explanation. (We will charge you \$\_\_\_\_\_ for the explanation if we sent you another written explanation of the amount you owe us within the last six months.)

If you need more information about the sale call us at (telephone number) or write us at (secured party's address).

We are sending this notice to the following other people who have an interest in (describe collateral) or who owe money under your agreement:

(Names of all other debtors and obligors, if any);

(4) A notification in the form of paragraph (3) of this Code section is sufficient, even if additional information appears at the end of the form;

(5) A notification in the form of paragraph (3) of this Code section is sufficient, even if it includes errors in information not required by paragraph (1) of this Code section, unless the error is misleading with respect to rights arising under this article; and

(6) If a notification under this Code section is not in the form of paragraph (3) of this Code section, law other than this article determines the effect of including information not required by paragraph (1) of this Code section. (Code 1981, § 11-9-614, enacted by Ga. L. 2001, p. 362, § 1.)

#### RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 9-614.

**11-9-615. Application of proceeds of disposition; liability for deficiency and right to surplus.**

(a) *Application of proceeds.* A secured party shall apply or pay over for application the cash proceeds of a disposition under Code Section 11-9-610 in the following order to:

(1) The reasonable expenses of retaking, holding, preparing for disposition, processing, and disposing, and, to the extent provided for by agreement and not prohibited by law, reasonable attorney's fees and legal expenses incurred by the secured party;

(2) The satisfaction of obligations secured by the security interest or agricultural lien under which the disposition is made;

(3) The satisfaction of obligations secured by any subordinate security interest in or other subordinate lien on the collateral if:

(A) The secured party receives from the holder of the subordinate security interest or other lien an authenticated demand for proceeds before distribution of the proceeds is completed; and

(B) In a case in which a consignor has an interest in the collateral, the subordinate security interest or other lien is senior to the interest of the consignor; and

(4) A secured party that is a consignor of the collateral if the secured party receives from the consignor an authenticated demand for proceeds before distribution of the proceeds is completed.

(b) *Proof of subordinate interest.* If requested by a secured party, a holder of a subordinate security interest or other lien shall furnish reasonable proof of the interest or lien within a reasonable time. Unless the holder does so, the secured party need not comply with the holder's demand under paragraph (3) of subsection (a) of this Code section.

(c) *Application of noncash proceeds.* A secured party need not apply or pay over for application noncash proceeds of a disposition under Code Section 11-9-610 unless the failure to do so would be commercially unreasonable. A secured party that applies or pays over for application noncash proceeds shall do so in a commercially reasonable manner.

(d) *Surplus or deficiency if obligation secured.* If the security interest under which a disposition is made secures payment or performance of an obligation, after making the payments and applications required by subsection (a) of this Code section and permitted by subsection (c) of this Code section:

(1) Unless paragraph (4) of subsection (a) of this Code section requires the secured party to apply or pay over cash proceeds to a

consignor, the secured party shall account to and pay a debtor for any surplus; and

(2) The obligor is liable for any deficiency.

(e) *No surplus or deficiency in sales of certain rights to payment.* If the underlying transaction is a sale of accounts, chattel paper, payment intangibles, or promissory notes:

(1) The debtor is not entitled to any surplus; and

(2) The obligor is not liable for any deficiency.

(f) *Calculation of surplus or deficiency in disposition to person related to secured party.* The surplus or deficiency following a disposition is calculated based on the amount of proceeds that would have been realized in a disposition complying with this part to a transferee other than the secured party, a person related to the secured party, or a secondary obligor if:

(1) The transferee in the disposition is the secured party, a person related to the secured party, or a secondary obligor; and

(2) The amount of proceeds of the disposition is significantly below the range of proceeds that a complying disposition to a person other than the secured party, a person related to the secured party, or a secondary obligor would have brought.

(g) *Cash proceeds received by junior secured party.* A secured party that receives cash proceeds of a disposition in good faith and without knowledge that the receipt violates the rights of the holder of a security interest or other lien that is not subordinate to the security interest or agricultural lien under which the disposition is made:

(1) Takes the cash proceeds free of the security interest or other lien;

(2) Is not obligated to apply the proceeds of the disposition to the satisfaction of obligations secured by the security interest or other lien; and

(3) Is not obligated to account to or pay the holder of the security interest or other lien for any surplus. (Code 1981, § 11-9-615, enacted by Ga. L. 2001, p. 362, § 1.)

#### RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 9-615.

#### 11-9-616. Explanation of calculation of surplus or deficiency.

(a) *Definitions.* As used in this Code section, the term:

(1) “Explanation” means a writing that:

(A) States the amount of the surplus or deficiency;



(B) Provides an explanation in accordance with subsection (c) of this Code section of how the secured party calculated the surplus or deficiency;

(C) States, if applicable, that future debits, credits, charges, including additional credit service charges or interest, rebates, and expenses may affect the amount of the surplus or deficiency; and

(D) Provides a telephone number or mailing address from which additional information concerning the transaction is available.

(2) "Request" means a record:

(A) Authenticated by a debtor or consumer obligor;

(B) Requesting that the recipient provide an explanation; and

(C) Sent after disposition of the collateral under Code Section 11-9-610.

(b) *Explanation of calculation.* In a consumer goods transaction in which the debtor is entitled to a surplus or a consumer obligor is liable for a deficiency under Code Section 11-9-615, the secured party shall:

(1) Send an explanation to the debtor or consumer obligor, as applicable, after the disposition and:

(A) Before or when the secured party accounts to the debtor and pays any surplus or first makes written demand on the consumer obligor after the disposition for payment of the deficiency; and

(B) Within 14 days after receipt of a request; or

(2) In the case of a consumer obligor who is liable for a deficiency, within 14 days after receipt of a request, send to the consumer obligor a record waiving the secured party's right to a deficiency.

(c) *Required information.* To comply with subparagraph (a)(1)(B) of this Code section, a writing must provide the following information in the following order:

(1) The aggregate amount of obligations secured by the security interest under which the disposition was made, and, if the amount reflects a rebate of unearned interest or credit service charge, an indication of that fact, calculated as of a specified date:

(A) If the secured party takes or receives possession of the collateral after default, not more than 35 days before the secured party takes or receives possession; or

(B) If the secured party takes or receives possession of the collateral before default or does not take possession of the collateral, not more than 35 days before the disposition;

(2) The amount of proceeds of the disposition;

(3) The aggregate amount of the obligations after deducting the amount of proceeds;

(4) The amount, in the aggregate or by type, and types of expenses, including expenses of retaking, holding, preparing for disposition, processing, and disposing of the collateral, and attorney's fees secured by the collateral which are known to the secured party and relate to the current disposition;

(5) The amount, in the aggregate or by type, and types of credits, including rebates of interest or credit service charges, to which the obligor is known to be entitled and which are not reflected in the amount in paragraph (1) of this subsection; and

(6) The amount of the surplus or deficiency.

(d) *Substantial compliance.* A particular phrasing of the explanation is not required. An explanation complying substantially with the requirements of subsection (a) of this Code section is sufficient, even if it includes minor errors that are not seriously misleading.

(e) *Charges for responses.* A debtor or consumer obligor is entitled without charge to one response to a request under this Code section during any six-month period in which the secured party did not send to the debtor or consumer obligor an explanation pursuant to paragraph (1) of subsection (b) of this Code section. The secured party may require payment of a charge not exceeding \$10.00 for each additional response. (Code 1981, § 11-9-616, enacted by Ga. L. 2001, p. 362, § 1.)

#### RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 9-616.

#### **11-9-617. Rights of transferee of collateral.**

(a) *Effects of disposition.* A secured party's disposition of collateral after default:

(1) Transfers to a transferee for value all of the debtor's rights in the collateral;

(2) Discharges the security interest under which the disposition is made; and

(3) Discharges any subordinate security interest or other subordinate lien.

(b) *Rights of good faith transferee.* A transferee that acts in good faith takes free of the rights and interests described in subsection (a) of this Code section, even if the secured party fails to comply with this article or the requirements of any judicial proceeding.

(c) *Rights of other transferee.* If a transferee does not take free of the rights and interests described in subsection (a) of this Code section, the transferee takes the collateral subject to:

- (1) The debtor's rights in the collateral;
- (2) The security interest or agricultural lien under which the disposition is made; and
- (3) Any other security interest or other lien. (Code 1981, § 11-9-617, enacted by Ga. L. 2001, p. 362, § 1.)

#### RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 9-617.

#### 11-9-618. Rights and duties of certain secondary obligors.

(a) *Rights and duties of secondary obligor.* A secondary obligor acquires the rights and becomes obligated to perform the duties of the secured party after the secondary obligor:

- (1) Receives an assignment of a secured obligation from the secured party;
- (2) Receives a transfer of collateral from the secured party and agrees to accept the rights and assume the duties of the secured party; or
- (3) Is subrogated to the rights of a secured party with respect to collateral.

(b) *Effect of assignment, transfer, or subrogation.* An assignment, transfer, or subrogation described in subsection (a) of this Code section:

- (1) Is not a disposition of collateral under Code Section 11-9-610; and
- (2) Relieves the secured party of further duties under this article. (Code 1981, § 11-9-618, enacted by Ga. L. 2001, p. 362, § 1.)

#### RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 9-618.



**11-9-619. Transfer of record or legal title.**

(a) *“Transfer statement.”* As used in this Code section, the term “transfer statement” means a record authenticated by a secured party stating:

- (1) That the debtor has defaulted in connection with an obligation secured by specified collateral;
- (2) That the secured party has exercised its postdefault remedies with respect to the collateral;
- (3) That, by reason of the exercise, a transferee has acquired the rights of the debtor in the collateral; and
- (4) The name and mailing address of the secured party, debtor, and transferee.

(b) *Effect of transfer statement.* A transfer statement entitles the transferee to the transfer of record of all rights of the debtor in the collateral specified in the statement in any official filing, recording, registration, or certificate of title system covering the collateral. If a transfer statement is presented with the applicable fee and request form to the official or office responsible for maintaining the system, the official or office shall:

- (1) Accept the transfer statement;
- (2) Promptly amend its records to reflect the transfer; and
- (3) If applicable, issue a new appropriate certificate of title in the name of the transferee.

(c) *Transfer not a disposition; no relief of secured party’s duties.* A transfer of the record or legal title to collateral to a secured party under subsection (b) of this Code section or otherwise is not of itself a disposition of collateral under this article and does not of itself relieve the secured party of its duties under this article. (Code 1981, § 11-9-619, enacted by Ga. L. 2001, p. 362, § 1.)

**RESEARCH REFERENCES**

**U.L.A.** — Uniform Commercial Code  
(U.L.A.) § 9-619.

**11-9-620. Acceptance of collateral in full or partial satisfaction of obligation; compulsory disposition of collateral.**

(a) *Conditions to acceptance in satisfaction.* Except as otherwise provided in subsection (g) of this Code section, a secured party may accept collateral in full or partial satisfaction of the obligation it secures only if:

- (1) The debtor consents to the acceptance under subsection (c) of this Code section;

(2) The secured party does not receive, within the time set forth in subsection (d) of this Code section, a notification of objection to the proposal authenticated by:

(A) A person to which the secured party was required to send a proposal under Code Section 11-9-621; or

(B) Any other person, other than the debtor, holding an interest in the collateral subordinate to the security interest that is the subject of the proposal;

(3) If the collateral is consumer goods, the collateral is not in the possession of the debtor when the debtor consents to the acceptance; and

(4) Subsection (e) of this Code section does not require the secured party to dispose of the collateral or the debtor waives the requirement pursuant to Code Section 11-9-624.

(b) *Purported acceptance ineffective.* A purported or apparent acceptance of collateral under this Code section is ineffective unless:

(1) The secured party consents to the acceptance in an authenticated record or sends a proposal to the debtor; and

(2) The conditions of subsection (a) of this Code section are met.

(c) *Debtor's consent.* For purposes of this Code section:

(1) A debtor consents to an acceptance of collateral in partial satisfaction of the obligation it secures only if the debtor agrees to the terms of the acceptance in a record authenticated after default; and

(2) A debtor consents to an acceptance of collateral in full satisfaction of the obligation it secures only if the debtor agrees to the terms of the acceptance in a record authenticated after default or the secured party:

(A) Sends to the debtor after default a proposal that is unconditional or subject only to a condition that collateral not in the possession of the secured party be preserved or maintained;

(B) In the proposal, proposes to accept collateral in full satisfaction of the obligation it secures; and

(C) Does not receive a notification of objection authenticated by the debtor within 20 days after the proposal is sent.

(d) *Effectiveness of notification.* To be effective under paragraph (2) of subsection (a) of this Code section, a notification of objection must be received by the secured party:

(1) In the case of a person to which the proposal was sent pursuant to Code Section 11-9-621, within 20 days after notification was sent to that person; and

(2) In other cases:

(A) Within 20 days after the last notification was sent pursuant to Code Section 11-9-621; or

(B) If a notification was not sent, before the debtor consents to the acceptance under subsection (c) of this Code section.

(e) *Mandatory disposition of consumer goods.* A secured party that has taken possession of collateral shall dispose of the collateral pursuant to Code Section 11-9-610 within the time specified in subsection (f) of this Code section if:

(1) Sixty percent of the cash price has been paid in the case of a purchase money security interest in consumer goods; or

(2) Sixty percent of the principal amount of the obligation secured has been paid in the case of a nonpurchase money security interest in consumer goods.

(f) *Compliance with mandatory disposition requirement.* To comply with subsection (e) of this Code section, the secured party shall dispose of the collateral:

(1) Within 90 days after taking possession; or

(2) Within any longer period to which the debtor and all secondary obligors have agreed in an agreement to that effect entered into and authenticated after default.

(g) *No partial satisfaction in consumer transaction.* In a consumer transaction, a secured party may not accept collateral in partial satisfaction of the obligation it secures. (Code 1981, § 11-9-620, enacted by Ga. L. 2001, p. 362, § 1.)

## JUDICIAL DECISIONS

**Editor's notes.** — In the light of the similarity of the provisions, decisions under former Article 9 are included in the annotations for this Code section. For a table of comparable provisions, see the table at the beginning of the Article.

**Retention of collateral is permissive remedy.** — In stating that creditor may propose to keep goods in satisfaction of debt so long as the creditor gives required notice and no one objects, the former provisions merely set forth a permissive, not a mandatory, remedy. *McCullough v. Mobiland, Inc.*, 139 Ga. App. 260, 228 S.E.2d 146 (1976); *Ricker v. First Fed.*, 215 Ga. App. 793, 452 S.E.2d 583 (1994) (decided under former Code Section 11-9-505).

**Applicability of former paragraph (1).** — Former paragraph (1) applied only where there is a security interest in consumer goods. *Marshall v. Fulton Nat'l Bank*, 152 Ga. App. 121, 262 S.E.2d 448 (1979), rev'd on other grounds, 245 Ga. 745, 267 S.E.2d 225 (1980) (decided under former Code Section 11-9-505).

**Notice requirement of former paragraph (2).** — The written notice required by former paragraph (2) must clearly state the creditor's proposal to retain the collateral in satisfaction of the debt and must notify the debtor that the debtor has 21 days in which to raise an objection to such a proposal. *Chen v. Profit Sharing Plan*, 216 Ga. App. 878, 456 S.E.2d 237 (1995) (decided under



former Code Section 11-9-505).

The purpose of requiring written notice of a creditor's proposal to retain collateral in lieu of the debt and of prohibiting waiver of such notice before default is to provide the debtor with options for reducing loss when collateral has a value greater than the debt via redemption pursuant to former § 11-9-506 or liquidation in a commercially reasonable manner as required by former § 11-9-504. *Chen v. Profit Sharing Plan*, 216 Ga. App. 878, 456 S.E.2d 237 (1995) (decided under former Code Section 11-9-505).

Even though a debtor gave possession of a note and security deed and executed a transfer and assignment of the instruments to the creditor as collateral for a loan, the instruments never vested in the creditor and the transaction was not the creation or transfer of an interest in real estate under former § 11-9-104(h); thus, where the creditor did not comply with the notice requirement of former paragraph (2), the debtor was entitled to recover either damages for conversion of the collateral after default or damages prescribed by former § 11-9-507. *Chen v. Profit Sharing Plan*, 216 Ga. App. 878, 456 S.E.2d 237 (1995) (decided under former Code Section 11-9-505).

**Retention of collateral.** — Allowing a debtor to reject a secured creditor's proposal to retain collateral in lieu of debt (after default) not only protects the debtor's right to mitigate loss, it protects the creditor from claims of the debtor that the creditor should have disposed of the collateral. *Chen v. Profit Sharing Plan*, 216 Ga. App. 878, 456 S.E.2d 237 (1995) (decided under former Code Section 11-9-505).

**Election barring deficiency claim.** — Creditor's written notice of repossession, of intent not to sell at a commercially reasonable sale, and of intent to keep the property for creditor's own use came within the ambit of former paragraph (2) and constituted an election barring the creditor's deficiency claim. *Oraka v. Jaraysi*, 226 Ga. App. 310, 486 S.E.2d 69 (1997) (decided under former Code Section 11-9-505).

**Retention of collateral after default does not preclude suit for money judgment.** *McCullough v. Mobiland, Inc.*, 139 Ga. App. 260, 228 S.E.2d 146 (1976); *Ricker v. First Fed.*, 215 Ga. App. 793, 452 S.E.2d 583 (1994) (decided under former Code Section 11-9-505).

**Rejection in writing by debtor.** — A debtor's defensive pleadings alleging that the creditor's petition failed to state a claim, the enumeration of various defenses to repossession, and a denial of all averments in the petition except jurisdiction, did not meet the requirement of this former section for a written objection to the creditor's notice of intention to retain the collateral in satisfaction of the obligation. *Edward McGill, Inc. v. Wise*, 181 Ga. App. 486, 352 S.E.2d 809 (1987).

**Defaulting debtor cannot claim loss of profits due to failure to give notice.** — In an action by a debtor for damages caused by repossession of collateral after an alleged breach of an agreement between the debtor and the secured party, where the debtor is in default the debtor cannot allege that the failure of the secured party to give notice as to the retention and sale of collateral caused the debtor to be damaged by loss of profits. Such violations only raise the presumption that the value of the collateral equals the amount due on the debt. *Barney v. Morris*, 168 Ga. App. 426, 309 S.E.2d 420 (1983).

**Duty of creditor with respect to seized collateral.** — Once a creditor has possession of the collateral, the creditor must act in a commercially reasonable manner and is liable for any damage sustained by the debtor as a result of breach of that duty. Thus, personalty seized by the creditor must be applied toward liquidation of the debt, and the debtor is entitled to any damage sustained as a result of any failure by the creditor to act in a commercially reasonable manner with respect to the seized personalty. *Ricker v. First Fed.*, 215 Ga. App. 793, 452 S.E.2d 583 (1994) (decided under former Code Section 11-9-505).

**Question remained whether secured creditor acted in manner amounting to retention of collateral** in satisfaction of the contract, such action constituting a rescission of the contract, there being evidence that the creditor offered to surrender the collateral to the debtor upon payment of the indebtedness, continually maintained that the transaction was valid, and otherwise acted in a manner consistent with the contract. *ITT Terryphone Corp. v. Modems Plus, Inc.*, 171 Ga. App. 710, 320 S.E.2d 784 (1984) (decided under former Code Section 11-9-505).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 68A Am. Jur. 2d, Secured Transactions, §§ 704-729, 758.

**C.J.S.** — 72 C.J.S., Pledges, §§ 49, 50.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 9-620.

**ALR.** — Construction and operation of UCC § 9-505(2) authorizing secured party

in possession of collateral to retain it in satisfaction of obligation, 55 ALR3d 651.

Uniform Commercial Code: failure of secured creditor to give required notice of disposition of collateral as bar to deficiency judgment, 59 ALR3d 401.

**11-9-621. Notification of proposal to accept collateral.**

(a) *Persons to which proposal to be sent.* A secured party that desires to accept collateral in full or partial satisfaction of the obligation it secures shall send its proposal to:

(1) Any person from which the secured party has received, before the debtor consented to the acceptance, an authenticated notification of a claim of an interest in the collateral;

(2) Any other secured party or lienholder that, ten days before the debtor consented to the acceptance, held a security interest in or other lien on the collateral perfected by the filing of a financing statement that:

(A) Identified the collateral;

(B) Was indexed under the debtor's name as of that date; and

(C) Was filed in the office or offices in which to file a financing statement against the debtor covering the collateral as of that date; and

(3) Any other secured party that, ten days before the debtor consented to the acceptance, held a security interest in the collateral perfected by compliance with a statute, regulation, or treaty described in subsection (a) of Code Section 11-9-311.

(b) *Proposal to be sent to secondary obligor in partial satisfaction.* A secured party that desires to accept collateral in partial satisfaction of the obligation it secures shall send its proposal to any secondary obligor in addition to the persons described in subsection (a) of this Code section. (Code 1981, § 11-9-621, enacted by Ga. L. 2001, p. 362, § 1.)

## RESEARCH REFERENCES

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 9-621.

**11-9-622. Effect of acceptance of collateral.**

(a) *Effect of acceptance.* A secured party's acceptance of collateral in full or partial satisfaction of the obligation it secures:

(1) Discharges the obligation to the extent consented to by the debtor;

(2) Transfers to the secured party all of a debtor's rights in the collateral;

(3) Discharges the security interest or agricultural lien that is the subject of the debtor's consent and any subordinate security interest or other subordinate lien; and

(4) Terminates any other subordinate interest.

(b) *Discharge of subordinate interest notwithstanding noncompliance.* A subordinate interest is discharged or terminated under subsection (a) of this Code section, even if the secured party fails to comply with this article. (Code 1981, § 11-9-622, enacted by Ga. L. 2001, p. 362, § 1.)

### JUDICIAL DECISIONS

**Editor's notes.** — In the light of the similarity of the provisions, decisions under former Article 9 are included in the annotations for this Code section. For a table of comparable provisions, see the table at the beginning of the Article.

**Retention of collateral is permissive remedy.** — In stating that creditor may propose to keep goods in satisfaction of debt so long as the creditor gives required notice and no one objects, these provisions merely set forth a permissive, not a mandatory, remedy. *McCullough v. Mobiland, Inc.*, 139 Ga. App. 260, 228 S.E.2d 146 (1976); *Ricker v. First Fed.*, 215 Ga. App. 793, 452 S.E.2d 583 (1994) (decided under former Code Section 11-9-505).

**Applicability of former paragraph (1).** — Former paragraph (1) of this section applied only where there is a security interest in consumer goods. *Marshall v. Fulton Nat'l Bank*, 152 Ga. App. 121, 262 S.E.2d 448 (1979), rev'd on other grounds, 245 Ga. 745, 267 S.E.2d 225 (1980) (decided under former Code Section 11-9-505).

**Notice requirement of former paragraph (2).** — The written notice required by former paragraph (2) must clearly state the creditor's proposal to retain the collateral in satisfaction of the debt and must notify the debtor that the debtor has 21 days in which to raise an objection to such a proposal. *Chen v. Profit Sharing Plan*, 216 Ga. App. 878, 456 S.E.2d 237 (1995) (decided under former Code Section 11-9-505).

The purpose of requiring written notice of a creditor's proposal to retain collateral in lieu of the debt and of prohibiting waiver of

such notice before default is to provide the debtor with options for reducing the debtor's loss when collateral has a value greater than the debt via redemption pursuant to former § 11-9-506 or liquidation in a commercially reasonable manner as required by former § 11-9-504. *Chen v. Profit Sharing Plan*, 216 Ga. App. 878, 456 S.E.2d 237 (1995) (decided under former Code Section 11-9-505).

Even though a debtor gave possession of a note and security deed and executed a transfer and assignment of the instruments to the creditor as collateral for a loan, the instruments never vested in the creditor and the transaction was not the creation or transfer of an interest in real estate under former § 11-9-104(h); thus, where the creditor did not comply with the notice requirement of former paragraph (2), the debtor was entitled to recover either damages for conversion of the collateral after default or damages prescribed by former § 11-9-507. *Chen v. Profit Sharing Plan*, 216 Ga. App. 878, 456 S.E.2d 237 (1995) (decided under former Code Section 11-9-505).

**Retention of collateral.** — Allowing a debtor to reject a secured creditor's proposal to retain collateral in lieu of debt (after default) not only protects the debtor's right to mitigate loss, it protects the creditor from claims of the debtor that the creditor should have disposed of the collateral. *Chen v. Profit Sharing Plan*, 216 Ga. App. 878, 456 S.E.2d 237 (1995) (decided under former Code Section 11-9-505).

**Election barring deficiency claim.** — Creditor's written notice of repossession, of in-



tent not to sell at a commercially reasonable sale, and of intent to keep the property for creditor's own use came within the ambit of former paragraph (2) and constituted an election barring the creditor's deficiency claim. *Oraka v. Jaraysi*, 226 Ga. App. 310, 486 S.E.2d 69 (1997) (decided under former Code Section 11-9-505).

**Retention of collateral after default does not preclude suit for money judgment.** *McCullough v. Mobiland, Inc.*, 139 Ga. App. 260, 228 S.E.2d 146 (1976); *Ricker v. First Fed.*, 215 Ga. App. 793, 452 S.E.2d 583 (1994) (decided under former Code Section 11-9-505).

**Rejection in writing by debtor.** — A debtor's defensive pleadings alleging that the creditor's petition failed to state a claim, the enumeration of various defenses to repossession, and a denial of all averments in the petition except jurisdiction, did not meet the requirement of these provisions for a written objection to the creditor's notice of intention to retain the collateral in satisfaction of the obligation. *Edward McGill, Inc. v. Wise*, 181 Ga. App. 486, 352 S.E.2d 809 (1987) (decided under former Code Section 11-9-505).

**Defaulting debtor cannot claim loss of profits due to failure to give notice.** — In an action by a debtor for damages caused by repossession of collateral after an alleged breach of an agreement between the debtor and the secured party, where the debtor is in default the debtor cannot allege that the failure of the secured party to give notice as

to the retention and sale of collateral caused the debtor to be damaged by loss of profits. Such violations only raise the presumption that the value of the collateral equals the amount due on the debt. *Barney v. Morris*, 168 Ga. App. 426, 309 S.E.2d 420 (1983) (decided under former Code Section 11-9-505).

**Duty of creditor with respect to seized collateral.** — Once a creditor has possession of the collateral, the creditor must act in a commercially reasonable manner and is liable for any damage sustained by the debtor as a result of breach of that duty. Thus, personalty seized by the creditor must be applied toward liquidation of the debt, and the debtor is entitled to any damage sustained as a result of any failure by the creditor to act in a commercially reasonable manner with respect to the seized personalty. *Ricker v. First Fed.*, 215 Ga. App. 793, 452 S.E.2d 583 (1994) (decided under former Code Section 11-9-505).

**Question remained whether secured creditor acted in manner amounting to retention of collateral** in satisfaction of the contract, such action constituting a rescission of the contract, there being evidence that the creditor offered to surrender the collateral to the debtor upon payment of the indebtedness, continually maintained that the transaction was valid, and otherwise acted in a manner consistent with the contract. *ITT Terryphone Corp. v. Modems Plus, Inc.*, 171 Ga. App. 710, 320 S.E.2d 784 (1984) (decided under former Code Section 11-9-505).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 68A Am. Jur. 2d, Secured Transactions, §§ 704-729, 758.

**C.J.S.** — 72 C.J.S., Pledges, §§ 49, 50.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 9-622.

**ALR.** — Construction and operation of UCC § 9-505(2) authorizing secured party

in possession of collateral to retain it in satisfaction of obligation, 55 ALR3d 651.

Uniform Commercial Code: failure of secured creditor to give required notice of disposition of collateral as bar to deficiency judgment, 59 ALR3d 401.

## 11-9-623. Right to redeem collateral.

(a) *Persons that may redeem.* A debtor, any secondary obligor, or any other secured party or lienholder may redeem collateral.

(b) *Requirements for redemption.* To redeem collateral, a person shall tender:

(1) Fulfillment of all obligations secured by the collateral; and

(2) The reasonable expenses and attorney's fees described in paragraph (1) of subsection (a) of Code Section 11-9-615.

(c) *When redemption may occur.* A redemption may occur at any time before a secured party:

(1) Has collected collateral under Code Section 11-9-607;

(2) Has disposed of collateral or entered into a contract for its disposition under Code Section 11-9-610; or

(3) Has accepted collateral in full or partial satisfaction of the obligation it secures under Code Section 11-9-622. (Code 1981, § 11-9-623, enacted by Ga. L. 2001, p. 362, § 1.)

### JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Article 9 are included in the annotations of this section.

**Debtor to be notified he can redeem collateral at any time before sale.** — Where the debtor is told by notification letter that he has ten days to redeem his repossessed collateral, but the collateral is sold after the tenth day, the debtor has not, as a matter of law, been notified that he can redeem his collateral at any time before the sale, as required by §§ 10-1-10 and 11-9-506, and a verdict should be directed for the debtor when the creditor sues for a deficiency judgment. *Credithrift of Am., Inc. v. Smith*, 168 Ga. App. 45, 308 S.E.2d 53 (1983) (decided under former Code Section 11-9-506).

Where debtors were informed that payment to redeem the collateral had to be made on or before 10 days from the date of the letter and were not informed that they had a right to redeem the collateral at any time before its sale, this section was violated. *Bradford v. GECC*, 183 Ga. App. 782, 359 S.E.2d 757, cert. denied, 183 Ga. App. 905, 359 S.E.2d 757 (1987) (decided under former Code Section 11-9-506).

**Waiver of right to redeem.** — Right to redeem collateral may be waived by written agreement after default, but not before default. *Kellos v. Parker-Sharpe, Inc.*, 245 Ga.

130, 263 S.E.2d 138 (1980) (decided under former Code Section 11-9-506).

**Notice in accord with § 11-9-504(3).** — Notice in accord with requirements of § 11-9-504(3), and which is not such as misled or prevented debtor from exercising his right of redemption under § 11-9-506, is sufficient to reasonably notify debtor of his rights. *Motor Contract Co. v. Sawyer*, 123 Ga. App. 207, 180 S.E.2d 282 (1971) (decided under former Code Section 11-9-506).

**Acts precluding deficiency judgment.** — Act of secured party, in selling collateral without strict compliance with notice of sale provisions of § 11-9-504 precludes purchaser or owner from exercising his right of redemption under this section, and for that reason secured party cannot recover for deficiency owed him by purchaser. *Braswell v. American Nat'l Bank*, 117 Ga. App. 699, 161 S.E.2d 420 (1968) (decided under former Code Section 11-9-506).

Notice only of intention to sell without any notification of time is not in compliance with Uniform Commercial Code, as it precludes purchaser or owner from exercising his right of redemption, and therefore prevents recovery of deficiency. *Motor Contract Co. v. Sawyer*, 123 Ga. App. 207, 180 S.E.2d 282 (1971) (decided under former Code Section 11-9-506).

Selling collateral without strict compliance with notice of sale provisions, thereby

precluding purchaser or owner from exercising his right of redemption under this section, precludes second party from recovery for deficiency. *GEMC Fed. Credit Union v. Shoemake*, 151 Ga. App. 705, 261 S.E.2d 443 (1979) (decided under former Code Section 11-9-506).

**Charges imposed in event of default.** — Security agreement may impose various charges, not found in promissory note, in event of default. *General Fin. Corp. v. Sprouse*, 577 F.2d 989 (5th Cir. 1978) (decided under former Code Section 11-9-506).

**Levy and sale upon foreclosure of materialman's lien, subject to satisfaction of prior security interest.** — Where plaintiff materialman obtains lien against property and judgment against contractor who used

materials, and judgment has not been satisfied, plaintiff is entitled to obtain judgment foreclosing his lien, but cannot enforce it by levy and sale until any prior security deed is satisfied. *Bowen v. Kicklighter*, 124 Ga. App. 82, 183 S.E.2d 10 (1971) (decided under former Code Section 11-9-506).

**Mortgagor's option to purchase collateral not enforceable.** — An option agreement executed at the same time as the mortgage, giving the mortgagor the option to purchase the collateral, constituted an impermissible attempt to defeat the mortgagee's right to redeem the collateral and could not enforced by specific performance. *Lewis Broadcasting Corp. v. Phoenix Broadcasting Partners*, 232 Ga. App. 94, 502 S.E.2d 254 (1998).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 68A Am. Jur. 2d, Secured Transactions, §§ 564-571.

**C.J.S.** — 72 C.J.S., Pledges, §§ 47, 48.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 9-623.

**ALR.** — Validity of agreement clogging equity of redemption from mortgage or pledge of personal property, 24 ALR 822.

Jurisdiction of court of state other than that in which property is located to redeem from or enforce a chattel mortgage or debt secured thereby, 69 ALR 622.

Doctrine of equitable conversion as affecting right of redemption from execution or judicial sale, 138 ALR 1296.

Payment or discharge of principal obligation as affecting right of the pledgee to sue or continue pending suit against the maker of the collateral pledged, or judgment previously recovered on the collateral obligations, 157 ALR 261.

Redemption rights of mortgagor making timely tender but of inadequate amount because of officer's mistake, 52 ALR2d 1327.

### 11-9-624. Waiver.

(a) *Waiver of disposition notification.* A debtor or secondary obligor may waive the right to notification of disposition of collateral under Code Section 11-9-611 only by an agreement to that effect entered into and authenticated after default.

(b) *Waiver of mandatory disposition.* A debtor may waive the right to require disposition of collateral under subsection (e) of Code Section 11-9-620 only by an agreement to that effect entered into and authenticated after default.

(c) *Waiver of redemption right.* Except in a consumer goods transaction, a debtor or secondary obligor may waive the right to redeem collateral under Code Section 11-9-623 only by an agreement to that effect entered into and authenticated after default. (Code 1981, § 11-9-624, enacted by Ga. L. 2001, p. 362, § 1.)



## RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 9-624.

## Subpart 2

## Noncompliance with Article

**11-9-625. Remedies for secured party's failure to comply with article.**

(a) *Judicial orders concerning noncompliance.* If it is established that a secured party is not proceeding in accordance with this article, a court may order or restrain collection, enforcement, or disposition of collateral on appropriate terms and conditions.

(b) *Damages for noncompliance.* Subject to subsections (c), (d), and (f) of this Code section, a person is liable for damages in the amount of any loss caused by a failure to comply with this article. Loss caused by a failure to comply may include loss resulting from the debtor's inability to obtain, or increased costs of, alternative financing.

(c) *Persons entitled to recover damages; statutory damages in consumer goods transaction.* Except as otherwise provided in Code Section 11-9-628:

(1) A person that, at the time of the failure, was a debtor, was an obligor, or held a security interest in or other lien on the collateral may recover damages under subsection (b) of this Code section for its loss; and

(2) If the collateral is consumer goods, a person that was a debtor or a secondary obligor at the time a secured party failed to comply with this part may recover for that failure in any event an amount not less than the credit service charge plus 10 percent of the principal amount of the obligation or the time price differential plus 10 percent of the cash price.

(d) *Recovery when deficiency eliminated or reduced.* A debtor whose deficiency is eliminated under Code Section 11-9-626 may recover damages for the loss of any surplus. However, a debtor or secondary obligor whose deficiency is eliminated or reduced under Code Section 11-9-626 may not otherwise recover under subsection (b) of this Code section for noncompliance with the provisions of this part relating to collection, enforcement, disposition, or acceptance.

(e) *Statutory damages; noncompliance with specified provisions.* In addition to any damages recoverable under subsection (b) of this Code section, the debtor, consumer obligor, or person named as a debtor in a filed record, as applicable, may recover \$250.00 in each case from a person that:

(1) Fails to comply with Code Section 11-9-208;

(2) Fails to comply with Code Section 11-9-209;

(3) Files a record that the person is not entitled to file under subsection (a) of Code Section 11-9-509;

(4) Fails to cause the secured party of record to file or send a termination statement as required by subsection (a) or (c) of Code Section 11-9-513;

(5) Fails to comply with paragraph (1) of subsection (b) of Code Section 11-9-616 and whose failure is part of a pattern, or consistent with a practice, of noncompliance; or

(6) Fails to comply with paragraph (2) of subsection (b) of Code Section 11-9-616.

(f) *Statutory damages; noncompliance with Code Section 11-9-210.* A debtor or consumer obligor may recover damages under subsection (b) of this Code section and, in addition, \$250.00 in each case from a person that, without reasonable cause, fails to comply with a request under Code Section 11-9-210. A recipient of a request under Code Section 11-9-210 which never claimed an interest in the collateral or obligations that are the subject of a request under that Code section has a reasonable excuse for failure to comply with the request within the meaning of this subsection.

(g) *Limitation of security interest; noncompliance with Code Section 11-9-210.* If a secured party fails to comply with a request regarding a list of collateral or a statement of account under Code Section 11-9-210, the secured party may claim a security interest only as shown in the list or statement included in the request as against a person that is reasonably misled by the failure. (Code 1981, § 11-9-625, enacted by Ga. L. 2001, p. 362, § 1.)

**Law reviews.** — For article, “Nonjudicial Foreclosures in Georgia Revisited,” see 24 Ga. St. B.J. 43 (1987). For annual survey of commercial law, see 43 Mercer L. Rev. 119 (1991). For survey article on commercial

law, see 44 Mercer L. Rev. 99 (1992).

For comment on a secured party’s burden of proof in seeking a deficiency judgment after resale of collateral, see 33 Mercer L. Rev. 397 (1981).

## JUDICIAL DECISIONS

**Editor’s notes.** — In the light of the similarity of the provisions, decisions under former Article 9 are included in the annotations for this Code section. For a table of comparable provisions, see the table at the beginning of the Article.

**Liability for loss caused by failure to comply with law.** — The debtor or any person entitled to notification has a right to recover from secured party any loss caused by failure to comply with provisions of law. Georgia Cent. Credit Union v. Coleman, 155 Ga.

App. 547, 271 S.E.2d 681 (1980) (decided under former Code Section 11-9-507).

**Recovery of “any loss” by the debtor** under former paragraph (1) for the creditor’s noncompliance with the Codal provisions must necessarily be limited to actual damages caused by a sale at less than an adequate price. Willis v. Healthdyne, Inc., 191 Ga. App. 671, 382 S.E.2d 651 (1989) (decided under former Code Section 11-9-507).

**Disposition approved in judicial proceed-**

**ing.** — A judicial order which merely authorized plaintiff to conduct a commercially reasonable sale but did not declare the manner in which plaintiff ultimately conducted the sale to be commercially reasonable did not constitute judicial approval of the sale which would conclusively deem the sale to be commercially reasonable. *Carlton Mfg., Inc. v. Bauer*, 207 Ga. App. 850, 429 S.E.2d 329 (1993) (decided under former Code Section 11-9-507).

**Effect of failure to prove commercial reasonableness of disposition.** — A creditor who fails to prove that notice of sale was given debtor (where required) or fails to prove that disposition, including its method, manner, time, place and terms, was commercially reasonable, is barred from obtaining a deficiency judgment. *Farmers Bank v. Hubbard*, 247 Ga. 431, 276 S.E.2d 622 (1981) (decided under former Code Section 11-9-507).

When the reasonableness of the sale is challenged, the seller of the collateral has the burden of proving that the sale was reasonable. A secured creditor who fails to meet this burden is barred from recovering any deficiency between the sale price and the debt. *Walker v. Modnar Corp.*, 194 Ga. App. 68, 389 S.E.2d 558 (1989) (decided under former Code Section 11-9-507).

**Creditor's failure to notify of dispository intent immaterial.** — Where collateral securing debt was never repossessed by subsequent creditor but was instead sold at auction by guarantor's bankruptcy trustee and the proceeds thereof were retained by the trustee as an asset of the bankruptcy estate and not distributed to creditor, pursuant to former paragraph (2), this disposition by creditor's representative was conclusively deemed to be commercially reasonable, rendering immaterial creditor's failure to notify guarantor of its intent not to repossess and dispose of that collateral. *Davis v. Concord Com. Corp.*, 209 Ga. App. 595, 434 S.E.2d 571 (1993) (decided under former Code Section 11-9-507).

**Creditor's failure to comply with notice requirement of former § 11-9-505.** — Even though a debtor gave possession of a note and security deed and executed a transfer and assignment of the instruments to the creditor as collateral for a loan, the instruments never vested in the creditor and the

transaction was not the creation or transfer of an interest in real estate under former § 11-9-104(h); thus, where the creditor did not comply with the notice requirement of former § 11-9-503(2), the debtor was entitled to recover either damages for conversion of the collateral after default or damages prescribed by this former section. *Chen v. Profit Sharing Plan*, 216 Ga. App. 878, 456 S.E.2d 237 (1995).

**Reasonable terms of sale.** — For secured party to meet burden of proving every aspect of sale to be commercially reasonable, it must establish affirmatively that the "terms" of sale were commercially reasonable; this includes burden to show that resale price was fair and reasonable value of collateral. *Granite Equip. Leasing Corp. v. Marine Dev. Corp.*, 139 Ga. App. 778, 230 S.E.2d 43 (1976) (decided under former Code Section 11-9-507).

Where commercial reasonableness of sale is challenged by debtor, party holding security interest has burden of proving that terms of sale were commercially reasonable and that resale price was fair and reasonable value of collateral. *Richard v. Fulton Nat'l Bank*, 158 Ga. App. 595, 281 S.E.2d 338 (1981) (decided under former Code Section 11-9-507).

Denial of the creditor's motion for a directed verdict was proper since, based on the evidence presented, the jury could have determined that a sale was commercially unreasonable and that the debtor was entitled to money damages as a result. *Atlantic Coast Fed. Credit Union v. Delk*, 241 Ga. App. 589, 526 S.E.2d 425 (1999).

**Overcoming presumption that value of collateral equals debt.** — Presumption that value of collateral equals debt on it is overcome by proving fair and reasonable value of collateral, whereupon creditor is entitled to deficiency judgment in amount of debt (plus or minus any payments or charges properly applicable to disposition) less fair and reasonable value of collateral proved by creditor (if resale price is less than fair and reasonable value proved). *Farmers Bank v. Hubbard*, 247 Ga. 431, 276 S.E.2d 622 (1981) (decided under former Code Section 11-9-507).

Burden is on secured party to prove value of collateral at time of repossession and that such value does not equal debt; failure to so



prove results in a presumption that value was at least amount of debt. *Granite Equip. Leasing Corp. v. Marine Dev. Corp.*, 139 Ga. App. 778, 230 S.E.2d 43 (1976) (decided under former Code Section 11-9-507).

**Where adequacy of price is challenged**, creditor must overcome presumption as to value to recover deficiency. *Farmers Bank v. Hubbard*, 247 Ga. 431, 276 S.E.2d 622 (1981) (decided under former Code Section 11-9-507).

**Debtor's contention that the debtor could have obtained higher price** for aircraft sold at private sale had the debtor sold them personally was insufficient to infer that creditor, who sold planes, acted in commercially unreasonable manner. *Cessna Fin. Corp. v. Wall*, 876 F. Supp. 273 (M.D. Ga. 1994).

**Wide discrepancy between sale price and value of collateral** signals need for close scrutiny, even though a seemingly low return is usually not dispositive on question of commercial reasonableness. *Granite Equip. Leasing Corp. v. Marine Dev. Corp.*, 139 Ga. App. 778, 230 S.E.2d 43 (1976) (decided under former Code Section 11-9-507).

Sale of repossessed collateral is not commercially reasonable when there is wide discrepancy between sale price and value of such collateral (presumed to equal amount of debt in absence of proof otherwise) coupled with secured party's failure to prove value at time of repossession, and that such value does not equal debt. *Granite Equip. Leasing Corp. v. Marine Dev. Corp.*, 139 Ga. App. 778, 230 S.E.2d 43 (1976) (decided under former Code Section 11-9-507).

**Ultimate question of commercial reasonableness is one of law.** — When reasonableness of sale of repossessed collateral is challenged, secured party has burden of proving that it was reasonable; and ultimate question of commercial reasonableness is one of law. *Granite Equip. Leasing Corp. v. Marine Dev. Corp.*, 139 Ga. App. 778, 230 S.E.2d 43 (1976) (decided under former Code Section 11-9-507).

**Notice to secured party holding interest senior to that of selling secured party.** — Secured party who holds interest senior to one held by secured party selling property at public sale and who meets other requirements of Code, must be sent notification of sale, and failure to do so gives rise to cause of action under the former provisions of this

section. *Bank of Camilla v. Stephens*, 234 Ga. 293, 216 S.E.2d 71 (1975) (decided under former Code Section 11-9-507).

**Acts of secured party which deny debtor opportunity to redeem collateral.** — Act of secured party, in selling collateral without strict compliance with notice of sale provisions of former § 11-9-504 precluded purchaser or owner from exercising right of redemption under former § 11-506, and for that reason secured party cannot recover for deficiency owed by purchaser. *Braswell v. American Nat'l Bank*, 117 Ga. App. 699, 161 S.E.2d 420 (1968) (decided under former Code Section 11-9-507).

**Sale of property by secured party without notice.** — In action for conversion of mortgaged property, instruction that secured party had no right to sell property if no notice was given was erroneous, as the U.C.C. does not prohibit sale without notice, but rather provides that a debtor is entitled to recover any loss caused by such a sale, that is, a loss caused by a sale at a less than adequate price, and is also protected from any action by secured party to recover any deficiency between sale price and balance owing. *Trust Co. v. Kite*, 164 Ga. App. 119, 294 S.E.2d 606 (1982) (decided under former Code Section 11-9-507).

The UCC does not prohibit a post-re-possession sale without notice. A debtor's remedies for a sale without notice are recovery of loss caused by an inadequate sale price. *Clark v. GMAC*, 185 Ga. App. 130, 363 S.E.2d 813 (1987) (decided under former Code Section 11-9-507).

**Repossession collateral need not be disposed of where only fraction of value recoverable.** — A secured creditor did not act in a commercially unreasonable manner when it repossessed the collateral and, without ever disposing of it, filed suit against the debtor, there being evidence that the collateral was the type of equipment which in the past the creditor had been able to dispose of at only a fraction of its original sale value. However, if it was later established that the creditor did not act in a commercially reasonable manner, the balance of the indebtedness owed on the contracts would be reduced by the value of the equipment at the time it was repossessed, plus the amount of any damage sustained as a result of the creditor's inaction in returning or disposing of the goods.

ITT Terryphone Corp. v. Modems Plus, Inc., 171 Ga. App. 710, 320 S.E.2d 784 (1984) (decided under former Code Section 11-9-507).

**When the resale price is less than the fair and reasonable value**, the creditor is entitled to a deficiency judgment in the amount of the debt (plus or minus any payments or changes properly applicable to the disposition) less the fair and reasonable value of the collateral proved by the creditor, not the debt less the resale price. *McMillian v. Bank S.*, 188 Ga. App. 355, 373 S.E.2d 61 (1988) (decided under former Code Section 11-9-507).

**Private auction sale of automobile.** — The method and manner of sale of a repossessed automobile were commercially reasonable, where the collateral was disposed of at a

private auction by a recognized automobile auction company according to standard practice and procedure for sales of this kind. *McMillian v. Bank S.*, 188 Ga. App. 355, 373 S.E.2d 61 (1988) (decided under former Code Section 11-9-507).

**Failure to prove fair and reasonable value of minibuses.** — Secured creditor failed to prove the fair and reasonable value of minibuses at the time of sale, where the only evidence of value of the vehicles was the offers received after the default by the creditor's corporate president, upon the solicitation of some 15 individuals nationwide, and the actual price paid at the sale of the vehicles. *Walker v. Modnar Corp.*, 194 Ga. App. 68, 389 S.E.2d 558 (1989) (decided under former Code Section 11-9-507).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 68A Am. Jur. 2d, Secured Transactions, § 709, 737-779.

**C.J.S.** — 72 C.J.S., Pledges, § 30.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 9-625.

**ALR.** — Uniform Commercial Code: Burden of proof as to commercially reasonable disposition of collateral, 59 ALR3d 369.

Uniform Commercial Code: failure of secured creditor to give required notice of disposition of collateral as bar to deficiency judgment, 59 ALR3d 401.

UCC: value of trade-in taken on sale of collateral for purposes of computing surplus or deficiency, 72 ALR4th 1128.

### 11-9-626. Action in which deficiency or surplus is in issue.

(a) *Applicable rules if amount of deficiency or surplus in issue.* In an action arising from a transaction, other than a consumer transaction, in which the amount of a deficiency or surplus is in issue, the following rules apply:

(1) A secured party need not prove compliance with the provisions of this part relating to collection, enforcement, disposition, or acceptance unless the debtor or a secondary obligor places the secured party's compliance in issue;

(2) If the secured party's compliance is placed in issue, the secured party has the burden of establishing that the collection, enforcement, disposition, or acceptance was conducted in accordance with this part;

(3) Except as otherwise provided in Code Section 11-9-628, if a secured party fails to prove that the collection, enforcement, disposition, or acceptance was conducted in accordance with the provisions of this part relating to collection, enforcement, disposition, or acceptance, the liability of a debtor or a secondary obligor for a deficiency is limited to an

amount by which the sum of the secured obligation, expenses, and attorney's fees exceeds the greater of:

(A) The proceeds of the collection, enforcement, disposition, or acceptance; or

(B) The amount of proceeds that would have been realized had the noncomplying secured party proceeded in accordance with the provisions of this part relating to collection, enforcement, disposition, or acceptance;

(4) For purposes of subparagraph (B) of paragraph (3) of this subsection, the amount of proceeds that would have been realized is equal to the sum of the secured obligation, expenses, and attorney's fees unless the secured party proves that the amount is less than that sum;

(5) If a deficiency or surplus is calculated under subsection (f) of Code Section 11-9-615, the debtor or obligor has the burden of establishing that the amount of proceeds of the disposition is significantly below the range of prices that a complying disposition to a person other than the secured party, a person related to the secured party, or a secondary obligor would have brought.

(b) *Nonconsumer transactions; no inference.* The limitation of the rules in subsection (a) of this Code section to transactions other than consumer transactions is intended to leave to the court the determination of the proper rules in consumer transactions. The court may not infer from that limitation the nature of the proper rule in consumer transactions and may continue to apply established approaches. (Code 1981, § 11-9-626, enacted by Ga. L. 2001, p. 362, § 1.)

**Cross references.** — Additional provisions regarding disposition of goods repossessed after default, § 10-1-10.

**Law reviews.** — For article, "The Revisions to Article IX of the Uniform Commercial Code," see 15 Ga. St. B.J. 120 (1977). For article surveying developments in Georgia commercial law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 33 (1981). For article, "Nonjudicial Foreclosures in Georgia: Fresh Doubts, Issues and Strate-

gies," see 23 Ga. St. B.J. 123 (1987). For annual survey of commercial law, see 43 Mercer L. Rev. 119 (1991).

For note discussing repossession and foreclosure as creditor's remedies under the Uniform Commercial Code, see 3 Ga. L. Rev. 198 (1968).

For comment on a secured party's burden of proof in seeking a deficiency judgment after resale of collateral, see 33 Mercer L. Rev. 397 (1981).

## JUDICIAL DECISIONS

**Editor's notes.** — In the light of the similarity of the provisions, decisions under former Article 9 are included in the annotations for this Code section. For a table of comparable provisions, see the table at the beginning of the Article.

**Where only fraction of value of repos-**

**sessed collateral recoverable.** — A secured creditor did not act in a commercially unreasonable manner when it repossessed the collateral and, without ever disposing of it, filed suit against the debtor, there being evidence that the collateral was the type of equipment which in the past the creditor



had been able to dispose of at only a fraction of its original sale value. However, if it was later established that the creditor did not act in a commercially reasonable manner, the balance of the indebtedness owed on the contracts would be reduced by the value of the equipment at the time it was repossessed, plus the amount of any damage sustained as a result of the creditor's inaction in returning or disposing of the goods. *ITT Terryphone Corp. v. Modems Plus, Inc.*, 171 Ga. App. 710, 320 S.E.2d 784 (1984).

**Strict compliance required.** — Strict compliance with all requirements of these former provisions was condition precedent to recovery of deficiency between sale price of collateral and debt owed. *Comfort Trane Air Conditioning Co. v. Trane Co.*, 592 F.2d 1373 (5th Cir. 1979) (decided under former Code Section 11-9-504).

Compliance with this former section was condition precedent to recovery of any deficiency between sale price of collateral and amount of unpaid balance. *Citizens State Bank v. Hewitt*, 158 Ga. App. 238, 279 S.E.2d 531 (1981); *Vickers v. Chrysler Credit Corp.*, 158 Ga. App. 434, 280 S.E.2d 842 (1981); *Citizens & S. Nat'l Bank v. Dorsey*, 159 Ga. App. 784, 285 S.E.2d 242 (1981); *Litton Indus. Credit Corp. v. Lunceford*, 175 Ga. App. 445, 333 S.E.2d 373 (1985) (decided under former Code Section 11-9-504).

Compliance with former subsection (3) is condition precedent to recovery of any deficiency between sale price of collateral and amount of unpaid balance. *Gurwitch v. Luxurest Furn. Mfg. Co.*, 233 Ga. 934, 214 S.E.2d 373 (1975) (decided under former Code Section 11-9-504).

**Rights and remedies under O.C.G.A. § 10-1-36 as prerequisite.** — O.C.G.A. § 10-1-36 is cumulative of former Code Sections 11-9-501 through 11-9-507 and provides cumulative additional rights and remedies which must be fulfilled before any deficiency claim will lie against a buyer. *Georgia Cent. Credit Union v. Coleman*, 155 Ga. App. 547, 271 S.E.2d 681 (1980) (decided under former Code Section 11-9-504).

**Commercially reasonable disposition as prerequisite for deficiency judgment.** — If the secured party does not dispose of the collateral in a commercially reasonable manner, there can be no recovery of any deficiency between the sale price and the unpaid

balance. *Granite Equip. Leasing Corp. v. Marine Dev. Corp.*, 139 Ga. App. 778, 230 S.E.2d 43 (1976) (decided under former Code Section 11-9-504).

Fact that every aspect of foreclosure sale (method, manner, time, place and terms) must be commercially reasonable is a condition precedent to recovery of any deficiency between sale price and balance remaining due on contract price, and if sale is not commercially reasonable plaintiff can recover nothing, because it is then presumed that price on foreclosure sale in fact does represent full value of article at time of repossession. *Brown v. C.I.T. Corp.*, 150 Ga. App. 361, 258 S.E.2d 44 (1979) (decided under former Code Section 11-9-504).

In Georgia, a secured party is absolutely prohibited from recovering deficiency judgment where notice is not given or sale is commercially unreasonable. *Comfort Trane Air Conditioning Co. v. Trane Co.*, 592 F.2d 1373 (5th Cir. 1979) (decided under former Code Section 11-9-504).

Even though defendant debtor failed to introduce any testimony while denying claim in its entirety, burden of proof was upon secured party to prove sale was done in a commercially reasonable manner in order to recover on deficiency. *Georgia Cent. Credit Union v. Coleman*, 155 Ga. App. 547, 271 S.E.2d 681 (1980) (decided under former Code Section 11-9-504).

In the case of a loan secured by both real and personal property, the provision of this former section for liquidation of the guarantor's personal property "in a commercially reasonable manner" did not apply where the lender chose to exercise its "rights and remedies in respect of the real property" as permitted under former § 11-9-501(4). *Senske v. Harris Trust & Sav. Bank*, 233 Ga. App. 407, 504 S.E.2d 272 (1998).

**Absolute bar rule.** — These code provisions do not require the imposition of an absolute-bar rule and the absolute-bar rule is contrary to the intent of O.C.G.A. § 11-1-106 which expressly prohibits penal damages. *Emmons v. Burkett*, 256 Ga. 855, 353 S.E.2d 908 (1987) (decided under former Code Section 11-9-504).

**Presumption that value of collateral equals debt.** — Failure on part of secured party to establish that fair and reasonable value of collateral does not equal debt re-

sults in presumption that value of collateral disposed of is at least equal to debt, from which it follows that no deficiency judgment can be obtained. *Hubbard v. Farmers Bank*, 155 Ga. App. 720, 272 S.E.2d 510 (1980) (decided under former Code Section 11-9-504).

Secured party must prove value of collateral at time of repossession and that value of goods does not equal value of debt. *Richard v. Fulton Nat'l Bank*, 158 Ga. App. 595, 281 S.E.2d 338 (1981) (decided under former Code Section 11-9-504).

Failure to introduce any evidence of the fair and reasonable value of the collateral, in order to overcome the presumption that the value of the collateral equaled the amount of the debt, will operate as a failure to establish that the disposition of the collateral was commercially reasonable; and therefore no deficiency judgment can be obtained. *Giddens v. Bo Lovein Ford, Inc.*, 167 Ga. App. 699, 307 S.E.2d 271 (1983) (decided under former Code Section 11-9-504).

**Overcoming presumption concerning collateral.** — The presumption that the value of collateral equals the debt on it is overcome by proving the fair and reasonable value of the collateral. *First Nat'l Bank v. Rivercliff Hdwe., Inc.*, 161 Ga. App. 259, 287 S.E.2d 701 (1982) (decided under former Code Section 11-9-504).

**Value presumed equal to debt owed.** — Absent evidence of the value of collateral at the time of repossession, the value of the goods is presumed to be equal to the debt owed. *Borden v. Pope Jeep-Eagle, Inc.*, 200 Ga. App. 176, 407 S.E.2d 128 (1991) (decided under former Code Section 11-9-504).

**Sole defect in sale was adequacy of price.** — Creditor who fails to prove that notice of sale was given debtor (where required) or fails to prove that disposition, including its method, manner, time, place and terms, was commercially reasonable, is barred from obtaining a deficiency judgment, except where sole defect is adequacy of sale price, in which event creditor is not barred from recovery but must overcome presumption that value of collateral equals debt. *Richard v. Fulton Nat'l Bank*, 158 Ga. App. 595, 281 S.E.2d 338 (1981); *First Nat'l Bank v. Rivercliff Hdwe., Inc.*, 161 Ga. App. 259, 287 S.E.2d 701 (1982) (decided under former Code Section 11-9-504).

Where sole defect in sale of collateral is adequacy of sale price, creditor is not barred from obtaining deficiency judgment; however, creditor must overcome presumption that value of collateral equals debt on it, proving its fair and reasonable value. *Zohbe v. First Nat'l Bank*, 162 Ga. App. 604, 292 S.E.2d 444 (1982) (decided under former Code Section 11-9-504).

**Collection of deficiency balance dependent on reasonable notice.** — Former section permitted secured creditor to dispose of collateral if debtor defaults, but before creditor can pursue deficiency balance it must reasonably notify debtor of time and place of any public sale or of time after which any private sale or other intended disposition is to be made. *Lacy v. General Fin. Corp.*, 651 F.2d 1026 (5th Cir. 1981) (decided under former Code Section 11-9-504).

**Proceeding against real property prevented.** — Where a sale of collateral occurs without notice, in violation of former subsection (3), the bar against collection of a deficiency prevents a creditor holding a claim against a guarantor secured by real property from proceeding against the real estate to collect the balance remaining after a commercially unreasonable sale of the personalty. *United States ex rel. FHA v. Kennedy*, 256 Ga. 345, 348 S.E.2d 636 (1986) (decided under former Code Section 11-9-504).

**Satisfaction sought through personal judgment, out of collateral or pursuant to guaranty.** — The rule precluding recovery of a deficiency where the secured party has failed to dispose of the collateral in a commercially reasonable manner or provide the debtor with reasonable notification of the disposition is applicable where a secured creditor seeks to satisfy the deficiency either through a personal judgment or out of collateral or pursuant to a guaranty. *Reeves v. Habersham Bank*, 254 Ga. 615, 331 S.E.2d 589 (1985) (decided under former Code Section 11-9-504).

**Rebuttable presumption rule.** — The rebuttable presumption rule, by placing the burden on the creditor to show the propriety of the sale and making the creditor liable for any injury to the debtor, provides an adequate deterrent to an improper sale on the part of a creditor and adequately protects the debtor's interest, without arbitrarily pe-



nalizing the creditor. *Emmons v. Burkett*, 256 Ga. 855, 353 S.E.2d 908 (1987) (decided under former Code Section 11-9-504).

Under the rebuttable presumption rule, if a creditor fails to give notice or conducts an unreasonable sale, the presumption is raised that the value of the collateral is equal to the indebtedness. To overcome this presumption, the creditor must present evidence of the fair and reasonable value of the collateral, and the evidence must show that such value was less than the debt. If the creditor rebuts the presumption, the creditor may maintain an action against the debtor or guarantor for any deficiency. Any loss suffered by the debtor as a consequence of the failure to give notice or to conduct a commercially reasonable sale is recoverable and may be set off against the deficiency. *Emmons v. Burkett*, 256 Ga. 855, 353 S.E.2d 908 (1987) (decided under former Code Section 11-9-504).

A more complete statement of the rule set forth in *Emmons v. Burkette*, 256 Ga. 855, 353 S.E.2d 908 (1987), is: If the creditor conducts a commercially unreasonable sale and does not rebut the presumption that the value of the collateral is equal to the indebtedness, the creditor loses the right to recover the deficiency against the debtor and the guarantor. If the presumption is rebutted, the first to recover the deficiency remains as held in *Emmons. Business Dev. Corp. v. Contestabile*, 261 Ga. 886, 413 S.E.2d 447 (1992).

**Creditor showing of reasonableness as prerequisite to deficiency judgment.** — If condition precedent of commercial reasonableness is not met in foreclosure sale, no recovery is possible, and burden is on creditor to prove such. *Brown v. C.I.T. Corp.*, 150 Ga. App. 361, 258 S.E.2d 44 (1979).

**Showing required to recover deficiency.** — Burden is on secured party to prove value of

collateral at time of repossession and that such value does not equal debt; failure to do so results in presumption that value was at least amount of debt. *BVA Credit Corp. v. May*, 152 Ga. App. 733, 264 S.E.2d 32 (1979); *Comfort Trane Air Conditioning Co. v. Trane Co.*, 592 F.2d 1373 (5th Cir. 1979); *Georgia Cent. Credit Union v. Coleman*, 155 Ga. App. 547, 271 S.E.2d 681 (1980).

Appellee secured creditor had burden of overcoming presumption that value of trucks equalled the debts on them by evidence of their fair and reasonable values, and evidence of resale prices was not sufficient to do this, nor were appellee's affiant's conclusory statements that they were sold in a commercially reasonable manner, thus, grant of summary judgment for appellee on claim for deficiency was error. *Davis v. Ford Motor Credit Co.*, 164 Ga. App. 137, 296 S.E.2d 431 (1982).

**Debtor's burden after creditor proves commercial reasonableness.** — Where creditor shows prima facie that sale of collateral was reasonable, to prevent summary judgment for deficiency, debtor must support debtor's challenge to the sale by asserting specific facts showing there is a genuine issue for trial. *Slaughter v. Ford Motor Credit Co.*, 164 Ga. App. 428, 296 S.E.2d 428 (1982).

**Debtor's burden after creditor files a deficiency claim.** — A proof of claim constitutes prima facie evidence of the validity and amount of the claim, shifting the burden of proof to the debtor to show that the deficiency claim should not be allowed; the mere recitation of National Automobile Dealers Association mobile home values is insufficient for this purpose without some evidentiary connection to the actual home at issue. In re *Brown*, 221 Bankr. 46 (Bankr. M.D. Ga. 1998).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 68A Am. Jur. 2d, Secured Transactions, §§ 556-572, 606, 624 et seq., 642-680, 685-703.

**C.J.S.** — 72 C.J.S., Pledges, §§ 49, 50.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 9-626.

**ALR.** — Seller's rights in respect of the

property, or its proceeds, upon dishonor of draft or check for purchase price, on a cash sale, 31 ALR 578, 54 ALR 526.

Rights and remedies as between parties to conditional sale after seller has repossessed himself of the property, 99 ALR 1288.

Right of creditor or mortgagee to redeem



from his own sale, 108 ALR 993.

Purchase by pledgee of subject of pledge, 37 ALR2d 1381.

Rights and duties of parties to conditional sales contract as to resale of repossessed property, 49 ALR2d 15.

Uniform Commercial Code: Burden of proof as to commercially reasonable disposition of collateral, 59 ALR3d 369.

Uniform Commercial Code: failure of secured creditor to give required notice of disposition of collateral as bar to deficiency judgment, 59 ALR3d 401.

Construction of term "debtor" as used in UCC § 9-504(3), requiring secured party to give notice to debtor of sale of collateral securing obligation, 5 ALR4th 1291.

What is "commercially reasonable" disposition of collateral required by UCC § 9-504(3), 7 ALR4th 308.

Loss or modification of right to notification of sale of repossessed collateral under

Uniform Commercial Code § 9-504, 9 ALR4th 552.

Failure of secured party to make "commercially reasonable" disposition of collateral under UCC § 9-504(3) as bar to deficiency judgment, 10 ALR4th 413.

Sufficiency of secured party's notification of sale or other intended disposition of collateral under UCC § 9-504(3), 11 ALR4th 241.

Nature of collateral which secured party may sell or otherwise dispose of without giving notice to defaulting debtor under UCC § 9-504(3), 11 ALR4th 1060.

Secured transactions: what is "public" or "private" sale under UCC § 9-504(3), 60 ALR4th 1012.

UCC: value of trade-in taken on sale of collateral for purposes of computing surplus or deficiency, 72 ALR4th 1128.

Causes of action governed by limitations period in UCC § 2-725, 49 ALR5th 1.

### **11-9-627. Determination of whether conduct was commercially reasonable.**

(a) *Greater amount obtainable under other circumstances; no preclusion of commercial reasonableness.* The fact that a greater amount could have been obtained by a collection, enforcement, disposition, or acceptance at a different time or in a different method from that selected by the secured party is not of itself sufficient to preclude the secured party from establishing that the collection, enforcement, disposition, or acceptance was made in a commercially reasonable manner.

(b) *Dispositions that are commercially reasonable.* A disposition of collateral is made in a commercially reasonable manner if the disposition is made:

(1) In the usual manner on any recognized market;

(2) At the price current in any recognized market at the time of the disposition; or

(3) Otherwise in conformity with reasonable commercial practices among dealers in the type of property that was the subject of the disposition.

(c) *Approval by court or on behalf of creditors.* A collection, enforcement, disposition, or acceptance is commercially reasonable if it has been approved:

(1) In a judicial proceeding;

(2) By a bona fide creditors' committee;

- (3) By a representative of creditors; or
- (4) By an assignee for the benefit of creditors.

(d) *Approval under subsection (c) of this Code section not necessary; absence of approval has no effect.* Approval under subsection (c) of this Code section need not be obtained, and lack of approval does not mean that the collection, enforcement, disposition, or acceptance is not commercially reasonable. (Code 1981, § 11-9-627, enacted by Ga. L. 2001, p. 362, § 1.)

**Law reviews.** — For article, “The Revisions to Article IX of the Uniform Commercial Code,” see 15 Ga. St. B.J. 120 (1977). For article surveying developments in Georgia commercial law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 33 (1981). For article, “Nonjudicial Foreclosures in Georgia: Fresh Doubts, Issues and Strategies,” see 23 Ga. St. B.J. 123 (1987). For annual survey of commercial law, see 43

Mercer L. Rev. 119 (1991).  
For note discussing repossession and foreclosure as creditor’s remedies under the Uniform Commercial Code, see 3 Ga. L. Rev. 198 (1968).  
For comment on a secured party’s burden of proof in seeking a deficiency judgment after resale of collateral, see 33 Mercer L. Rev. 397 (1981).

JUDICIAL DECISIONS

ANALYSIS

- RIGHT TO DEFICIENCY JUDGMENT
- COMMERCIAL REASONABLENESS OF DISPOSITION
- WAIVER
- SUMMARY JUDGMENT
- BURDEN OF PROOF
- JURY/COURT DETERMINATIONS

Right to Deficiency Judgment

**Editor’s notes.** — In the light of the similarity of the provisions, decisions under former Article 9 are included in the annotations for this Code section. For a table of comparable provisions, see the table at the beginning of the Article.

**Commercially reasonable disposition as prerequisite for deficiency judgment.** — If the secured party does not dispose of the collateral in a commercially reasonable manner, there can be no recovery of any deficiency between the sale price and the unpaid balance. Granite Equip. Leasing Corp. v. Marine Dev. Corp., 139 Ga. App. 778, 230 S.E.2d 43 (1976) (decided under former Code Section 11-9-504).

Fact that every aspect of foreclosure sale (method, manner, time, place and terms) must be commercially reasonable is a condition precedent to recovery of any deficiency between sale price and balance remaining

due on contract price, and if sale is not commercially reasonable plaintiff can recover nothing, because it is then presumed that price on foreclosure sale in fact does represent full value of article at time of repossession. Brown v. C.I.T. Corp., 150 Ga. App. 361, 258 S.E.2d 44 (1979) (decided under former Code Section 11-9-504).

In Georgia, a secured party is absolutely prohibited from recovering deficiency judgment where notice is not given or sale is commercially unreasonable. Comfort Trane Air Conditioning Co. v. Trane Co., 592 F.2d 1373 (5th Cir. 1979) (decided under former Code Section 11-9-504).

Even though defendant debtor failed to introduce any testimony while denying claim in its entirety, burden of proof was upon secured party to prove sale was done in a commercially reasonable manner in order to recover on deficiency. Georgia Cent. Credit Union v. Coleman, 155 Ga. App. 547, 271

**Right to Deficiency Judgment** (Cont'd)

S.E.2d 681 (1980) (decided under former Code Section 11-9-504).

In the case of a loan secured by both real and personal property, the provision for liquidation of the guarantor's personal property "in a commercially reasonable manner" did not apply where the lender chose to exercise its "rights and remedies in respect of the real property" as permitted under former § 11-9-501(4). *Senske v. Harris Trust & Sav. Bank*, 233 Ga. App. 407, 504 S.E.2d 272 (1998).

**Sale must allow debtor to exercise redemption right.** — Act of secured party, in selling collateral without strict compliance with notice of sale provisions precludes purchaser or owner from exercising right of redemption under former § 11-9-506, and for that reason secured party cannot recover for deficiency owed by purchaser. *Braswell v. American Nat'l Bank*, 117 Ga. App. 699, 161 S.E.2d 420 (1968) (decided under former Code Section 11-9-504).

**Sole defect in sale was adequacy of price.** — Creditor who fails to prove that notice of sale was given debtor (where required) or fails to prove that disposition, including its method, manner, time, place and terms, was commercially reasonable, is barred from obtaining a deficiency judgment, except where sole defect is adequacy of sale price, in which event creditor is not barred from recovery but must overcome presumption that value of collateral equals debt. *Richard v. Fulton Nat'l Bank*, 158 Ga. App. 595, 281 S.E.2d 338 (1981); *First Nat'l Bank v. Rivercliff Hdwe., Inc.*, 161 Ga. App. 259, 287 S.E.2d 701 (1982) (decided under former Code Section 11-9-504).

Where sole defect in sale of collateral is adequacy of sale price, creditor is not barred from obtaining deficiency judgment; however, creditor must overcome presumption that value of collateral equals debt on it, proving its fair and reasonable value. *Zohbe v. First Nat'l Bank*, 162 Ga. App. 604, 292 S.E.2d 444 (1982) (decided under former Code Section 11-9-504).

**Overcoming presumption concerning collateral.** — The presumption that the value of collateral equals the debt on it is overcome by proving the fair and reasonable value of the collateral. *First Nat'l Bank v. Rivercliff*

*Hdwe., Inc.*, 161 Ga. App. 259, 287 S.E.2d 701 (1982) (decided under former Code Section 11-9-504).

**When collateral valued.** — Proof of the value of the collateral is required to be the value at the time of repossession. *First Nat'l Bank v. Rivercliff Hdwe., Inc.*, 161 Ga. App. 259, 287 S.E.2d 701 (1982) (decided under former Code Section 11-9-504).

**Cost alone** is never proof of market value. *Zohbe v. First Nat'l Bank*, 162 Ga. App. 604, 292 S.E.2d 444 (1982) (decided under former Code Section 11-9-504).

Proof of price brought at public sale is not sufficient to overcome presumption against creditor that value of collateral equals debt on it. *Zohbe v. First Nat'l Bank*, 162 Ga. App. 604, 292 S.E.2d 444 (1982) (decided under former Code Section 11-9-504).

**Commercial Reasonableness of Disposition**

**Good faith required.** — A creditor must perform in good faith its obligations in disposing of collateral. *Lacy v. General Fin. Corp.*, 651 F.2d 1026 (5th Cir. 1981) (decided under former Code Section 11-9-504).

**Commercially reasonable disposition required.** — Although Uniform Commercial Code has no requirement that secured party sell collateral after repossession, secured party who does not elect to retain collateral in satisfaction of indebtedness must act in commercially reasonable manner in disposing of it, and disposition must be made in commercially reasonable time. *Henderson Few & Co. v. Rollins Communications, Inc.*, 148 Ga. App. 139, 250 S.E.2d 830 (1978) (decided under former Code Section 11-9-504).

Once creditor has possession the creditor must act in a commercially reasonable manner toward sale, lease, proposed retention where permissible, or other disposition. If such disposition is not feasible, the asset must be returned, still subject, of course, to creditor's security interest. To the extent that creditor's inaction results in injury to debtor, debtor has right of recovery. *Henderson Few & Co. v. Rollins Communications, Inc.*, 148 Ga. App. 139, 250 S.E.2d 830 (1978) (decided under former Code Section 11-9-504).

Secured party has right to dispose of collateral repossessed from debtor so long as every aspect of disposition — method, man-



ner, time, place, and terms — are commercially reasonable. *Comfort Trane Air Conditioning Co. v. Trane Co.*, 592 F.2d 1373 (5th Cir. 1979) (decided under former Code Section 11-9-504).

**Effect of conducting unreasonable sale.** — A secured creditor who conducts a commercially unreasonable sale is barred from proceeding against other collateral pledged for the debt and/or from seeking a deficiency judgment against the debtor or the guarantor. *Contestabile v. Business Dev. Corp.*, 259 Ga. 783, 387 S.E.2d 137 (1990) (decided under former Code Section 11-9-504).

**Burden of proving reasonableness.** — Where reasonableness of sale of repossessed collateral is challenged, burden of showing that disposition of collateral was commercially reasonable rests with secured party. *Wagner v. Ford Motor Credit Co.*, 155 Ga. App. 729, 272 S.E.2d 500 (1980) (decided under former Code Section 11-9-504).

Burden of proof of commercial reasonableness of sale of collateral rests with secured party, and includes burden to show that terms of sale are commercially reasonable, and one term which must be so proved is that resale price was fair and reasonable value of collateral. *Hubbard v. Farmers Bank*, 155 Ga. App. 720, 272 S.E.2d 510 (1980), *aff'd*, 247 Ga. 431, 276 S.E.2d 622 (1981) (decided under former Code Section 11-9-504).

When the reasonableness of the sale is challenged, the seller of the collateral has the burden of proving that the sale was reasonable. A secured creditor who fails to meet this burden is barred from recovering any deficiency between the sale price and the debt. *Walker v. Modnar Corp.*, 194 Ga. App. 68, 389 S.E.2d 558 (1989) (decided under former Code Section 11-9-504).

**Proof required to show reasonableness.** — Where reasonableness of sale of repossessed collateral is challenged, secured party must establish affirmatively that “terms” of sale were commercially reasonable, and that resale price was fair and reasonable value of collateral. *Wagner v. Ford Motor Credit Co.*, 155 Ga. App. 729, 272 S.E.2d 500 (1980); *Massey-Ferguson Credit Corp. v. Bond*, 176 Ga. App. 217, 335 S.E.2d 454 (1985) (decided under former Code Section 11-9-504).

For secured party to meet burden of proving every aspect of sale is commercially

reasonable, it must establish affirmatively that terms of sale were commercially reasonable, which includes burden of showing that resale price was fair and reasonable value of collateral. *Granite Equip. Leasing Corp. v. Marine Dev. Corp.*, 139 Ga. App. 778, 230 S.E.2d 43 (1976); *BVA Credit Corp. v. May*, 152 Ga. App. 733, 264 S.E.2d 32 (1979); *Comfort Trane Air Conditioning Co. v. Trane Co.*, 592 F.2d 1373 (5th Cir. 1979) (decided under former Code Section 11-9-504).

**Presumption as to value of collateral serves as gauge of commercial reasonableness.** — Effect of presumption that value of collateral at time of repossession equals debt owed is to provide value against which price obtained upon secured party’s disposition of repossessed collateral can be measured for purpose of deciding whether price term was commercially reasonable. The presumption does not operate, however, to deny a secured party a deficiency judgment. *Comfort Trane Air Conditioning Co. v. Trane Co.*, 592 F.2d 1373 (5th Cir. 1979) (decided under former Code Section 11-9-504).

**Overcoming presumption as to collateral value.** — Presumption that value of collateral equals debt on it is overcome by proving fair and reasonable value of collateral, whereupon creditor is entitled to deficiency judgment in amount of debt (plus or minus any payments or charges properly applicable to disposition) less fair and reasonable value of collateral proved by creditor (if resale price is less than fair and reasonable value proved). *Farmers Bank v. Hubbard*, 247 Ga. 431, 276 S.E.2d 622 (1981) (decided under former Code Section 11-9-504).

**Effect of price obtained on resale in establishing value.** — Where, in case challenging reasonableness of sale of repossessed collateral, secured party presents no evidence other than price obtained on resale; this was not sufficient to establish fair and reasonable value of collateral. *Wagner v. Ford Motor Credit Co.*, 155 Ga. App. 729, 272 S.E.2d 500 (1980) (decided under former Code Section 11-9-504).

Proof of price brought at public sale of collateral is insufficient to establish market value for purposes of proving commercial reasonableness of sale, since foreclosure sales are forced sales and notoriously fail to bring true market price of article. *Hubbard*

**Commercial Reasonableness of  
Disposition (Cont'd)**

v. Farmers Bank, 155 Ga. App. 720, 272 S.E.2d 510 (1980) (decided under former Code Section 11-9-504).

Debtor's contention that debtor could have obtained a higher price for aircraft sold at private sale had debtor sold them personally was insufficient to infer that creditor who sold planes acted in commercially unreasonable manner. Cessna Fin. Corp. v. Wall, 876 F. Supp. 273 (M.D. Ga. 1994).

**Failure to obtain price equal to presumed value.** — Failure of secured party to obtain price equal to presumed value does not make sale commercially unreasonable *per se*, but this circumstance would be one fact taken into account by trier of fact in determining whether sale was commercially reasonable. Comfort Trane Air Conditioning Co. v. Trane Co., 592 F.2d 1373 (5th Cir. 1979) (decided under former Code Section 11-9-504).

**Wide discrepancy between sale price and value of collateral** signals need for close scrutiny, even though a seemingly low return is usually not dispositive on question of commercial reasonableness. Granite Equip. Leasing Corp. v. Marine Dev. Corp., 139 Ga. App. 778, 230 S.E.2d 43 (1976) (decided under former Code Section 11-9-504).

Sale of repossessed collateral is not commercially reasonable when there is wide discrepancy between sale price and value of such collateral (presumed to equal amount of debt in absence of proof otherwise) coupled with secured party's failure to prove value at time of repossession, and that such value does not equal debt. Granite Equip. Leasing Corp. v. Marine Dev. Corp., 139 Ga. App. 778, 230 S.E.2d 43 (1976) (decided under former Code Section 11-9-504).

Where the secured party sold collateral at a private sale and within hours the buyer sold the collateral to a third party for more than 13 times what the buyer paid, and there was no evidence that the seller solicited more than one buyer, the debtor carried the burden in opposing summary judgment of identifying evidence that the sale of the collateral was not commercially reasonable. Hansford v. Burns, 241 Ga. App. 407, 526 S.E.2d 884 (1999).

**Commercial reasonableness of time of sale.** — Commercial reasonableness of time

of sale must be judged from time of repossession rather than time creditor finally chooses to dispose of goods. Henderson Few & Co. v. Rollins Communications, Inc., 148 Ga. App. 139, 250 S.E.2d 830 (1978) (decided under former Code Section 11-9-504).

**Sale not commercially reasonable where only one dealer contacted.** — Where time is not of the essence and secured party only contacts one dealer in attempting to sell, sale is not commercially reasonable. Luxurest Furn. Mfg. Co. v. Furniture Whse. Sales, Inc., 132 Ga. App. 661, 209 S.E.2d 63 (1974), *aff'd sub nom.*, 233 Ga. 934, 214 S.E.2d 373 (1975).

**Commercially unreasonableness sale of goods is not conversion.** — Private sale of vehicle repossessed by agents of secured party is not conversion even though terms are not commercially reasonable. Thurmond v. Elliott Fin. Co., 141 Ga. App. 574, 234 S.E.2d 153 (1977) (decided under former Code Section 11-9-504).

**Detailed accounting required.** — The provision as to the disposition of collateral being "commercially reasonable" does not abrogate the doctrine that a creditor asserting control over a debtor's assets, then seeking to recover a deficiency judgment, must make a detailed accounting of its disposition of the assets. Walton Motor Sales, Inc. v. Ross, 736 F.2d 1449 (11th Cir. 1984) (decided under former Code Section 11-9-504).

**Effect of unreasonable sale of one security item on recovery of other items.** — Distributor, who was the secured creditor of the dealer (via the execution of one security interest agreement) conducted a commercially unreasonable sale of one of the forklifts which secured the debt and thereby adversely affected the distributor's action to recover the amount due on the remaining inventory which secured the debt. C. Itoh Indus. Mach., Inc. v. Forklift Serv. Co., 180 Ga. App. 125, 348 S.E.2d 551 (1986), *aff'd*, 256 Ga. 757, 354 S.E.2d 159 (1987) (decided under former Code Section 11-9-504).

**Sale of collateral done in commercially reasonable manner.** — See *White v. First Ga. Bank*, 167 Ga. App. 825, 307 S.E.2d 720 (1983) (decided under former Code Section 11-9-504).

**Private auction sale of automobile.** — The method and manner of sale of a repossessed automobile were commercially reasonable,



where the collateral was disposed of at a private auction by a recognized automobile auction company according to standard practice and procedure for sales of this kind. *McMillian v. Bank S.*, 188 Ga. App. 355, 373 S.E.2d 61 (1988) (decided under former Code Section 11-9-504).

**Failure to prove fair and reasonable value of minibuses.** — Secured creditor failed to prove the fair and reasonable value of minibuses at the time of sale, where the only evidence of value of the vehicles was the offers received after the default by the creditor's corporate president, upon solicitation of some 15 individuals nationwide, and the actual price paid at the sale of the vehicles. *Walker v. Modnar Corp.*, 194 Ga. App. 68, 389 S.E.2d 558 (1989) (decided under former Code Section 11-9-504).

**Sale of convenience store equipment and food inventory.** — Small Business Administration failed to act in a commercially reasonable manner in the sale of collateral consisting of inventory and equipment from a convenience store, where the value of food inventory substantially diminished by the time of auction and the equipment brought less than it would have if it had been sold at the store site in a timely manner. *Johnson v. United States Small Bus. Admin.*, 116 Bankr. 863 (Bankr. M.D. Ga. 1990) (decided under former Code Section 11-9-504).

### Waiver

**Commercial reasonableness cannot be waived.** — Commercial reasonability of method and notice of sale cannot be contractually waived under former § 11-9-501(3). The commercial reasonability of method and notice of sale required cannot be contractually waived or varied. *Ennis v. Atlas Fin. Co.*, 120 Ga. App. 849, 172 S.E.2d 482 (1969) (decided under former Code Section 11-9-504).

**Status of "guarantor" is determinative** as to legally non-binding effect of pre-default waiver of the requirements of former § 11-9-501(3). *Branan v. Equico Lessors, Inc.*, 255 Ga. 718, 342 S.E.2d 671 (1986) (decided under former Code Section 11-9-504).

**Guarantor may waive notice.** — A guarantor or surety, under the terms of a separate contract, may waive such protection as notice or the right to contest the commercial

reasonableness of the disposition of collateral. *Pollard v. Trust Co. Bank*, 175 Ga. App. 510, 333 S.E.2d 642 (1985), overruled on other grounds, 255 Ga. 721, 342 S.E.2d 674 (1986) (decided under former Code Section 11-9-504).

**Surety's advance consent to otherwise dischargeable conduct.** — Surety or guarantor may consent in advance to conduct which would otherwise result in discharge. *Vickers v. Chrysler Credit Corp.*, 158 Ga. App. 434, 280 S.E.2d 842 (1981) (decided under former Code Section 11-9-504).

### Summary Judgment

**Summary judgment denied.** — Trial court erred by granting summary judgment to creditor regarding the commercial reasonableness of the sale, where a material issue of fact existed regarding whether creditor carried its burden of proving that the sale price obtained for a piece of logging equipment was equal to its fair market value. *Gilbert v. F & M Bank*, 192 Ga. App. 700, 385 S.E.2d 782 (1989) (decided under former Code Section 11-9-504).

Where it is unclear whether certified letter sent as "notice," which was returned marked "unclaimed" was returned prior to or after private sale, and where length of time between mailing and sale is almost four months, it is error to grant a summary judgment for deficiency balance in favor of plaintiff creditor. *Geohagan v. Commercial Credit Corp.*, 130 Ga. App. 828, 204 S.E.2d 784 (1974) (decided under former Code Section 11-9-504).

### Burden of Proof

**Burden on secured party.** — Burden of proving reasonableness of disposition of collateral is upon the secured party. *Henderson Few & Co. v. Rollins Communications, Inc.*, 148 Ga. App. 139, 250 S.E.2d 830 (1978) (decided under former Code Section 11-9-504).

The burden is on the secured party to prove that the sale of the collateral was commercially reasonable. *Johnson v. United States Small Bus. Admin.*, 116 Bankr. 863 (Bankr. M.D. Ga. 1990) (decided under former Code Section 11-9-504).

After commercial reasonableness of secured party's disposition has been chal-



**Burden of Proof** (Cont'd)

lenged, burden is placed upon the secured party to prove disposition was commercially reasonable. *Comfort Trane Air Conditioning Co. v. Trane Co.*, 592 F.2d 1373 (5th Cir. 1979) (decided under former Code Section 11-9-504).

In challenge to reasonableness of a sale of repossessed collateral, secured party bears burden of proof that sale was commercially reasonable. *BVA Credit Corp. v. May*, 152 Ga. App. 733, 264 S.E.2d 32 (1979) (decided under former Code Section 11-9-504).

**Where reasonableness of disposition challenged, secured party must show resale price was fair, reasonable value.** — Whenever reasonableness to sale of repossessed collateral is challenged, burden of showing that disposition of collateral was commercially reasonable rests with the secured party. This includes burden of showing that resale price is fair and reasonable value of collateral. *Vines v. Citizens Trust Bank*, 146 Ga. App. 845, 247 S.E.2d 528 (1979); *Central & S. Bank v. Craft*, 190 Ga. App. 576, 379 S.E.2d 432 (1989) (decided under former Code Section 11-9-504).

Where commercial reasonableness of sale is challenged by debtor, party holding security interest has burden of proving that terms of sale were commercially reasonable and that resale price was fair and reasonable value of collateral. *Richard v. Fulton Nat'l Bank*, 158 Ga. App. 595, 281 S.E.2d 338 (1981); *Harrison v. Massey-Ferguson Credit Corp.*, 175 Ga. App. 752, 334 S.E.2d 352 (1985); *Carlton Mfg., Inc. v. Bauer*, 207 Ga. App. 850, 429 S.E.2d 329 (1993) (decided under former Code Section 11-9-504).

**Value presumed equal to debt owed.** — Absent evidence of the value of collateral at the time of repossession, the value of the goods is presumed to be equal to the debt owed. *Borden v. Pope Jeep-Eagle, Inc.*, 200 Ga. App. 176, 407 S.E.2d 128 (1991) (decided under former Code Section 11-9-504).

**Rebuttable presumption rule.** — The rebuttable presumption rule, by placing the burden on the creditor to show the propriety of the sale and making the creditor liable for any injury to the debtor, provides an adequate deterrent to an improper sale on the part of a creditor and adequately protects the debtor's interest, without arbitrarily pe-

nalizing the creditor. *Emmons v. Burkett*, 256 Ga. 855, 353 S.E.2d 908 (1987) (decided under former Code Section 11-9-504).

Under the rebuttable presumption rule, if a creditor fails to give notice or conducts an unreasonable sale, the presumption is raised that the value of the collateral is equal to the indebtedness. To overcome this presumption, the creditor must present evidence of the fair and reasonable value of the collateral, and the evidence must show that such value was less than the debt. If the creditor rebuts the presumption, the creditor may maintain an action against the debtor or guarantor for any deficiency. Any loss suffered by the debtor as a consequence of the failure to give notice or to conduct a commercially reasonable sale is recoverable and may be set off against the deficiency. *Emmons v. Burkett*, 256 Ga. 855, 353 S.E.2d 908 (1987) (decided under former Code Section 11-9-504).

A more complete statement of the rule set forth in *Emmons v. Burkette*, 256 Ga. 855, 353 S.E.2d 908 (1987), is: If the creditor conducts a commercially unreasonable sale and does not rebut the presumption that the value of the collateral is equal to the indebtedness, the creditor loses the right to recover the deficiency against the debtor and the guarantor. If the presumption is rebutted, the first to recover the deficiency remains as held in *Emmons*. *Business Dev. Corp. v. Contestabile*, 261 Ga. 886, 413 S.E.2d 447 (1992) (decided under former Code Section 11-9-504).

**Creditor showing of reasonableness as prerequisite to deficiency judgment.** — If condition precedent of commercial reasonableness is not met in foreclosure sale, no recovery is possible, and burden is on creditor to prove such. *Brown v. C.I.T. Corp.*, 150 Ga. App. 361, 258 S.E.2d 44 (1979) (decided under former Code Section 11-9-504).

**Showing required to recover deficiency.** — Burden is on secured party to prove value of collateral at time of repossession and that such value does not equal debt; failure to do so results in presumption that value was at least amount of debt. *BVA Credit Corp. v. May*, 152 Ga. App. 733, 264 S.E.2d 32 (1979); *Comfort Trane Air Conditioning Co. v. Trane Co.*, 592 F.2d 1373 (5th Cir. 1979); *Georgia Cent. Credit Union v. Coleman*, 155 Ga. App. 547, 271 S.E.2d 681 (1980) (decided under former Code Section 11-9-504).

Appellee secured creditor had burden of overcoming presumption that value of trucks equalled the debts on them by evidence of their fair and reasonable values, and evidence of resale prices was not sufficient to do this, nor were appellee's affiant's conclusory statements that they were sold in a commercially reasonable manner, thus, grant of summary judgment for appellee on claim for deficiency was error. *Davis v. Ford Motor Credit Co.*, 164 Ga. App. 137, 296 S.E.2d 431 (1982) (decided under former Code Section 11-9-504).

**Debtor's burden after creditor proves commercial reasonableness.** — Where creditor shows prima facie that sale of collateral was reasonable, to prevent summary judgment for deficiency, debtor must support debtor's challenge to the sale by asserting specific facts showing there is a genuine issue for trial. *Slaughter v. Ford Motor Credit Co.*, 164 Ga. App. 428, 296 S.E.2d 428 (1982) (decided under former Code Section 11-9-504).

**Debtor's burden after creditor files a deficiency claim.** — A proof of claim constitutes prima facie evidence of the validity and amount of the claim, shifting the burden of proof to the debtor to show that the deficiency claim should not be allowed; the mere recitation of National Automobile Dealers Association mobile home values is insufficient for this purpose without some evidentiary connection to the actual home at issue. *In re Brown*, 221 Bankr. 46 (Bankr. M.D. Ga. 1998).

### Jury/Court Determinations

**Commercial reasonableness of disposition is jury question.** — Question of commercial reasonableness is generally for jury, but trial judge may withdraw question of commercial reasonableness from jury and direct a verdict. *Comfort Trane Air Conditioning Co. v. Trane Co.*, 592 F.2d 1373 (5th Cir. 1979) (decided under former Code Section 11-9-504).

Commercial reasonableness of disposition of collateral, considering method, time, place and terms, is question of fact for jury. Neither trial court nor appellate court should take upon itself such a determination. *Ennis v. Atlas Fin. Co.*, 120 Ga. App. 849, 172 S.E.2d 482 (1969) (decided under former Code Section 11-9-504).

It is for jury to determine the commercial reasonableness of a private sale of collateral. *Gordon v. Weldon*, 154 Ga. App. 531, 268 S.E.2d 796 (1980) (decided under former Code Section 11-9-504).

**Ultimate question of commercial reasonableness is one of law.** — When reasonableness of a sale of repossessed collateral is challenged, secured party has burden of proving that it was reasonable; and ultimate question of commercial reasonableness is one of law. *Granite Equip. Leasing Corp. v. Marine Dev. Corp.*, 139 Ga. App. 778, 230 S.E.2d 43 (1976) (decided under former Code Section 11-9-504).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 68A Am. Jur. 2d, Secured Transactions, §§ 556-572, 606, 624 et seq., 642-680, 685-703.

**C.J.S.** — 72 C.J.S., Pledges, §§ 49, 50.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 9-627.

**ALR.** — Seller's rights in respect of the property, or its proceeds, upon dishonor of draft or check for purchase price, on a cash sale, 31 ALR 578; 54 ALR 526.

Rights and remedies as between parties to conditional sale after seller has repossessed himself of the property, 99 ALR 1288.

Right of creditor or mortgagee to redeem from his own sale, 108 ALR 993.

Purchase by pledgee of subject of pledge, 37 ALR2d 1381.

Rights and duties of parties to conditional sales contract as to resale of repossessed property, 49 ALR2d 15.

Uniform Commercial Code: Burden of proof as to commercially reasonable disposition of collateral, 59 ALR3d 369.

Uniform Commercial Code: failure of secured creditor to give required notice of disposition of collateral as bar to deficiency judgment, 59 ALR3d 401.

Construction of term "debtor" as used in UCC § 9-504(3), requiring secured party to give notice to debtor of sale of collateral securing obligation, 5 ALR4th 1291.

What is “commercially reasonable” disposition of collateral required by UCC § 9-504(3), 7 ALR4th 308.

Loss or modification of right to notification of sale of repossessed collateral under Uniform Commercial Code § 9-504, 9 ALR4th 552.

Failure of secured party to make “commercially reasonable” disposition of collateral under UCC § 9-504(3) as bar to deficiency judgment, 10 ALR4th 413.

Sufficiency of secured party’s notification of sale or other intended disposition of collateral under UCC § 9-504(3), 11 ALR4th 241.

Nature of collateral which secured party may sell or otherwise dispose of without giving notice to defaulting debtor under UCC § 9-504(3), 11 ALR4th 1060.

Secured transactions: what is “public” or “private” sale under UCC § 9-504(3), 60 ALR4th 1012.

UCC: value of trade-in taken on sale of collateral for purposes of computing surplus or deficiency, 72 ALR4th 1128.

Causes of action governed by limitations period in UCC § 2-725, 49 ALR5th 1.

### **11-9-628. Nonliability and limitation on liability of secured party; liability of secondary obligor.**

(a) *Limitation of liability of secured party for noncompliance with article.* Unless a secured party knows that a person is a debtor or obligor, knows the identity of the person, and knows how to communicate with the person:

(1) The secured party is not liable to the person, or to a secured party or lienholder that has filed a financing statement against the person, for failure to comply with this article; and

(2) The secured party’s failure to comply with this article does not affect the liability of the person for a deficiency.

(b) *Limitation of liability based on status as secured party.* A secured party is not liable because of its status as secured party:

(1) To a person that is a debtor or obligor, unless the secured party knows:

(A) That the person is a debtor or obligor;

(B) The identity of the person; and

(C) How to communicate with the person; or

(2) To a secured party or lienholder that has filed a financing statement against a person, unless the secured party knows:

(A) That the person is a debtor; and

(B) The identity of the person.

(c) *Limitation of liability if reasonable belief that transaction not a consumer goods transaction or consumer transaction.* A secured party is not liable to any person, and a person’s liability for a deficiency is not affected, because of any act or omission arising out of the secured party’s reasonable belief that a transaction is not a consumer goods transaction or a consumer transac-



tion or that goods are not consumer goods, if the secured party's belief is based on its reasonable reliance on:

(1) A debtor's representation concerning the purpose for which collateral was to be used, acquired, or held; or

(2) An obligor's representation concerning the purpose for which a secured obligation was incurred.

(d) *Limitation of liability for statutory damages.* A secured party is not liable to any person under paragraph (2) of subsection (c) of Code Section 11-9-625 for its failure to comply with Code Section 11-9-616.

(e) *Limitation of multiple liability for statutory damages.* A secured party is not liable under paragraph (2) of subsection (c) of Code Section 11-9-625 more than once with respect to any one secured obligation. (Code 1981, § 11-9-628, enacted by Ga. L. 2001, p. 362, § 1.)

#### RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 9-628.

### PART 7

#### TRANSITION

#### 11-9-701. Effective date.

This article takes effect on July 1, 2001. (Code 1981, § 11-9-701, enacted by Ga. L. 2001, p. 362, § 1.)

#### RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 9-701.

#### 11-9-702. Savings clause.

(a) *Pre-effective date transactions or liens.* Except as otherwise provided in this part, this article applies to a transaction or lien within its scope, even if the transaction or lien was entered into or created before July 1, 2001.

(b) *Continuing validity.* Except as otherwise provided in subsection (c) of this Code section and Code Sections 11-9-703 through 11-9-709:

(1) Transactions and liens that were not governed by former Article 9 of this title, were validly entered into or created before July 1, 2001, and would be subject to this article if they had been entered into or created on or after July 1, 2001, and the rights, duties, and interests flowing from those transactions and liens remain valid on or after July 1, 2001; and

(2) The transactions and liens may be terminated, completed, consummated, and enforced as required or permitted by this article or by the law, as amended and in effect from time to time, that otherwise would apply before July 1, 2001.

(c) *Pre-effective date proceedings.* This article and amendments to other Code sections which amendments were enacted in conjunction with this article do not affect an action, case, or proceeding commenced before July 1, 2001. (Code 1981, § 11-9-702, enacted by Ga. L. 2001, p. 362, § 1.)

#### RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 9-702.

#### 11-9-703. Security interest perfected before effective date.

(a) *Continuing priority over lien creditor; perfection requirements satisfied.* A security interest that is enforceable immediately before July 1, 2001, and would have priority over the rights of a person that becomes a lien creditor at that time is a perfected security interest under this article if, on July 1, 2001, the applicable requirements for enforceability and perfection under this article are satisfied without further action.

(b) *Continuing priority over lien creditor; perfection requirements not satisfied.* Except as otherwise provided in Code Section 11-9-705, if, immediately before July 1, 2001, a security interest is enforceable and would have priority over the rights of a person that becomes a lien creditor at that time, but the applicable requirements for enforceability or perfection under this article are not satisfied on July 1, 2001, the security interest:

(1) Is a perfected security interest on and for one year after July 1, 2001;

(2) Remains enforceable thereafter only if the security interest becomes enforceable under Code Section 11-9-203 before the year expires; and

(3) Remains perfected thereafter only if the applicable requirements for perfection under this article are satisfied before the year expires. (Code 1981, § 11-9-703, enacted by Ga. L. 2001, p. 362, § 1.)

#### RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 9-703.

**11-9-704. Security interest unperfected before effective date.**

A security interest that is enforceable immediately before July 1, 2001, but which would be subordinate to the rights of a person that becomes a lien creditor at that time:

(1) Remains an enforceable security interest on and for one year after July 1, 2001;

(2) Remains enforceable thereafter if the security interest becomes enforceable under Code Section 11-9-203 on July 1, 2001, or within one year thereafter; and

(3) Becomes perfected:

(A) Without further action, on July 1, 2001, if the applicable requirements for perfection under this article are satisfied before or at that time; or

(B) When the applicable requirements for perfection are satisfied if the requirements are satisfied after that time. (Code 1981, § 11-9-704, enacted by Ga. L. 2001, p. 362, § 1.)

**RESEARCH REFERENCES**

**U.L.A.** — Uniform Commercial Code  
(U.L.A.) § 9-704.

**11-9-705. Effectiveness of action taken before effective date.**

(a) *Pre-effective date action; one-year perfection period unless reperfected.* If action, other than the filing of a financing statement, is taken before July 1, 2001, and the action would have resulted in priority of a security interest over the rights of a person that becomes a lien creditor had the security interest become enforceable before July 1, 2001, the action is effective to perfect a security interest that attaches under this article within one year after July 1, 2001. An attached security interest becomes unperfected one year after July 1, 2001, unless the security interest becomes a perfected security interest under this article before the expiration of that period.

(b) *Pre-effective date filing.* The filing of a financing statement before July 1, 2001, is effective to perfect a security interest to the extent the filing would satisfy the applicable requirements for perfection under this article.

(c) *Pre-effective date filing in jurisdiction formerly governing perfection.* This article and amendments to other Code sections which amendments were enacted in conjunction with this article do not render ineffective an effective financing statement that, before July 1, 2001, is filed and satisfies the applicable requirements for perfection under the law of the jurisdiction governing perfection as provided in former Code Section 11-9-103. How-



ever, except as otherwise provided in subsections (d) and (e) of this Code section and Code Section 11-9-706, the financing statement ceases to be effective at the earlier of:

(1) The time the financing statement would have ceased to be effective under the law of the jurisdiction in which it is filed; or

(2) June 30, 2006.

(d) *Continuation statement.* The filing of a continuation statement on or after July 1, 2001, does not continue the effectiveness of the financing statement filed before July 1, 2001. However, upon the timely filing of a continuation statement on or after July 1, 2001, and in accordance with the law of the jurisdiction governing perfection as provided in Part 3 of this article, the effectiveness of a financing statement filed in the same office in that jurisdiction before July 1, 2001, continues for the period provided by the law of that jurisdiction.

(e) *Application of paragraph (2) of subsection (c) of this Code section to transmitting utility financing statement.* Paragraph (2) of subsection (c) of this Code section applies to a financing statement that, before July 1, 2001, is filed against a transmitting utility and satisfies the applicable requirements for perfection under the law of the jurisdiction governing perfection as provided in former Code Section 11-9-103 only to the extent that Part 3 of this article provides that the law of a jurisdiction other than jurisdiction in which the financing statement is filed governs perfection of a security interest in collateral covered by the financing statement.

(f) *Application of Part 5 of this article.* A financing statement that includes a financing statement filed before July 1, 2001, and a continuation statement filed on or after July 1, 2001, is effective only to the extent that it satisfies the requirements of Part 5 of this article for an initial financing statement. (Code 1981, § 11-9-705, enacted by Ga. L. 2001, p. 362, § 1.)

#### RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 9-705.

#### **11-9-706. When initial financing statement suffices to continue effectiveness of financing statement.**

(a) *Initial financing statement in lieu of continuation statement.* The filing of an initial financing statement in the office specified in Code Section 11-9-501 continues the effectiveness of a financing statement filed before July 1, 2001, if:

(1) The filing of an initial financing statement in that office would be effective to perfect a security interest under this article;

(2) The pre-effective date financing statement was filed in an office in another state or another office in this state; and

(3) The initial financing statement satisfies subsection (c) of this Code section.

(b) *Period of continued effectiveness.* The filing of an initial financing statement under subsection (a) of this Code section continues the effectiveness of the pre-effective date financing statement:

(1) If the initial financing statement is filed before July 1, 2001, for the period provided in former Code Section 11-9-403 with respect to a financing statement; and

(2) If the initial financing statement is filed on or after July 1, 2001, for the period provided in Code Section 11-9-515 with respect to an initial financing statement.

(c) *Requirements for initial financing statement under subsection (a) of this Code section.* To be effective for purposes of subsection (a), an initial financing statement must:

(1) Satisfy the requirements of Part 5 of this article for an initial financing statement;

(2) Identify the pre-effective date financing statement by indicating the office in which the financing statement was filed and providing the dates of filing and file numbers, if any, of the financing statement and of the most recent continuation statement filed with respect to the financing statement; and

(3) Indicate that the pre-effective date financing statement remains effective. (Code 1981, § 11-9-706, enacted by Ga. L. 2001, p. 362, § 1.)

#### RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 9-706.

#### **11-9-707. Amendment of pre-effective date financing statement.**

(a) *“Pre-effective date financing statement.”* In this Code section, “pre-effective date financing statement” means a financing statement filed before July 1, 2001.

(b) *Applicable law.* On or after July 1, 2001, a person may add or delete collateral covered by, continue or terminate the effectiveness of, or otherwise amend the information provided in a pre-effective date financing statement only in accordance with the law of the jurisdiction governing

perfection as provided in Part 3 of this article. However, the effectiveness of a pre-effective date financing statement also may be terminated in accordance with the law of the jurisdiction in which the financing statement is filed.

(c) *Method of amending: general rule.* Except as otherwise provided in subsection (d) of this Code section, if the law of this state governs perfection of a security interest, the information in a pre-effective date financing statement may be amended on or after July 1, 2001, only if:

(1) The pre-effective date financing statement and an amendment are filed in the office specified in Code Section 11-9-501;

(2) An amendment is filed in the office specified in Code Section 11-9-501 concurrently with, or after the filing in that office of, an initial financing statement that satisfies subsection (c) of Code Section 11-9-706; or

(3) An initial financing statement that provides the information as amended and satisfies subsection (c) of Code Section 11-9-706 is filed in the office specified in Code Section 11-9-501.

(d) *Method of amending: continuation.* If the law of this state governs perfection of a security interest, the effectiveness of a pre-effective date financing statement may be continued only under subsections (d) and (f) of Code Section 11-9-705 or Code Section 11-9-706.

(e) *Method of amending: additional termination rule.* Whether or not the law of this state governs perfection of a security interest, the effectiveness of a pre-effective date financing statement filed in this state may be terminated on and after July 1, 2001, by filing a termination statement in the office in which the pre-effective date financing statement is filed, unless an initial financing statement that satisfies subsection (c) of Code Section 11-9-706 has been filed in the office specified by the law of the jurisdiction governing perfection as provided in Part 3 of this article as the office in which to file a financing statement. (Code 1981, § 11-9-707, enacted by Ga. L. 2001, p. 362, § 1.)

#### RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 9-707.

#### **11-9-708. Persons entitled to file initial financing statement or continuation statement.**

A person may file an initial financing statement or a continuation statement under this part if:

(1) The secured party of record authorizes the filing; and



(2) The filing is necessary under this part:

(A) To continue the effectiveness of a financing statement filed before July 1, 2001; or

(B) To perfect or continue the perfection of a security interest. (Code 1981, § 11-9-708, enacted by Ga. L. 2001, p. 362, § 1.)

#### RESEARCH REFERENCES

U.L.A. — Uniform Commercial Code  
(U.L.A.) § 9-708.

#### 11-9-709. Priority.

(a) *Law governing priority.* This article determines the priority of conflicting claims to collateral. However, if the relative priorities of the claims were established before July 1, 2001, former Article 9 of this title determines priority.

(b) *Priority if security interest becomes enforceable under Code Section 11-9-203.* For purposes of subsection (a) of Code Section 11-9-322, the priority of a security interest that becomes enforceable under Code Section 11-9-203 dates from July 1, 2001, if the security interest is perfected under this article by the filing of a financing statement before July 1, 2001, which would not have been effective to perfect the security interest under former Article 9 of this title. This subsection does not apply to conflicting security interests each of which is perfected by the filing of such a financing statement. (Code 1981, § 11-9-709, enacted by Ga. L. 2001, p. 362, § 1.)

#### 11-9-710. Exculpation.

From July 1, 2001, until July 1, 2006, any search company shall not be liable to its customer as a result of failing to disclose the existence of a filed financing statement in any filing office or index maintained by the authority searched in good faith by such search company to the extent such failure is attributable either to the failure of such filing office or the authority, as the case may be, to have properly indexed such filed financing statement or to the failure of the search logic used by such filing office or the authority, as the case may be, to disclose such filed financing statement in response to a search in the appropriate records of such filing office or of such index in the name provided to such search company by its customer. As used in this Code section, “search company” shall mean any person engaged in the business of conducting or arranging searches of public records of filed financing statements. On and after July 1, 2006, the liability of a search company shall be determined by law other than this article. (Code 1981, § 11-9-710, enacted by Ga. L. 2001, p. 362, § 1.)

ARTICLE 10

EFFECTIVE DATE AND REPEALER

Sec.		Sec.	
11-10-101.	Effective date.	11-10-104.	Certain statutory remedies re-
11-10-102.	Provision for transition.		tained.
11-10-103.	Certain Code sections super-	11-10-105.	Laws not repealed.
	seded in part.		

JUDICIAL DECISIONS

Cited in *Staley v. Phelan Fin. Corp.*, 116 Ga. App. 1, 156 S.E.2d 201 (1967).

RESEARCH REFERENCES

Am. Jur. 2d. — 15A Am. Jur. 2d, Commercial Code, §§ 1, 18.

11-10-101. Effective date.

This title shall become effective at 12:01 A.M. on January 1, 1964. It applies to transactions entered into and events occurring on and after that time and date. (Code 1933, § 109A-10—101, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 1963, p. 188, § 37.)

Law reviews. — For article on the 1963 amendment to the Georgia Uniform Commercial Code, see 14 Mercer L. Rev. 378 (1963).

JUDICIAL DECISIONS

Cited in *McCarroll v. First Inv. Co.*, 109 Ga. App. 748, 137 S.E.2d 319 (1964); *Charles S. Martin Distrib. Co. v. First State Bank*, 114 Ga. App. 693, 152 S.E.2d 599 (1966); *Maley v. National Acceptance Co.*, 250 F. Supp. 841 (N.D. Ga. 1966).

RESEARCH REFERENCES

Am. Jur. 2d. — 15A Am. Jur. 2d, Commercial Code, § 9. U.L.A. — Uniform Commercial Code (U.L.A.) § 10-101.

11-10-102. Provision for transition.

Transactions validly entered into before the effective date specified in Code Section 11-10-101 and the rights, duties, and interests flowing from them remain valid thereafter and may be terminated, completed, consummated, or enforced as required or permitted by any statute or other law amended or repealed by this title as though such repeal or amendment had

not occurred. (Code 1933, § 109A-10—102, enacted by Ga. L. 1962, p. 156, § 1.)

JUDICIAL DECISIONS

**Law controlling contract rights.** — Rights of parties under contract are controlled by law applicable at time of contract. *Peachtree News Co. v. Macmillan Co.*, 112 Ga. App. 556, 145 S.E.2d 666 (1965).

**Applicability to pre-Code indebtedness.** — The Uniform Commercial Code, which became law in Georgia on January 1, 1964, is applicable to pre-Code indebtedness secured by bill of sale to secure debt where security agreement was substituted and financing statement was filed after Commer-

cial Code went into effect. *United States v. Big Z Whse.*, 311 F. Supp. 283 (S.D. Ga. 1970).

**Cited in** *Murray v. Life Ins. Co.*, 107 Ga. App. 545, 130 S.E.2d 767 (1963); *McCarroll v. First Inv. Co.*, 109 Ga. App. 748, 137 S.E.2d 319 (1964); *Charles S. Martin Distrib. Co. v. First State Bank*, 114 Ga. App. 693, 152 S.E.2d 599 (1966); *Small Equip. Co. v. Walker*, 126 Ga. App. 827, 192 S.E.2d 167 (1972).

RESEARCH REFERENCES

**Am. Jur. 2d.** — 15A Am. Jur. 2d, Commercial Code, § 9.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 10-102.

11-10-103. Certain Code sections superseded in part.

The provisions of the following chapters of the Official Code of Georgia Annotated, as amended, shall yield to and be superseded by any provisions of this title which conflict therewith:

Article 2 of Chapter 14 of Title 44, relating to mortgages.

Article 4 of Chapter 14 of Title 44, relating to mortgages and bills of sale for crops.

Article 3 of Chapter 14 of Title 44, relating to conveyances to secure debt. (Code 1933, § 109A-10—103.2, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 1963, p. 188, § 39.)

**Law reviews.** — For article on the 1963 amendment to the Georgia Uniform Com-

mercial Code, see 14 Mercer L. Rev. 378 (1963).

JUDICIAL DECISIONS

**Warranties to ultimate consumer.** — Repeal of former Code 1933, § 96-307, which provided implied warranty to ultimate consumer for whom product was intended, did not mean that there can be no warranties even if manufacturer or producer makes express warranty to ultimate consumer, which is commonly done in sales of a number of items, such as automobiles and household appliances. *Evershine Prods., Inc. v.*

*Schmitt*, 130 Ga. App. 34, 202 S.E.2d 228 (1973).

**Discharge of sureties and parties on instruments.** — Code 1933, § 103-203 was superseded by former Code 1933, § 14-902, which was, in turn, repealed by O.C.G.A. § 11-10-103. The law governing discharge of sureties and other parties on instruments is currently governed by the Uniform Commercial Code provisions cited in O.C.G.A.



§ 11-3-601. *Christian v. Atlanta Army Depot Fed. Credit Union*, 151 Ga. App. 403, 260 S.E.2d 533 (1979).

**Direct action against manufacturer for breached warranty.** — Repeal of former Code 1933, Ch. 96-3, by O.C.G.A. § 11-10-103 means that the ultimate buyer in Georgia cannot sue the manufacturer directly on breach of implied warranty where buyer does not purchase directly from manufacturer. *Chaffin v. Atlanta Coca-Cola Bottling Co.*, 127 Ga. App. 619, 194 S.E.2d 513 (1972).

**Implied warranty to one's household and guests** provided for in Ga. L. 1957, p. 405, was repealed in 1962 by O.C.G.A. § 11-10-103 but same protection was simultaneously incorporated in O.C.G.A. § 11-2-318. *Stewart v. Gainesville Glass Co.*, 131 Ga. App. 747, 206 S.E.2d 857 (1974), *aff'd*, 233 Ga. 578, 212 S.E.2d 377 (1975).

**Cited** in *Murray v. Life Ins. Co.*, 107 Ga. App. 545, 130 S.E.2d 767 (1963); *Northeast*

*Factor & Disct. Co. v. Mortgage Invs., Inc.*, 107 Ga. App. 705, 131 S.E.2d 221 (1963); *Frye v. Commonwealth Inv. Co.*, 107 Ga. App. 739, 131 S.E.2d 569 (1963); *Mack Trucks, Inc. v. Ryder Truck Rental, Inc.*, 110 Ga. App. 68, 137 S.E.2d 718 (1964); *Charles S. Martin Distrib. Co. v. First State Bank*, 114 Ga. App. 693, 152 S.E.2d 599 (1966); *Alice v. Robett Mfg. Co.*, 328 F. Supp. 1377 (N.D. Ga. 1970); *Myers v. F & M Bank*, 125 Ga. App. 123, 186 S.E.2d 592 (1971); *Atlas Supply Co. v. United States Fid. & Guar. Co.*, 126 Ga. App. 483, 191 S.E.2d 103 (1972); *Liberty Nat'l Bank & Trust Co. v. Interstate Motel Developers, Inc.*, 346 F. Supp. 888 (S.D. Ga. 1972); *Stewart v. Gainesville Glass Co.*, 131 Ga. App. 747, 206 S.E.2d 857 (1974); *Cleveland Lumber Co. v. Proctor & Schwartz, Inc.*, 397 F. Supp. 1088 (N.D. Ga. 1975); *DeKalb County Bank v. Haldi*, 146 Ga. App. 257, 246 S.E.2d 116 (1978); *Westwood Place, Ltd. v. Green*, 153 Ga. App. 595, 266 S.E.2d 242 (1980).

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 15A Am. Jur. 2d, Commercial Code, §§ 10, 43.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 10-103.

**ALR.** — Forfeiture by innocent vendor of article sold conditionally and used by vendee in violation of law, 2 ALR 1596.

Taking note for price as waiver of reserva-

tion of title under conditional sale, 13 ALR 1044; 55 ALR 1160.

What amounts to a conditional sale, 17 ALR 1421; 43 ALR 1247; 92 ALR 304; 175 ALR 1366.

Rights and duties of parties to conditional sales contract as to resale of repossessed property, 49 ALR2d 15.

#### 11-10-104. Certain statutory remedies retained.

Notwithstanding anything to the contrary stated in any of the following chapters of the Official Code of Georgia Annotated, as amended, the remedies provided by such chapters shall not restrict the remedies otherwise available to a secured party under this title, but all such remedies shall be cumulatively available in accordance with the respective terms to a secured party under this title:

Code Section 44-14-49, relating to foreclosures in equity.

Subparts 1 and 2 of Part 4 of Article 7 of Chapter 14 of Title 44, relating to applications to foreclose.

Subpart 4 of Part 4 of Article 7 of Chapter 14 of Title 44, relating to the procedure for foreclosure of mortgages on personalty in justices' courts.

Code Sections 44-14-238 through 44-14-241, relating to the foreclosure of mortgages on personalty before debts become due.

Subpart 3 of Part 4 of Article 7 of Chapter 14 of Title 44, relating to foreclosure of bills of sale to secure debt and conditional sales contracts. (Code 1933, § 109A-10—103.3, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 1963, p. 188, § 39.)

### JUDICIAL DECISIONS

**Cited** in *Maley v. National Acceptance Co.*, 250 F. Supp. 841 (N.D. Ga. 1966); *Cleveland Lumber Co. v. Proctor & Schwartz, Inc.*, 397 F. Supp. 1088 (N.D. Ga. 1975).

### RESEARCH REFERENCES

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 11-10-104.

**ALR.** — Validity, construction, and application of insecurity clause in chattel mortgage, 125 ALR 313.

Remedy of mortgagee in forged or unauthorized mortgage where proceeds are used to discharge valid lien, 151 ALR 407.

### 11-10-105. Laws not repealed.

The article on documents of title (Article 7 of this title) does not repeal or modify any laws prescribing the form or contents of documents of title or the services or facilities to be afforded by bailees, or otherwise regulating bailees' businesses in respects not specifically dealt with herein; but the fact that such laws are violated does not affect the status of a document of title which otherwise complies with the definition of a document of title (Code Section 11-1-201). (Code 1933, § 109A-10—105, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 1963, p. 188, § 40; Ga. L. 1991, p. 810, § 5; Ga. L. 1998, p. 1323, § 19.)

**Law reviews.** — For article on the 1963 amendment to the Georgia Uniform Commercial Code, see 14 Mercer L. Rev. 378

(1963). For article, "The Revisions to Article IX of the Uniform Commercial Code," see 15 Ga. St. B.J. 120 (1977).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 15A Am. Jur. 2d, Commercial Code, §§ 10, 69.

**U.L.A.** — Uniform Commercial Code (U.L.A.) § 11-10-105.

**ARTICLE 11****REVISED ARTICLE 9 AND CONFORMING AMENDMENTS TO  
OTHER ARTICLES**

Sec.		Sec.	
11-11-101.	Effective date; definitions.	11-11-103.	Transition to revised article.
11-11-102.	Preservation of old transition provisions.	11-11-104.	Presumption that rule of law continues unchanged.

**11-11-101. Effective date; definitions.**

(1) This Act shall become effective at 12:01 A.M. on July 1, 1978.

(2) As used in this article:

(a) "Old Article 9 of this title" means Code Sections 11-1-105, 11-1-201(9), 11-1-201(37), 11-2-107, 11-5-116, and Article 9 of this title, as they are in effect on June 30, 1978, immediately prior to the effective date of this Act.

(b) "Revised Article 9 of this title" means Code Sections 11-1-105, 11-1-201(9), 11-1-201(37), 11-1-209, 11-2-107, 11-5-116, and Article 9 of this title as said provisions are enacted pursuant to this Act. (Code 1933, § 109A-11—101, enacted by Ga. L. 1978, p. 1081, § 8; Ga. L. 1980, p. 443, § 7.)

**Editor's notes.** — The term "this Act," title, added this article, and made other which appears in this section, refers to Ga. L. conforming changes in this title. 1978, p. 1081, which revised Article 9 of this

**11-11-102. Preservation of old transition provisions.**

The provisions of Article 10 of this title shall continue to apply to the revised Article 9 of this title. (Code 1933, § 109A-11—102, enacted by Ga. L. 1978, p. 1081, § 8.)

**11-11-103. Transition to revised article.**

(1) Transactions validly entered into before July 1, 1978, and the rights, duties, and interests flowing from them remain valid thereafter; and, except as provided in subsection (2) of this Code section, may be terminated, completed, consummated, or enforced as required or permitted by old Article 9 of this title and other statute or other law amended or repealed by this Act as though such repeal or amendment had not occurred.

(2) Continuation statements with respect to security interests perfected under the old Article 9 of this title shall, after December 31, 1977, be filed in the manner and place specified in the revised Article 9 of this title. (Code 1933, § 109A-11—103, enacted by Ga. L. 1978, p. 1081, § 8.)



**Editor’s notes.** — The term “this Act,” title, added this article, and made other which appears in this section, refers to Ga. L. conforming changes in this title. 1978, p. 1081, which revised Article 9 of this

**11-11-104. Presumption that rule of law continues unchanged.**

Unless a change in law has clearly been made, the provisions of the revised Article 9 of this title shall be deemed declaratory of the meaning of the old Article 9 of this title. (Code 1933, § 109A-11—104, enacted by Ga. L. 1978, p. 1081, § 8.)

## ARTICLE 12

## REVISIONS TO ARTICLE 9 FILING

Sec.

11-12-101. Effective date.

11-12-102. Transition provisions.

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**Law reviews.** — For note on the 1994 amendments of Code Sections 11-12-101 to 11-12-102 of this article, see 11 Ga. St. U.L. Rev. 70 (1994).

**11-12-101. Effective date.**

This article shall become effective at 12:01 A.M. on January 1, 1995. (Code 1981, § 11-12-101, enacted by Ga. L. 1993, p. 1550, § 7; Ga. L. 1994, p. 1693, § 13.)

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 1993, “article” was substituted for “Act.”

**Law reviews.** — For note on 1993 enactment of this article, see 10 Ga. St. U.L. Rev. 41 (1993).

**11-12-102. Transition provisions.**

(1) A financing statement or continuation statement filed prior to January 1, 1995, which has not lapsed prior to January 1, 1995, shall remain effective for the period provided in Code Section 11-9-403 as in effect immediately prior to January 1, 1995.

(2) The effectiveness of any financing statement or continuation statement filed prior to January 1, 1995, may be continued only by the filing of a continuation statement, in the form prescribed by the Georgia Superior Court Clerks’ Cooperative Authority, signed by either the debtor or the secured party with the filing officer of the county where the original financing statement was filed or, if the financing statement has previously been continued, where the currently effective continuation statement was filed. If the original financing statement or currently effective continuation statement was filed in multiple counties, then such continuation statement may be filed in any of such multiple counties, except where the original financing statement or currently effective continuation statement covers crops growing or to be grown, or minerals or the like, including oil and gas, or accounts subject to subsection (5) of Code Section 11-9-103, or was filed as a fixture filing (Code Section 11-9-313), then such continuation statement must be filed in each of such counties where any of the related real estate is located. This continuation statement must contain the information required by the first sentence of subsection (1) of Code Section 11-9-402, other than a statement indicating the types, or describing the items, of collateral and the social security number or Internal Revenue Service taxpayer identification number of the debtor, and must further identify the

original financing statement or currently effective continuation statement, the office where such financing statement or continuation statement was filed, and the filing number and date of filing or other recording information, and further state that the original financing statement is still effective. Except as specified in this subsection, the provisions of subsection (3) of Code Section 11-9-403 for continuation statements apply to such a statement.

(3) Statements of amendment, assignment, release, or termination affecting original financing statements filed prior to January 1, 1995, ("transitional filings") shall be filed on the forms prescribed by the Georgia Superior Court Clerks' Cooperative Authority with the filing officer of the county where the original financing statement was filed, or if the original financing statement has previously been continued, where the currently effective continuation statement was filed. If the original financing statement or currently effective continuation statement was filed in multiple counties, then such statement of amendment, assignment, release, or termination may be filed in any one of such multiple counties, except where the original financing statement or currently effective continuation statement covers crops growing or to be grown, or minerals or the like, including oil and gas, or accounts subject to subsection (5) of Code Section 11-9-103, or was filed as a fixture filing (Code Section 11-9-313), in which event such statement of amendment, assignment, release, or termination must be filed in each of such counties where any of the related real estate is located. Each transitional filing shall identify the original financing statement or currently effective continuation statement, the office where such financing statement or continuation statement was filed, the filing number or other recording information, and identify each named debtor and secured party. Notwithstanding the requirements of subsection (2) of Code Section 11-9-405 or Code Section 11-9-406, no social security number or Internal Revenue Service taxpayer identification number of the debtor shall be required to be included in any such transitional filings. The Georgia Superior Court Clerks' Cooperative Authority shall prescribe rules and regulations, as appropriate, to govern the presentation of such transitional filings.

(4) A filing which was made in good faith in an improper place or not in all of the places required by Code Section 11-9-401 as in effect prior to January 1, 1995, is nevertheless effective with regard to any collateral as to which the filing complied with the requirements of this article and is also effective with regard to collateral covered by the financing statement against any person who has knowledge of the contents of such financing statement.

(5) A filing which was made in the proper place in this state pursuant to Code Section 11-9-401 as in effect prior to January 1, 1995, continues effective even though the debtor's residence or place of business or the location of the collateral or its use, whichever controlled the original filing, is thereafter changed.



(6) A continuation statement that was timely filed pursuant to subsection (8) of Code Section 11-9-403 as in effect prior to January 1, 1995, and that remains in effect as of January 1, 1995, shall continue the effectiveness of the original financing statement for the period specified in subsection (8) of Code Section 11-9-403 as in effect on January 1, 1995, provided that such continuation statement may thereafter be further continued by the filing of a subsequent continuation statement within six months prior to the expiration of the five-year period specified in subsection (8) of Code Section 11-9-403 as in effect prior to January 1, 1995, or, if such five-year period is determined to have a different duration, within six months prior to the expiration of the five-year period specified in subsection (8) of Code Section 11-9-403 as in effect on January 1, 1995. (Code 1981, § 11-12-102, enacted by Ga. L. 1993, p. 1550, § 7; Ga. L. 1994, p. 1693, § 13.)

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# OFFICIAL CODE OF GEORGIA ANNOTATED

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References to:

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### **Tables:**

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# TITLE 11

## COMMERCIAL CODE

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**Law reviews.** — For article, “The Implications for Regulating Innovation,” Myth of the Sharing Economy and its see 67 Emory L.J. 197 (2017).

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PART 1

GENERAL PROVISIONS

**Editor’s notes.** — Ga. L. 2015, p. 996, § 1-1/SB 65, not codified by the General Assembly, provides that: “(a) This Act shall be known and may be cited as the ‘Debtor-Creditor Uniform Law Modernization Act of 2015.’

“ (b) To promote consistency among the states, it is the intent of the General Assembly to modernize certain existing uniform laws promulgated by the Uniform Law Commission affecting debtor and creditor rights, responsibilities, and relationships and other federally recognized laws affecting such rights, responsibilities, and relationships.”

11-1-101. Short titles.

- (a) This Title 11 shall be known as and may be cited as the “Uniform Commercial Code.”
- (b) This article shall be known as and may be cited as the “Uniform Commercial Code — General Provisions.” (Code 1933, § 109A-1—101, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 2015, p. 996, § 3A-1/SB 65.)

**The 2015 amendment**, effective January 1, 2016, designated the existing provisions as subsection (a), and added subsection (b).

JUDICIAL DECISIONS

**Cited** in *AgriCommodities, Inc. v. J. D. Heiskell & Co.*, 297 Ga. App. 210, 676 S.E.2d 847 (2009); *Sun Nurseries, Inc. v. Lake Erma, LLC*, 316 Ga. App. 832, 730 S.E.2d 556 (2012).

RESEARCH REFERENCES

**Am. Jur. Pleading and Practice Forms.** — 6 Am. Jur. Pleading and Practice Forms, Commercial Code, § 1:1.

**ALR.** — Recognition of action for dam-

ages for wrongful foreclosure — general views, 81 A.L.R.6th 161.  
Recognition of action for damages for

wrongful foreclosure — types of actions, 82 A.L.R.6th 43.

11-1-102. Scope of article.

This article shall apply to a transaction to the extent that it is governed by another article of this title. (Code 1981, § 11-1-102, enacted by Ga. L. 2015, p. 996, § 3A-1/SB 65.)

Effective date. — This Code section became effective January 1, 2016.

redesignated former Code Section 11-1-102 as present Code Section 11-1-103.

Editor’s notes. — Ga. L. 2015, p. 996, § 3A-1/SB 65, effective January 1, 2016,

11-1-103. Rules of construction to promote purposes and policies; applicability of supplemental principles of law.

- (a) This title shall be liberally construed and applied to promote its underlying purposes and policies which are:
- (1) To simplify, clarify, and modernize the law governing commercial transactions;
  - (2) To permit the continued expansion of commercial practices through custom, usage, and agreement of the parties; and
  - (3) To make uniform the law among the various jurisdictions.

(b) Unless displaced by the particular provisions of this title, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, and other validating or invalidating cause shall supplement its provisions. (Code 1933, § 109A-1—102, enacted by Ga. L. 1962, p. 156, § 1; Code 1981, § 11-1-103, as redesignated by Ga. L. 2015, p. 996, § 3A-1/SB 65.)

The 2015 amendment, effective January 1, 2016, redesignated former Code Section 11-1-102 as present Code Section 11-1-103 and rewrote this Code section.

Editor’s notes. — Former Code Section 11-1-103, pertaining to supplementary general principles of law applicable, was repealed by Ga. L. 2015, p. 996, § 3A-1/SB 65, effective January 1, 2016. The former Code section was based on Ga. L. 1962, p. 156, § 1.

JUDICIAL DECISIONS

Assignability statute not preempted by UCC. — Lender’s assignee had no standing to pursue a fraudulent transfer claim against a guarantor because such claims were not assignable under O.C.G.A. § 44-12-24; therefore, the

assignee could not prevail on a legal malpractice action against attorneys who failed to timely assert a fraudulent transfer claim. O.C.G.A. § 44-12-24 was not preempted by 12 U.S.C. § 1821 of the Financial Institutions Reform, Recovery,



and Enforcement Act of 1989 (FIRREA) or by O.C.G.A. § 11-1-103 of the Uniform Commercial Code. RES-GA McDonough, LLC v. Taylor English Duma LLP, 302 Ga. 444, 807 S.E.2d 381 (2017).

**Cited** in Dalton Point, L.P. v. Regions

Bank, Inc., 287 Ga. App. 468, 651 S.E.2d 549 (2007); Ole Mexican Foods, Inc. v. Hanson Staple Co., 285 Ga. 288, 676 S.E.2d 169 (2009); SunTrust Bank v. Venable, 299 Ga. 655, 791 S.E.2d 5 (2016).

### 11-1-104. Construction against implicit repeal.

**Editor's notes.** — Ga. L. 2015, p. 996, § 3A-1/SB 65, effective January 1, 2016, reenacted this Code section without

change. Refer to bound volume for text of this Code section.

### 11-1-105. Severability.

If any provision or clause of this title or application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of this title which can be given effect without the invalid provision or application, and to this end the provisions of this title are declared to be severable. (Code 1933, § 109A-1—105, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 1978, p. 1081, § 2; Ga. L. 1992, p. 2685, § 1; Ga. L. 1993, p. 633, § 2; Ga. L. 1998, p. 1323, § 15; Ga. L. 2001, p. 362, § 2; Ga. L. 2015, p. 996, § 3A-1/SB 65.)

**The 2015 amendment**, effective January 1, 2016, rewrote this Code section.

### 11-1-106. Use of singular and plural; gender.

In this title unless the statutory context otherwise requires:

(1) Words in the singular number include the plural, and words in the plural include the singular; and

(2) Words of any gender also refer to any other gender. (Code 1933, § 109A-1—106, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 2015, p. 996, § 3A-1/SB 65.)

**The 2015 amendment**, effective January 1, 2016, rewrote this Code section.

### 11-1-107. Section captions.

Section captions are parts of this title. (Code 1933, § 109A-1—107, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 2015, p. 996, § 3A-1/SB 65.)

**The 2015 amendment**, effective January 1, 2016, substituted the present provisions of this Code section for the former

provisions, which read: “Any claim or right arising out of an alleged breach can be discharged in whole or in part without

consideration by a written waiver or renunciation signed and delivered by the aggrieved party.”

## RESEARCH REFERENCES

**Am. Jur. Pleading and Practice Forms.** — 9A Am. Jur. Pleading and Practice Forms, Estoppel and Waiver, § 39.

### 11-1-108. Relation to Electronic Signatures in Global and National Commerce Act.

This article modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001, et seq., but shall not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b). (Code 1933, § 109A-1—108, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 2015, p. 996, § 3A-1/SB 65.)

**The 2015 amendment**, effective January 1, 2016, substituted the present provisions of this Code section for the former provisions, which read: “If any provision or clause of this title or application thereof to any person or circumstances is held

invalid, such invalidity shall not affect other provisions or applications of the title which can be given effect without the invalid provision or application, and to this end the provisions of this title are declared to be severable.”

### 11-1-109. Section captions.

Repealed by Ga. L. 2015, p. 996, § 3A-1/SB 65, effective January 1, 2016.

**Editor’s notes.** — This Code section was based on Code 1933, § 109A-1-109, enacted by Ga. L. 1962, p. 156, § 1.

## PART 2

### GENERAL DEFINITIONS AND PRINCIPLES OF INTERPRETATION

**Editor’s notes.** — Ga. L. 2015, p. 996, § 1-1/SB 65, not codified by the General Assembly, provides that: “(a) This Act shall be known and may be cited as the ‘Debtor-Creditor Uniform Law Modernization Act of 2015.’

“(b) To promote consistency among the states, it is the intent of the General

Assembly to modernize certain existing uniform laws promulgated by the Uniform Law Commission affecting debtor and creditor rights, responsibilities, and relationships and other federally recognized laws affecting such rights, responsibilities, and relationships.”

**Law reviews.** — For note, “Not So

Good: The Classification of 'Smart Goods'  
Under UCC Article 2," see 34 Ga. St. U.L.  
Rev. 453 (2018).

### 11-1-201. General definitions.

(a) Unless the context otherwise requires, words or phrases defined in this Code section, or in the additional definitions contained in other articles of this title that apply to particular articles or parts thereof, have the meanings stated.

(b) Subject to additional definitions contained in the other articles of this title that are applicable to specific articles or parts thereof, in this title:

(1) "Action" in the sense of a judicial proceeding includes recoupment, counterclaim, setoff, suit in equity, and any other proceedings in which rights are determined.

(2) "Aggrieved party" means a party entitled to pursue a remedy.

(3) "Agreement," as distinguished from "contract," means the bargain of the parties in fact as found in their language or inferred from other circumstances including course of performance, course of dealing, or usage of trade as provided in Code Section 11-1-303.

(4) "Bank" means a person engaged in the business of banking and includes a savings bank, savings and loan association, credit union, or trust company.

(5) "Bearer" means a person in control of a negotiable instrument, document of title, or certificated security payable to bearer or indorsed in blank.

(6) "Bill of lading" means a document evidencing the receipt of goods for shipment issued by a person engaged in the business of transporting or forwarding goods.

(7) "Branch" includes a separately incorporated foreign branch of a bank.

(8) "Burden of establishing" a fact means the burden of persuading the trier of fact that the existence of the fact is more probable than its nonexistence.

(9) "Buyer in ordinary course of business" means a person that buys goods in good faith without knowledge that the sale violates the rights of another person in the goods, and in the ordinary course from a person, other than a pawnbroker, in the business of selling goods of that kind. A person buys goods in the ordinary course if the sale to the person comports with the usual or customary practices in the kind of



business in which the seller is engaged or with the seller's own usual or customary practices. A person that sells oil, gas, or other minerals at the wellhead or minehead is a person in the business of selling goods of that kind. A buyer in the ordinary course of business may buy for cash, by exchange of other property, or on secured or unsecured credit, and may acquire goods or documents of title under a preexisting contract for sale. Only a buyer that takes possession of the goods or has a right to recover the goods from the seller under Article 2 of this title may be a buyer in ordinary course of business. A person that acquires goods in a transfer in bulk or as security for or in total or partial satisfaction of a money debt is not a buyer in ordinary course of business.

(10) "Conspicuous," with reference to a term, means so written, displayed, or presented that a reasonable person against which it is to operate ought to have noticed it. Whether a term is "conspicuous" or not is a decision for the court. Conspicuous terms include the following:

(A) A heading in capitals equal to or greater in size than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same or lesser size; and

(B) Language in the body of a record or display in larger type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from the surrounding text of the same size by symbols or other marks that call attention to the language.

(11) "Consumer" means an individual who enters into a transaction primarily for personal, family, or household purposes.

(12) "Contract," as distinguished from "agreement," means the total legal obligation that results from the parties' agreement as determined by this title and any other applicable law.

(13) "Creditor" includes a general creditor, a secured creditor, a lien creditor and any representative of creditors, including an assignee for the benefit of creditors, a trustee in bankruptcy, a receiver in equity, and an executor or administrator of an insolvent debtor's or assignor's estate.

(14) "Defendant" includes a person in the position of defendant in a counterclaim, cross-claim, or third-party claim.

(15) "Delivery" with respect to an instrument, document of title, or chattel paper means voluntary transfer of possession.

(16) "Document of title" includes a bill of lading, dock warrant, dock receipt, warehouse receipt, or order for delivery of goods and any

other document which in the regular course of business or financing is treated as adequately evidencing that the person in possession of it is entitled to receive, hold, and dispose of the document and the goods it covers. To be a document of title, a document must purport to be issued by or addressed to a bailee and purport to cover goods in the bailee's possession which are either identified or are fungible portions of an identified mass.

(17) "Fault" means a default, breach, or wrongful act or omission.

(18) "Fungible goods" means:

(A) Goods of which any unit is, by nature or usage of trade, the equivalent of any other like unit; or

(B) Goods that by agreement are treated as equivalent.

(19) "Genuine" means free of forgery or counterfeiting.

(20) "Good faith," except as otherwise provided in Article 5 of this title, means honesty in fact and the observance of reasonable commercial standards of fair dealing.

(21) "Holder" means:

(A) The person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession; or

(B) The person in possession of a document of title if the goods are deliverable either to bearer or to the order of the person in possession.

(22) "Insolvency proceeding" includes any assignment for the benefit of creditors or other proceeding intended to liquidate or rehabilitate the estate of the person involved.

(23) "Insolvent" means:

(A) Having generally ceased to pay debts in the ordinary course of business other than as a result of bona fide dispute;

(B) Being unable to pay debts as they become due; or

(C) Being insolvent within the meaning of the federal bankruptcy law.

(24) "Money" means a medium of exchange authorized or adopted by a domestic or foreign government and includes a monetary unit of account established by an intergovernmental organization or by agreement between two or more countries.

(25) "Organization" means a person other than an individual.

(26) "Party," as distinct from "third party," means a person who has engaged in a transaction or made an agreement subject to this title.

(27) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision, agency, or instrumentality, public corporation, or any other legal or commercial entity.

(28) "Present value" means the amount as of a date certain of one or more sums payable in the future, discounted to the date certain by use of either an interest rate specified by the parties if that rate is not manifestly unreasonable at the time the transaction is entered into or, if an interest rate is not so specified, a commercially reasonable rate that takes into account the facts and circumstances at the time the transaction is entered into.

(29) "Purchase" means taking by sale, discount, negotiation, mortgage, pledge, lien, security interest, issue or reissue, gift, or any other voluntary transaction creating an interest in property.

(30) "Purchaser" means a person who takes by purchase.

(31) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(32) "Remedy" means any remedial right to which an aggrieved party is entitled with or without resort to a tribunal.

(33) "Representative" means a person empowered to act for another, including an agent, an officer of a corporation or association, and a trustee, executor or administrator of an estate.

(34) "Rights" includes remedies.

(35) "Security interest" means an interest in personal property or fixtures which secures payment or performance of an obligation. The term also includes any interest of a consignor and a buyer of accounts, chattel paper, a payment intangible, or a promissory note in a transaction that is subject to Article 9 of this title. The term does not include the special property interest of a buyer of goods on identification of those goods to a contract for sale under Code Section 11-2-401, but a buyer may also acquire a "security interest" by complying with Article 9 of this title. Except as otherwise provided in Code Section 11-2-505, the right of a seller or lessor of goods under Article 2 or 2A of this title to retain or acquire possession of the goods is not a "security interest," but a seller or lessor may also acquire a "security interest" by complying with Article 9 of this title. The retention or reservation of title by a seller of goods notwithstanding shipment or delivery to the buyer under Code Section 11-2-401 is limited in effect to a reservation of a "security interest."



Whether a transaction in the form of a lease creates a “security interest” shall be determined pursuant to Code Section 11-1-203.

(36) “Send” in connection with a writing, record, or notice means:

(A) To deposit in the mail or deliver for transmission by any other usual means of communication with postage or cost of transmission provided for and properly addressed and, in the case of an instrument, to an address specified thereon or otherwise agreed, or if there be none to any address reasonable under the circumstances; or

(B) In any other way to cause to be received any record or notice within the time it would have arrived if properly sent.

(37) “Signed” includes using any symbol executed or adopted with present intention to adopt or accept a writing.

(38) “State” means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

(39) “Surety” includes a guarantor or other secondary obligor.

(40) “Term” means that portion of an agreement that relates to a particular matter.

(41) “Unauthorized signature” means a signature made without actual, implied, or apparent authority. The term includes a forgery.

(42) “Warehouse receipt” means a receipt issued by a person engaged in the business of storing goods for hire.

(43) “Written” or “writing” includes printing, typewriting, or any other intentional reduction to tangible form. (Code 1933, § 109A-1—201, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 1963, p. 188, § 1; Ga. L. 1978, p. 1081, §§ 3, 4; Ga. L. 1981, p. 634, § 2; Ga. L. 1985, p. 825, § 1; Ga. L. 1992, p. 6, § 11; Ga. L. 1992, p. 2626, § 1; Ga. L. 1993, p. 633, § 3; Ga. L. 1996, p. 1306, § 1; Ga. L. 2000, p. 136, § 11; Ga. L. 2001, p. 362, § 3; Ga. L. 2010, p. 481, § 2-1/HB 451; Ga. L. 2015, p. 996, § 3A-1/SB 65.)

**The 2010 amendment**, effective May 27, 2010, in subsection (5), substituted “a person in control of a negotiable electronic document of title or” for “the” near the beginning, inserted “a negotiable tangible”, and inserted “a”; substituted the present provisions of subsection (6) for the former provisions, which read: “‘Bill of lading’ means a document evidencing the receipt of goods for shipment issued by a

person engaged in the business of transporting or forwarding goods, and includes an airbill. ‘Airbill’ means a document serving for air transportation as a bill of lading does for marine or rail transportation, and includes an air consignment note or air waybill.”; rewrote subsection (10); substituted “to an electronic document of title means voluntary transfer of control and with respect to instruments, tangible”

for “to instruments,” in the middle of subsection (14); rewrote subsections (15), (20), (25), and (26); in subsection (27), substituted “the individual’s” for “his” near the end of the first sentence and added the last two sentences; in subsection (38), substituted “a writing, a record, or notice means:” for “any writing or notice means” at the end of the introductory paragraph, designated the paragraphs, in paragraph (38)(a), inserted commas throughout, substituted “To deposit” for “to deposit” at the beginning and substituted “; or” for a period at the end, and, in paragraph (38)(b), substituted “In any other way to cause to be received any record” for “The receipt of any writing” at the beginning, deleted “at which” following “time” in the middle, and deleted “has the effect of a proper sending” following “properly” at the end; and substituted “document of title” for “receipt” in the middle of subsection (45). See the Editor’s notes for applicability.

**The 2015 amendment**, effective January 1, 2016, rewrote this Code section.

**Editor’s notes.** — Ga. L. 2010, p. 481, § 3-1, not codified by the General Assem-

bly, provides that: “This Act applies to a document of title that is issued or a bailment that arises on or after the effective date of this Act. This Act does not apply to a document of title that is issued or a bailment that arises before the effective date of this Act even if the document of title or bailment would be subject to this Act if the document of title had been issued or bailment had arisen on or after the effective date of this Act. This Act does not apply to a right of action that has accrued before the effective date of this Act.” This Act became effective May 27, 2010.

Ga. L. 2010, p. 481, § 3-2, not codified by the General Assembly, provides that: “A document of title issued or a bailment that arises before the effective date of this Act and the rights, documents, and interests flowing from that document or bailment are governed by any statute or other rule amended or repealed by this Act as if such amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute or other rule.” This Act became effective May 27, 2010.

## JUDICIAL DECISIONS

### ANALYSIS

#### GENERAL CONSIDERATION

##### AGREEMENT

##### BUYER IN ORDINARY COURSE OF BUSINESS

##### CONSPICUOUS TERM OR CLAUSE

##### HOLDER

##### NOTICE

##### SECURITY INTEREST

##### SIGNATURE

### General Consideration

**Cited** in *Gerber & Gerber, P.C. v. Regions Bank*, 266 Ga. App. 8, 596 S.E.2d 174 (2004); *Stein v. GEICO Indem. Ins. Co.*, 289 Ga. App. 739, 658 S.E.2d 153 (2008); *In re Estate of Miraglia*, 290 Ga. App. 28, 658 S.E.2d 777 (2008).

### Agreement

**Agreement not a lease.** — Claimant’s unwritten agreement with an individual concerning a vehicle was not a lease because the claimant offered no evidence

that the individual had the right to voluntarily terminate the individual’s payment obligation under the agreement, i.e., to pay less than the full amount of consideration under the lease, or that the individual could purchase the vehicle only after paying additional consideration. *United States v. Bushay*, 34 F. Supp. 3d 1260 (N.D. Ga. Aug. 5, 2014).

### Buyer in Ordinary Course of Business

#### Knowledge of security interest.

Although a bank’s security interests in

### Buyer in Ordinary Course of Business (Cont'd)

equipment were properly perfected and remained so throughout a buyer's acquisition of the equipment from the debtor, those security interests were deemed never to have been perfected as against a purchaser for value when the bank failed to file timely continuation statements, under O.C.G.A. § 11-9-515(b), and the buyer took free of the security interests under O.C.G.A. § 11-9-317(b) because the buyer did not have actual knowledge of the security interests. *Four County Bank v. Tidewater Equip. Co.*, 331 Ga. App. 753, 771 S.E.2d 437 (2015).

**Fractionalizing not permitted.** — Fractionalizing was not allowed by O.C.G.A. § 11-1-201(9) to permit labeling a transferee a buyer in the ordinary course of business to the extent that the purchase price was not in satisfaction of a money debt, but not a buyer in the ordinary course of business to the extent that the purchase price was in satisfaction of a money debt. *First Nat'l Bank v. Proceeding Ayres Aviation Holdings, Inc.* (In re Ayres Aviation Holdings, Inc.), 342 B.R. 104 (Bankr. M.D. Ga. 2006).

Because plaintiff cellular telephone trademark holder's packages contained terms and conditions inside and language on the outside of the packages that referenced those terms and conditions, there was a valid "shrink-wrap" contract between the holder and purchasers of the cell phones, and allegations that defendant competitor removed the phones from their original packaging and shipped the phones outside the United States sufficiently raised a reasonable expectation that discovery would reveal evidence that the competitor was aware of the terms and conditions, was afforded an opportunity to reject the terms and conditions, and failed to reject the terms and conditions, such that a breach of contract claim was plausible, and, because the allegations indicated a lack of good faith by the competitor, the bona fide purchaser for value and buyer in the ordinary course defenses under O.C.G.A. §§ 11-1-201 and 11-2-403(1)(a) were not available. *Tracfone Wireless, Inc. v. Zip Wireless*

*Prods.*, 716 F. Supp. 2d 1275 (N.D. Ga. 2010).

### Conspicuous Term or Clause

**Notice conspicuous.** — Limitation of liability language on a directory advertising order that appeared in all capital letters satisfied O.C.G.A. § 11-1-201(10). *Elliott Irrigation Co. v. L. M. Berry & Co.*, No. 1:03-CV-2776-CC, 2005 U.S. Dist. LEXIS 4573 (N.D. Ga. Mar. 14, 2005).

**Statement of payment in full conspicuous.** — Deposit of a check constituted an accord and satisfaction under O.C.G.A. § 11-3-311 of a settlement agreement in a debt dispute as a dispute under O.C.G.A. § 13-4-103(b)(1) existed as to the fee portion of the settlement and the letter sent with the check contained a conspicuous statement under O.C.G.A. § 11-1-201(10) that the tender of the check was full payment and satisfaction of the settlement. *Blich v. Walker Pharm.*, 295 Ga. App. 347, 671 S.E.2d 842 (2008).

### Holder

**Possession.** — Although the corporation met the requirements for being a holder in due course to the extent that it took the promissory note regarding the mortgage for value, in good faith, and without notice of any claim to the instrument, the corporation was not a holder in due course because it was not in possession of the promissory note at the time it purchased the mortgage; since it was not in possession, it failed to achieve holder-in-due-course status and the bank's security interest prevailed. *Provident Bank v. Morequity, Inc.*, 262 Ga. App. 331, 585 S.E.2d 625 (2003).

Payee of a check who never received possession of the check and who was unaware that the check had been made out to the payee was not a "holder" of the check. *Jenkins v. Wachovia Bank, Nat'l Ass'n*, 309 Ga. App. 562, 711 S.E.2d 80 (2011).

Pursuant to O.C.G.A. § 11-1-201(20)(a), the holder of a check is entitled to negotiate the check, and a holder is one who has possession of the check. *Sun Nurseries, Inc. v. Lake Erma, LLC*, 316 Ga. App. 832, 730 S.E.2d 556 (2012).



### Notice

#### Knowledge refers to actual knowledge.

Shortly after a bank made a loan to a farmer, it mailed a cotton gin written notice of its security interest in the farmer's cotton crop. As the gin's president admitted reading the bank's letter, the gin had "actual knowledge" of the bank's security interest under O.C.G.A. § 11-1-201(25), (27), despite the president's claim that no documentation had been enclosed with the letter. *Bank of Dawson v. Worth Gin Co.*, 295 Ga. App. 256, 671 S.E.2d 279 (2008).

**Notice not required.** — Lessor was not required to comply with the notice provisions of O.C.G.A. §§ 10-1-36 and 11-9-504 because the motor vehicle lease agreement the lessor entered into with the lessee was intended to be a true lease and not to evince a secured transaction; the lessor retained a meaningful reversionary interest in the car because the option price was more than nominal since the purchase option price was approximately one-third of the car's value, and the agreement contained no provision purporting to grant the lessee equity in the vehicle prior to exercise of the purchase option. *Aniebue v. Jaguar Credit Corp.*, 308 Ga. App. 1, 708 S.E.2d 4 (2011).

### Security Interest

**Lease not a security agreement.** — In a Chapter 13 bankruptcy, in which an automobile lease required the debtor to surrender possession of vehicle at the end of the lease, unless the debtor exercised the debtor's option to purchase vehicle, and the debtor was not required to pur-

chase the vehicle or renew the lease, and the debtor could not purchase the vehicle at the end of the lease for a nominal amount—rather, the end-of-lease purchase price exceeded the market value of the vehicle at that point—pursuant to O.C.G.A. § 11-1-201(37) (2002), the lease was a true lease, not a security agreement, and the debtor, thus, had to assume the lease or surrender the vehicle, rather than paying the lessor's claim in accordance with 11 U.S.C. § 1325(a)(5). *Free-way Auto Credit v. Bonner (In re Bonner)*, No. 06-50472 RFH, 2006 Bankr. LEXIS 1497 (Bankr. M.D. Ga. July 19, 2006).

**Summary judgment premature without Bright-Line test.** — Trial court erred in entering summary judgment for a lessor without addressing whether the parties' contract for a car was a lease or a security agreement under the Bright-Line Test. *Coleman v. DaimlerChrysler Servs. of N. Am., LLC*, 276 Ga. App. 336, 623 S.E.2d 189 (2005).

### Signature

**Absence of notary seal.** — Jury verdict imposing liability on guarantors for a debt of a corporation was reversed where there was no evidence that the guarantors wrote their names on or otherwise signed the guaranty, where a witness's opinion that the guaranty "appeared" to be executed by the guarantors lacked any basis whatsoever, other than the fact that their names appeared on the signature lines, and where the notary attestation was invalid, if for no other reason, because the guaranty did not contain a notary seal. *Friedrich v. APAC-Georgia, Inc.*, 265 Ga. App. 769, 595 S.E.2d 620 (2004).

## RESEARCH REFERENCES

**Am. Jur. Proof of Facts.** — Status as "Buyer in Ordinary Course of Business," 2 POF2d 165.

Ratification of Forged or Unauthorized Signature, 7 POF2d 675.

**Am. Jur. Pleading and Practice Forms.** — 14 Am. Jur. Pleading and Practice Forms, Insolvency, § 2.

**11-1-202. Notice; knowledge.**

(a) Subject to subsection (f) of this Code section, a person has “notice” of a fact if the person:

- (1) Has actual knowledge of it;
- (2) Has received a notice or notification of it; or

(3) From all the facts and circumstances known to the person at the time in question, has reason to know that it exists.

(b) “Knows” or “knowledge” means actual knowledge.

(c) “Discover,” “learn,” or words of similar import refer to knowledge rather than to reason to know.

(d) A person “notifies” or “gives” a notice or notification to another person by taking such steps as may be reasonably required to inform the other person in the ordinary course, whether or not the other person actually comes to know of it.

(e) Subject to subsection (f) of this Code section, a person “receives” a notice or notification when:

- (1) It comes to that person’s attention; or

(2) It is duly delivered in a form reasonable under the circumstances at the place of business through which the contract was made or at another location held out by that person as the place for receipt of such communications.

(f) Notice, knowledge, or a notice or notification received by an organization shall be effective for a particular transaction from the time it is brought to the attention of the individual conducting that transaction and, in any event, from the time it would have been brought to the individual’s attention if the organization had exercised due diligence. An organization exercises due diligence if it maintains reasonable routines for communicating significant information to the person conducting the transaction and there is reasonable compliance with the routines. Due diligence does not require an individual acting for the organization to communicate information unless the communication is part of the individual’s regular duties or the individual has reason to know of the transaction and that the transaction would be materially affected by the information. (Code 1933, § 109A-1—202, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 2015, p. 996, § 3A-1/SB 65; Ga. L. 2016, p. 864, § 11/HB 737.)

**The 2015 amendment**, effective January 1, 2016, substituted the present provisions of this Code section for the former provisions, which read: “A document in due form purporting to be a bill of lading, policy or certificate of insurance, official weigher’s or inspector’s certificate, consular invoice, or any other document au-

thorized or required by the contract to be issued by a third party shall be prima facie evidence of its own authenticity and genuineness and of the facts stated in the document by the third party.”

**The 2016 amendment**, effective May 3, 2016, part of an Act to revise, modernize, and correct the Code, substituted “a notice or notification” for “notice or notification” in subsection (e).

### **11-1-203. Lease distinguished from security interest.**

(a) Whether a transaction in the form of a lease creates a security interest is determined by the facts of each case.

(b) A transaction in the form of a lease creates a security interest if the consideration that the lessee is to pay to the lessor for the right to possession and use of the goods is an obligation for the term of the lease and is not subject to termination by the lessee, and:

(1) The original term of the lease is equal to or greater than the remaining economic life of the goods;

(2) The lessee is bound to renew the lease for the remaining economic life of the goods or is bound to become the owner of the goods;

(3) The lessee has an option to renew the lease for the remaining economic life of the goods for no additional consideration or nominal additional consideration upon compliance with the lease agreement; or

(4) The lessee has an option to become the owner of the goods for no additional consideration or nominal additional consideration upon compliance with the lease agreement.

(c) A transaction in the form of a lease does not create a security interest merely because:

(1) The present value of the consideration the lessee is obligated to pay the lessor for the right to possession and use of the goods is substantially equal to or is greater than the fair market value of the goods at the time the lease is entered into;

(2) The lessee assumes risk of loss of the goods;

(3) The lessee agrees to pay, with respect to the goods, taxes, insurance, filing, recording, or registration fees, or service or maintenance costs;

(4) The lessee has an option to renew the lease or to become the owner of the goods;

(5) The lessee has an option to renew the lease for a fixed rent that is equal to or greater than the reasonably predictable fair market rent for the use of the goods for the term of the renewal at the time the option is to be performed; or



(6) The lessee has an option to become the owner of the goods for a fixed price that is equal to or greater than the reasonably predictable fair market value of the goods at the time the option is to be performed.

(d) Additional consideration is nominal if it is less than the lessee's reasonably predictable cost of performing under the lease agreement if the option is not exercised. Additional consideration is not nominal if:

(1) When the option to renew the lease is granted to the lessee, the rent is stated to be the fair market rent for the use of the goods for the term of the renewal determined at the time the option is to be performed; or

(2) When the option to become the owner of the goods is granted to the lessee, the price is stated to be the fair market value of the goods determined at the time the option is to be performed.

(e) The "remaining economic life of the goods" and "reasonably predictable" fair market rent, fair market value, or cost of performing under the lease agreement must be determined with reference to the facts and circumstances at the time the transaction is entered into. (Code 1933, § 109A-1—203, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 2015, p. 996, § 3A-1/SB 65.)

**The 2015 amendment**, effective January 1, 2016, substituted the present provisions of this Code section for the former provisions, which read: "Every contract or duty within this title imposes an obliga-

tion of good faith in its performance or enforcement."

**Law reviews.** — For article, "Common Fact Patterns of Stock Broker Fraud and Misconduct," see 7 Ga. St. B.J. 14 (2002).

## JUDICIAL DECISIONS

**No independent cause of action created by O.C.G.A. § 11-1-203.** — Inasmuch as a borrower could not prevail on its breach of contract claim against a lender, it could not prevail on a cause of action based on the failure to act in good faith in performing the contract because there was no independent cause of action for breach of duty of good faith in performing a contract governed by the Uniform Commercial Code. *Heritage Creek Dev. Corp. v. Colonial Bank*, 268 Ga. App. 369, 601 S.E.2d 842 (2004).

**Good faith required in foreclosing on security deed.** — Homeowner stated a claim for breach of contract and breach of the duty of good faith and fair dealing against the homeowner's mortgage lender based on the lender's legal duty in the

security agreement to conduct the foreclosure of the property fairly, acting as the owner's agent. *Stewart v. SunTrust Mortg., Inc.*, 331 Ga. App. 635, 770 S.E.2d 892 (2015).

**Inapplicable to franchise agreement.** — Because a franchise agreement primarily governed issues regarding the proper operation of a franchise restaurant, advertising, the use of trademarks, trade names, and service marks, and the provisions regarding goods were incidental at best, the court concluded that non-sale aspects predominated the franchise agreement, and the duty of good faith and fair dealing embodied in O.C.G.A. § 11-1-203 did not apply. *Am. Casual Dining, L.P. v. Moe's Southwest Grill, L.L.C.*, 426 F. Supp. 2d 1356 (N.D.

Ga. 2006).

**Good faith not violated.**

When plaintiff Jobber petroleum distributors’ only allegations of wrongdoing was defendant oil company’s purported recapture of the cost of a prompt-pay discount when setting its price, and the parties’ contract imposed no limits on the costs that could be recouped in setting the price, the good-faith safe harbor provided in O.C.G.A. § 11-2-305(2) applied;

O.C.G.A. § 11-2-103 did not support imposing fundamental substantive limitations on the pricing methodology set out in the contract. *Autry Petroleum Co. v. BP Prods. North America, Inc.*, No. 08-11607, 2009 U.S. App. LEXIS 13978 (11th Cir. June 26, 2009) (Unpublished).

**Cited** in *Four County Bank v. Tidewater Equip. Co.*, 331 Ga. App. 753, 771 S.E.2d 437 (2015).

**11-1-204. Value.**

Except as otherwise provided in Articles 3, 4, 5, and 6 of this title, a person gives value for rights if the person acquires them:

- (1) In return for a binding commitment to extend credit or for the extension of immediately available credit, whether or not drawn upon and whether or not a charge-back is provided for in the event of difficulties in collection;
- (2) As security for, or in total or partial satisfaction of, a preexisting claim;
- (3) By accepting delivery under a preexisting contract for purchase; or
- (4) In return for any consideration sufficient to support a simple contract. (Code 1981, § 11-1-204, enacted by Ga. L. 2015, p. 996, § 3A-1/SB 65.)

**Effective date.** — This Code section redesignated former Code Section 11-1-204 as present Code Section 11-1-205. became effective January 1, 2016.

**Editor’s notes.** — Ga. L. 2015, p. 996, § 3A-1/SB 65, effective January 1, 2016,

**11-1-205. Reasonable time; seasonableness.**

- (a) Whether a time for taking any action required by this title is reasonable depends on the nature, purpose, and circumstances of such action.
- (b) An action is taken “seasonably” if it is taken at or within the time agreed, or if no time is agreed, at or within a reasonable time. (Code 1933, § 109A-1—204, enacted by Ga. L. 1962, p. 156, § 1; Code 1981, § 11-1-205, as redesignated by Ga. L. 2015, p. 996, § 3A-1/SB 65.)

**The 2015 amendment**, effective January 1, 2016, redesignated former Code Section 11-1-204 as present Code Section 11-1-205; and substituted the present pro-

visions of this Code section for the former provisions, which read: “(1) Whenever this title requires any action to be taken within a reasonable time, any time which

is not manifestly unreasonable may be fixed by agreement.

“(2) What is a reasonable time for taking any action depends on the nature, purpose, and circumstances of such action.

“(3) An action is taken ‘seasonably’ when it is taken at or within the time

agreed or if no time is agreed at or within a reasonable time.”

**Editor’s notes.** — Former Code Section 11-1-205, pertaining to course of dealing and usage of trade, was repealed by Ga. L. 2015, p. 996, § 3A-1/SB 65, effective January 1, 2016. The former Code section was based on Ga. L. 1962, p. 156, § 1.

## JUDICIAL DECISIONS

**One opportunity to cure was unreasonable.** — Motor coach buyer’s revocation of acceptance claim under O.C.G.A. § 11-2-608(1)(b) failed because the buyer’s providing only one opportunity to repair before the extent of the defect was truly apparent was not reasonable under O.C.G.A. § 11-1-204; the futility exception to providing an opportunity to cure did not apply because there was no evi-

dence that the buyer knew prior to revocation that the seller would have been unable to repair the coach. *Car Transp. Brokerage Co. v. Blue Bird Body Co.*, No. 08-16103, 2009 U.S. App. LEXIS 7661 (11th Cir. Apr. 10, 2009) (Unpublished).

**Cited in** *Wal-Mart Stores, Inc. v. Wheeler*, 262 Ga. App. 607, 586 S.E.2d 83 (2003).

### 11-1-206. Presumptions.

Whenever this title creates a “presumption” with respect to a fact, or provides that a fact is “presumed,” the trier of fact must find the existence of the fact presumed unless and until evidence is introduced that supports a finding of its nonexistence. (Code 1933, § 109A-1—206, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 1998, p. 1323, § 16; Ga. L. 2015, p. 996, § 3A-1/SB 65.)

**The 2015 amendment**, effective January 1, 2016, substituted the present provisions of this Code section for the former provisions, which read: “(1) Except in the cases described in subsection (2) of this Code section a contract for the sale of personal property is not enforceable by way of action or defense beyond \$5,000.00 in amount or value of remedy unless there is some writing which indicates that a contract for sale has been made between

the parties at a defined or stated price, reasonably identifies the subject matter, and is signed by the party against whom enforcement is sought or by his authorized agent.

“(2) Subsection (1) of this Code section does not apply to contracts for the sale of goods (Code Section 11-2-201) nor of securities (Code Section 11-8-113) nor to security agreements (Code Section 11-9-203).”

### 11-1-207 through 11-1-209.

Repealed by Ga. L. 2015, p. 996, § 3A-1/SB 65, effective January 1, 2016.

**Editor’s notes.** — These Code sections were based on Code 1933, §§ 109A-1—207 through 109A-1—209,

enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 1978, p. 1081, § 7; Ga. L. 1996, p. 1306, § 2.



## PART 3

## TERRITORIAL APPLICABILITY AND GENERAL RULES

**Editor's notes.** — This part became effective January 1, 2016.

Ga. L. 2015, p. 996, § 1-1/SB 65(a), not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Debtor-Creditor Uniform Law Modernization Act of 2015.'"

"(b) To promote consistency among the

states, it is the intent of the General Assembly to modernize certain existing uniform laws promulgated by the Uniform Law Commission affecting debtor and creditor rights, responsibilities, and relationships and other federally recognized laws affecting such rights, responsibilities, and relationships."

**11-1-301. Territorial applicability; parties' power to choose applicable law.**

(a) Except as otherwise provided in this Code section, when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties.

(b) In the absence of an agreement under subsection (a) of this Code section, and except as provided in subsection (c) of this Code section, this title applies to transactions bearing an appropriate relation to this state.

(c) If one of the following provisions of this title specifies the applicable law, that provision governs and a contrary agreement is effective only to the extent permitted by the law so specified:

(1) Code Section 11-2-402;

(2) Code Sections 11-2A-105 and 11-2A-106;

(3) Code Section 11-4-102;

(4) Code Section 11-4A-507;

(5) Code Section 11-5-116;

(6) Code Section 11-6-103;

(7) Code Section 11-8-110; or

(8) Code Sections 11-9-301 through 11-9-307. (Code 1981, § 11-1-301, enacted by Ga. L. 2015, p. 996, § 3A-1/SB 65.)

**11-1-302. Variation by agreement.**

(a) Except as otherwise provided in subsection (b) of this Code section or elsewhere in this title, the effect of provisions of this title may be varied by agreement.

(b) The obligations of good faith, diligence, reasonableness, and care prescribed by this title may not be disclaimed by agreement. The parties may by agreement determine the standards by which the performance of such obligations is to be measured if such standards are not manifestly unreasonable. Whenever this title requires an action to be taken within a reasonable time, a time that is not manifestly unreasonable may be fixed by agreement.

(c) The presence in certain provisions of this title of the phrase “unless otherwise agreed” or words of similar import does not imply that the effect of other provisions may not be varied by agreement under this Code section. (Code 1981, § 11-1-302, enacted by Ga. L. 2015, p. 996, § 3A-1/SB 65.)

### **11-1-303. Course of performance, course of dealing, and usage of trade.**

(a) A “course of performance” is a sequence of conduct between the parties to a particular transaction that exists if:

(1) The agreement of the parties with respect to the transaction involves repeated occasions for performance by a party; and

(2) The other party, with knowledge of the nature of the performance and opportunity for objection to it, accepts the performance or acquiesces in it without objection.

(b) A “course of dealing” is a sequence of conduct concerning previous transactions between the parties to a particular transaction that is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.

(c) A “usage of trade” is any practice or method of dealing having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to the transaction in question. The existence and scope of such a usage must be proved as facts. If it is established that such a usage is embodied in a trade code or similar record, the interpretation of the record is a question of law.

(d) A course of performance or course of dealing between the parties or usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware is relevant in ascertaining the meaning of the parties’ agreement, may give particular meaning to specific terms of the agreement, and may supplement or qualify the terms of the agreement. A usage of trade applicable in the place in which part of the performance under the agreement is to occur may be so utilized as to that part of the performance.

(e) Except as otherwise provided in subsection (f) of this Code section, the express terms of an agreement and any applicable course of

performance, course of dealing, or usage of trade shall be construed whenever reasonable as consistent with each other. If such a construction is unreasonable:

(1) Express terms prevail over course of performance, course of dealing, and usage of trade;

(2) Course of performance prevails over course of dealing and usage of trade; and

(3) Course of dealing prevails over usage of trade.

(f) Subject to Code Section 11-2-209, a course of performance is relevant to show a waiver or modification of any term inconsistent with the course of performance.

(g) Evidence of a relevant usage of trade offered by one party shall not be admissible unless that party has given the other party notice that the court finds sufficient to prevent unfair surprise to the other party. (Code 1981, § 11-1-303, enacted by Ga. L. 2015, p. 996, § 3A-1/SB 65.)

#### **11-1-304. Obligation of good faith.**

Every contract or duty within this title imposes an obligation of good faith in its performance and enforcement. (Code 1981, § 11-1-304, enacted by Ga. L. 2015, p. 996, § 3A-1/SB 65.)

#### **11-1-305. Remedies to be liberally administered.**

(a) The remedies provided by this title shall be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed but neither consequential or special damages nor penal damages may be had except as specifically provided in this title or by other rule of law.

(b) Any right or obligation declared by this title shall be enforceable by action unless the provision declaring it specifies a different and limited effect. (Code 1981, § 11-1-305, enacted by Ga. L. 2015, p. 996, § 3A-1/SB 65.)

#### **11-1-306. Waiver or renunciation of claim or right after breach.**

A claim or right arising out of an alleged breach may be discharged in whole or in part without consideration by agreement of the aggrieved party in an authenticated record. (Code 1981, § 11-1-306, enacted by Ga. L. 2015, p. 996, § 3A-1/SB 65.)



**11-1-307. Prima-facie evidence by third party documents.**

A document in due form purporting to be a bill of lading, policy or certificate of insurance, official weigher's or inspector's certificate, consular invoice, or any other document authorized or required by the contract to be issued by a third party shall be prima-facie evidence of its own authenticity and genuineness and of the facts stated in the document by the third party. (Code 1981, § 11-1-307, enacted by Ga. L. 2015, p. 996, § 3A-1/SB 65.)

**11-1-308. Performance or acceptance under reservation of rights.**

(a) A party who, with explicit reservation of rights, performs or promises performance or assents to performance in a manner demanded or offered by the other party does not thereby prejudice the rights reserved. Such words as "without prejudice," "under protest," or the like are sufficient.

(b) Subsection (a) of this Code section shall not apply to an accord and satisfaction. (Code 1981, § 11-1-308, enacted by Ga. L. 2015, p. 996, § 3A-1/SB 65.)

**11-1-309. Option to accelerate at will.**

A term providing that one party or that party's successor in interest may accelerate payment or performance or require collateral or additional collateral "at will" or when the party "deems itself insecure" or words of similar import shall be construed to mean that the party shall have power to do so only if that party in good faith believes that the prospect of payment or performance is impaired. The burden of establishing lack of good faith is on the party against whom the power has been exercised. (Code 1981, § 11-1-309, enacted by Ga. L. 2015, p. 996, § 3A-1/SB 65.)

**11-1-310. Subordinated obligations.**

An obligation may be issued as subordinated to performance of another obligation of the person obligated, or a creditor may subordinate its right to performance of an obligation by agreement with either the person obligated or another creditor of the person obligated. Such a subordination does not create a security interest as against either the common debtor or a subordinated creditor. (Code 1981, § 11-1-310, enacted by Ga. L. 2015, p. 996, § 3A-1/SB 65.)

ARTICLE 2

SALES

Part 1		Part 4	
Short Title, General Construction, and Subject Matter		Title, Creditors, and Good Faith Purchasers	
Sec.		Sec.	
11-2-103.	Definitions and index of definitions.	11-2-401.	Passing of title; reservation for security; limited application of this Code section.
11-2-104.	Definitions: “merchant”; “between merchants”; “financing agency.”		
Part 2		Part 5	
Form, Formation, and Readjustment of Contract		Performance	
11-2-202.	Final written expression; parol or extrinsic evidence.	11-2-503.	Manner of seller’s tender of delivery.
11-2-208.	Course of performance or practical construction.	11-2-505.	Seller’s shipment under reservation.
		11-2-506.	Rights of financing agency.
		11-2-509.	Risk of loss in the absence of breach.
Part 3		Part 6	
General Obligation and Construction of Contract		Breach, Repudiation, and Excuse	
11-2-310.	Open time for payment or running of credit; authority to ship under reservation.	11-2-605.	Waiver of buyer’s objections by failure to particularize.
11-2-323.	Form of bill of lading required in overseas shipment; “overseas.”		
		Part 7	
		Remedies	
		11-2-705.	Seller’s stoppage of delivery in transit or otherwise.

**Law reviews.** — For article, “Rethinking the Commercial Law Treaty,” see 45 Ga. L. Rev. 343 (2011).

PART 1

SHORT TITLE, GENERAL CONSTRUCTION, AND SUBJECT MATTER

**11-2-101. Short title.**

JUDICIAL DECISIONS

**Coverage of article.** — Article 2 of the Georgia Commercial Code, O.C.G.A. § 11-2-101 et seq., applied to a contract because the sale of goods, the dirt which the seller offered to furnish to the buyer, was the predominant purpose of the con-

templated transaction. Furthermore, the trial court did not err in putting the question of predominant purpose to the jury because the evidence permitted a rational jury to resolve this issue in a way that would lead to a conclusion that the sale of goods under O.C.G.A. § 11-2-107(1) was

the predominant purpose of the contemplated transaction. *Paramount Contr. Co. v. DPS Indus.*, 309 Ga. App. 113, 709 S.E.2d 288 (2011).

**Cited in** *Jones v. Baran Co., LLC*, 290 Ga. App. 578, 660 S.E.2d 420 (2008).

## RESEARCH REFERENCES

**Am. Jur. Pleading and Practice Forms.** — 6 Am. Jur. Pleading and Practice Forms, Commercial Code, § 2:2.

### 11-2-102. Scope; certain security and other transactions excluded from this article.

## JUDICIAL DECISIONS

**Purchase and processing of car skeletons.** — Seller's testimony established that the UCC applied to an oral agreement concerning the purchase and processing of car skeletons, as car skeletons or other scrap were considered "goods" under O.C.G.A. § 11-2-102. *Henry v. Blankenship*, 284 Ga. App. 578, 644 S.E.2d 419 (2007).

**Secured transactions.** — While it appeared that O.C.G.A. § 9-3-24, rather than O.C.G.A. § 11-2-725, would most

likely apply to defendant collection attorney's state court deficiency action against plaintiff consumer, and it was not for the federal court to say what the Georgia courts would hold, the uncertainty meant there was no intentional unfair conduct and the consumer's Fair Debt Collection Practices Act claim was dismissed; language in O.C.G.A. § 11-2-201 excluded "secured transactions" from § 11-2-201. *Almand v. Reynolds & Robin, P.C.*, 485 F. Supp. 2d 1361 (M.D. Ga. 2007).

### 11-2-103. Definitions and index of definitions.

(1) In this article unless the context otherwise requires:

- (a) "Buyer" means a person who buys or contracts to buy goods.
- (b) Reserved.
- (c) "Receipt" of goods means taking physical possession of them.
- (d) "Seller" means a person who sells or contracts to sell goods.

(2) Other definitions applying to this article or to specified parts thereof, and the Code sections in which they appear are:

"Acceptance." Code Section 11-2-606.

"Banker's credit." Code Section 11-2-325.

"Between merchants." Code Section 11-2-104.

"Cancellation." Code Section 11-2-106(4).

"Commercial unit." Code Section 11-2-105.



- “Confirmed credit.” Code Section 11-2-325.
- “Conforming to contract.” Code Section 11-2-106.
- “Contract for sale.” Code Section 11-2-106.
- “Cover.” Code Section 11-2-712.
- “Entrusting.” Code Section 11-2-403.
- “Financing agency.” Code Section 11-2-104.
- “Future goods.” Code Section 11-2-105.
- “Goods.” Code Section 11-2-105.
- “Identification.” Code Section 11-2-501.
- “Installment contract.” Code Section 11-2-612.
- “Letter of credit.” Code Section 11-2-325.
- “Lot.” Code Section 11-2-105.
- “Merchant.” Code Section 11-2-104.
- “Overseas.” Code Section 11-2-323.
- “Person in position of seller.” Code Section 11-2-707.
- “Present sale.” Code Section 11-2-106.
- “Sale.” Code Section 11-2-106.
- “Sale on approval.” Code Section 11-2-326.
- “Sale or return.” Code Section 11-2-326.
- “Termination.” Code Section 11-2-106.

(3) “Control” as provided in Code Section 11-7-106 and the following definitions in other articles of this title apply to this article:

- “Check.” Code Section 11-3-104.
- “Consignee.” Code Section 11-7-102.
- “Consignor.” Code Section 11-7-102.
- “Consumer goods.” Code Section 11-9-102.
- “Dishonor.” Code Section 11-3-502.
- “Draft.” Code Section 11-3-104.

(4) In addition Article 1 of this title contains general definitions and principles of construction and interpretation applicable throughout this article. (Code 1933, § 109A-2—103, enacted by Ga. L. 1962, p. 156, § 1;

Ga. L. 2001, p. 362, § 4; Ga. L. 2010, p. 481, § 2-2/HB 451; Ga. L. 2015, p. 996, § 3B-1/SB 65.)

**The 2010 amendment**, effective May 27, 2010, substituted “‘Control’ as provided in Code Section 11-7-106 and the” for “The” at the beginning of subsection (3). See the Editor’s notes for applicability.

**The 2015 amendment**, effective January 1, 2016, in subsection (b), substituted “Reserved” for “‘Good faith’ in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade”.

**Editor’s notes.** — Ga. L. 2010, p. 481, § 3-1, not codified by the General Assembly, provides that: “This Act applies to a document of title that is issued or a bailment that arises on or after the effective date of this Act. This Act does not apply to a document of title that is issued or a bailment that arises before the effective date of this Act even if the document of title or bailment would be subject to this Act if the document of title had been issued or bailment had arisen on or after the effective date of this Act. This Act does not apply to a right of action that has accrued before the effective date of this Act.” This Act became effective May 27, 2010.

Ga. L. 2010, p. 481, § 3-2, not codified by the General Assembly, provides that: “A document of title issued or a bailment that arises before the effective date of this Act and the rights, documents, and interests flowing from that document or bailment are governed by any statute or other rule amended or repealed by this Act as if such amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute or other rule.” This Act became effective May 27, 2010.

Ga. L. 2015, p. 996, § 1-1/SB 65, not codified by the General Assembly, provides: “(a) This Act shall be known and may be cited as the ‘Debtor-Creditor Uniform Law Modernization Act of 2015.’

“(b) To promote consistency among the states, it is the intent of the General Assembly to modernize certain existing uniform laws promulgated by the Uniform Law Commission affecting debtor and creditor rights, responsibilities, and relationships and other federally recognized laws affecting such rights, responsibilities, and relationships.”

## JUDICIAL DECISIONS

### “Good Faith.”

Motor home seller’s renewed motion for judgment as a matter of law was denied because the buyers presented sufficient evidence to support the jury verdict in their favor as to the state law breach of implied warranty claims as the buyers presented evidence showing that they were the real buyers of the motor home even though the legal transaction was done in the name of a corporate entity and the seller could not challenge the buyers’ standing to assert breach of warranty claims because the seller assured the buyers that they were covered under the motor home’s warranty and that the warranty was being honored; testimony of the seller’s service manager, that the buyers were entitled to the benefits of the warranty, was sufficient to establish that they were “buyers” under O.C.G.A. § 11-2-103.

*Gill v. Bluebird Body Co.*, No. 5:02-CV-328 (CAR), 2005 U.S. Dist. LEXIS 4611 (M.D. Ga. Jan. 21, 2005).

Consumers, whose O.C.G.A. § 11-2-103 claim for breach of express warranty was unsuccessful, but whose claim for breach of implied warranty of merchantability was successful, were entitled to reasonable attorney’s fees based upon a rate that was about average for other consumer law attorneys in Georgia; however, the number of compensable hours was reduced to exclude work done on the unsuccessful claims. *Gill v. Bluebird Body Co.*, 353 F. Supp. 2d 1265 (M.D. Ga. Jan. 28, 2005).

**No support for limitations.** — When plaintiff Jobber petroleum distributors’ only allegations of wrongdoing was defendant oil company’s purported recapture of the cost of a prompt-pay discount when setting its price, and the parties’ contract

imposed no limits on the costs that could be recouped in setting the price, the good-faith safe harbor provided in O.C.G.A. § 11-2-305(2) applied; O.C.G.A. § 11-2-103 did not support imposing fundamental substantive limitations on the pricing methodology set out in the con-

tract. *Autry Petroleum Co. v. BP Prods. North America, Inc.*, No. 08-11607, 2009 U.S. App. LEXIS 13978 (11th Cir. June 26, 2009) (Unpublished).

**Cited** in *Imex Int'l v. Wires Eng'g*, 261 Ga. App. 329, 583 S.E.2d 117 (2003).

#### **11-2-104. Definitions: “merchant”; “between merchants”; “financing agency.”**

(1) “Merchant” means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.

(2) “Financing agency” means a bank, finance company, or other person who in the ordinary course of business makes advances against goods or documents of title or who by arrangement with either the seller or the buyer intervenes in ordinary course to make or collect payment due or claimed under the contract for sale, as by purchasing or paying the seller’s draft or making advances against it or by merely taking it for collection whether or not documents of title accompany or are associated with the draft. “Financing agency” includes also a bank or other person who similarly intervenes between persons who are in the position of seller and buyer in respect to the goods (Code Section 11-2-707).

(3) “Between merchants” means in any transaction with respect to which both parties are chargeable with the knowledge or skill of merchants. (Code 1933, § 109A-2—104, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 2010, p. 481, § 2-3/HB 451.)

**The 2010 amendment**, effective May 27, 2010, inserted “or are associated with” near the end of the first sentence of subsection (2). See the Editor’s notes for applicability.

**Editor’s notes.** — Ga. L. 2010, p. 481, § 3-1, not codified by the General Assembly, provides that: “This Act applies to a document of title that is issued or a bailment that arises on or after the effective date of this Act. This Act does not apply to a document of title that is issued or a bailment that arises before the effective date of this Act even if the document of title or bailment would be subject to this Act if the document of title had been

issued or bailment had arisen on or after the effective date of this Act. This Act does not apply to a right of action that has accrued before the effective date of this Act.” This Act became effective May 27, 2010.

Ga. L. 2010, p. 481, § 3-2, not codified by the General Assembly, provides that: “A document of title issued or a bailment that arises before the effective date of this Act and the rights, documents, and interests flowing from that document or bailment are governed by any statute or other rule amended or repealed by this Act as if such amendment or repeal had not occurred and may be terminated, com-



pleted, consummated, or enforced under that statute or other rule.” This Act became effective May 27, 2010.

### JUDICIAL DECISIONS

**No dispute as to merchant status.** — Although usually whether a party was a “merchant” for purposes of sale transactions under the Uniform Commercial Code was a question of law for a court, in a disputed peanut commodities transaction, there was no dispute that the parties were both merchants. *Brooks Peanut Co. v. Great S. Peanut, LLC*, 322 Ga. App. 801, 746 S.E.2d 272 (2013).

**Attorney fees.** — Consumers, whose O.C.G.A. § 11-2-104 claim for breach of implied warranty of merchantability was

successful, were entitled to reasonable attorney’s fees based upon a rate that was about average for other consumer law attorneys in Georgia; however, the number of compensable hours was reduced to exclude work done on the unsuccessful claims. *Gill v. Bluebird Body Co.*, 353 F. Supp. 2d 1265 (M.D. Ga. Jan. 28, 2005).

**Cited in** *Imex Int’l v. Wires Eng’g*, 261 Ga. App. 329, 583 S.E.2d 117 (2003); *In re Tucker*, No. 12-53285-JDW, 2013 Bankr. LEXIS 2664 (Bankr. M.D. Ga. June 25, 2013).

## 11-2-105. Definitions: transferability; “goods”; “future” goods; “lot”; “commercial unit.”

### JUDICIAL DECISIONS

#### ANALYSIS

#### GENERAL CONSIDERATION FUNGIBLE GOODS

##### General Consideration

**Cited in** *SunTrust Bank v. Venable*, 299 Ga. 655, 791 S.E.2d 5 (2016).

##### Fungible Goods

**Peanuts were a farm commodity**, and peanuts were also “goods” for pur-

poses of applying the Statute of Frauds within the Uniform Commercial Code. *Brooks Peanut Co. v. Great S. Peanut, LLC*, 322 Ga. App. 801, 746 S.E.2d 272 (2013).

### RESEARCH REFERENCES

**ALR.** — What constitutes “future goods” within scope of U.C.C. Article 2, 48 A.L.R.6th 475.

Electricity, gas, or water furnished by

public utility or alternative supplier as “goods” within provisions of Uniform Commercial Code, Article 2 on sales, 97 A.L.R.6th 1.

## 11-2-106. Definitions: “contract”; “agreement”; “contract for sale”; “sale”; “present sale”; “conforming” to contract; “termination”; “cancellation.”

### JUDICIAL DECISIONS

#### ANALYSIS

#### CONTRACT FOR SALE

Contract for Sale

**Buyer as titled owner.** — Although a warranty of merchantability was implied in any sale of goods under O.C.G.A. § 11-2-314, the warranty only ran to a buyer in privity of contract with the seller and did not pass to a second or subsequent purchaser; thus, buyers who were not

placed on the title and the title transferees had no cause of action against the seller under Georgia law under O.C.G.A. § 11-2-106(1) for breach of implied warranties because of their lack of privity as original purchasers. *Gill v. Blue Bird Body Co.*, No. 05-10466, 2005 U.S. App. LEXIS 11626 (11th Cir. June 17, 2005).

11-2-107. Goods to be severed from realty; recording.

JUDICIAL DECISIONS

**Applicability of the Georgia Commercial Code to a contract for dirt.** — Article 2 of the Georgia Commercial Code, O.C.G.A. § 11-2-101 et seq., applied to a contract because the sale of goods, the dirt which the seller offered to furnish to the buyer, was the predominant purpose of the contemplated transaction. Furthermore, the trial court did not err in putting the question of predominant purpose to the jury because the evidence permitted a rational jury to resolve this issue in a way that would lead to a conclusion that the sale of goods under O.C.G.A.

§ 11-2-107(1) was the predominant purpose of the contemplated transaction. *Paramount Contr. Co. v. DPS Indus.*, 309 Ga. App. 113, 709 S.E.2d 288 (2011).

**Dirt was a good.** — Dirt was a “good” only if the dirt was severed from the land by the seller, O.C.G.A. § 11-2-107(1), so the separation of fill dirt from the land was a necessary component of the sale of dirt, not the dirt’s transportation to a construction site after sale. *Paramount Contr. Co. v. DPS Indus.*, 309 Ga. App. 113, 709 S.E.2d 288 (2011).

PART 2

FORM, FORMATION, AND READJUSTMENT OF CONTRACT

11-2-201. Formal requirements; statute of frauds.

**Law reviews.** — For survey article on construction law for the period from June 1, 2002 through May 31, 2003, see 55 *Mercer L. Rev.* 85 (2003). For article, “The

Cost of Consent: Optimal Standardization in the Law of Contract,” see 58 *Emory L.J.* 1401 (2009).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION  
MERCHANTS’ CONFIRMATIONS  
ACTIONS

General Consideration

**Sufficient evidence that bank was holder of note.** — In a bank’s suit against the guarantor of a note, the affidavit of the bank’s vice-president established that the note was among the bank’s

business records and in the bank’s possession; as such, the bank submitted competent proof that the bank was the holder of the note for purposes of the bank’s summary judgment motion. *Salahat v. FDIC*, 298 Ga. App. 624, 680 S.E.2d 638 (2009).

**Cited** in *Isbell v. Credit Nation Lending*

**General Consideration (Cont'd)**

Serv., LLC, 319 Ga. App. 19, 735 S.E.2d 46 (2012); *Brooks Peanut Co. v. Great S. Peanut, LLC*, 322 Ga. App. 801, 746 S.E.2d 272 (2013).

**Merchants' Confirmations**

**Confirmation order of broker sufficient writing.** — As there was evidence from which it could be inferred that a peanut commodities broker's confirmation order was a writing that was signed by both parties to the transaction, through the broker as their agent, and that the confirmation was signed by the sender's agent such that it was sufficient against the sender, the seller could not rely on a defense under the Statute of Frauds to the buyer's claims. *Brooks Peanut Co. v. Great S. Peanut, LLC*, 322 Ga. App. 801, 746 S.E.2d 272 (2013).

**Invoices held to be written confirmation of the contract, etc.**

Italian companies that sold goods to a Georgia corporation were not required to obtain a certificate of authority from the State of Georgia prior to doing business in Georgia, and Georgia courts had jurisdiction over actions which the Italian companies filed against the Georgia corporation after they delivered goods, submitted invoices for payment, but were not fully paid. *Imex Int'l v. Wires Eng'g*, 261 Ga. App. 329, 583 S.E.2d 117 (2003).

**Preprinted "limited warranty" language.** — Under O.C.G.A. § 13-2-2(7), preprinted "limited warranty" language on the back of a confirmation had no effect because it directly contradicted the full warranty language that was typed on the front of the preprinted confirmation form; the court erred when it relied on this warranty to bar claims for lost profits or other special damages. *Authentic Architectural Millworks, Inc. v. SCM Group USA, Inc.*, 262 Ga. App. 826, 586 S.E.2d 726 (2003).

**Deposition testimony of merchant's representative sufficient to form oral agreement.** — When a car dealer admitted that a contract existed for the sale of a specific quantity of goods, namely, one vehicle, via the dealer's representative's deposition, but on different terms and

conditions than those alleged by the car's potential buyer, the oral agreement between the parties was enforceable under the exception to the statute of frauds set forth in O.C.G.A. § 11-2-201(3)(b). *Jones v. Baran Co., LLC*, 290 Ga. App. 578, 660 S.E.2d 420 (2008).

**Objection requirements of O.C.G.A.** §§ 11-2-201(2), 11-2-202, and 11-2-207 applied to work orders issued by a home improvement store to a contractor for the purchase of carpeting because the contractor's installation service was incidental to the purchase of carpeting by the store's customers. On the other hand, change orders that dealt with services that the contractor was asked to provide over and above the initial installation of the carpeting were not subject to the requirements of the Uniform Commercial Code. *Ricciardelli v. Home Depot U.S.A., Inc.*, No. 08-10756, 2009 U.S. Dist. LEXIS 123344 (DC Jan. 15, 2009).

**Actions**

**Failure to object to goods constituted acceptance and formed contract.** — Under the merchant rule in O.C.G.A. § 11-2-201(2), a hospital's failure to object in writing to a medical supplier's invoice for pumps within ten days of receipt constituted the hospital's acceptance of the goods and formed an enforceable contract, even though the hospital's purchase order noted that the purchase was contingent on approval by the hospital's board of directors. *Ardus Med., Inc. v. Emanuel County Hosp. Auth.*, 558 F. Supp. 2d 1301 (S.D. Ga. 2008).

**Party admitting contract may not claim benefit of statute of frauds.**

An oral agreement for the sale of a horse for \$35,000 was enforceable under O.C.G.A. § 11-2-201(3)(b); the seller admitted that a contract was made for the sale of one horse. *Rowland v. Scarborough Farms, LLC*, 285 Ga. App. 831, 648 S.E.2d 151 (2007).

**Secured transactions.** — While it appeared that O.C.G.A. § 9-3-24, rather than O.C.G.A. § 11-2-725, would most likely apply to defendant collection attorney's state court deficiency action against plaintiff consumer, and it was not for the federal court to say what the Georgia



courts would hold, the uncertainty meant there was no intentional unfair conduct and the consumer's Fair Debt Collection Practices Act claim was dismissed; language in O.C.G.A. § 11-2-201 excluded "secured transactions" from § 11-2-201. *Almand v. Reynolds & Robin, P.C.*, 485 F. Supp. 2d 1361 (M.D. Ga. 2007).

**Summary judgment.** — Lender and attorney were properly granted summary judgment against a home buyer's breach of contract, fraud, and conspiracy claims, as: (1) there was no evidence of a written purchase agreement for the home and the land it was placed on; and (2) a simple reading of the contract by the buyer would have protected against any alleged mis-

representations; moreover, to the extent that the home buyer's claim of a conspiracy depended upon the viability of the fraud and breach of contract claims, it also failed. *Parrish v. Jackson W. Jones, P.C.*, 278 Ga. App. 645, 629 S.E.2d 468 (2006).

Because an oral contract concerning the disposal of car skeletons on property operated as a junkyard did not violate the O.C.G.A. §§ 11-2-201 and 11-2-725, the trial court erred in granting summary judgment against a seller on his counterclaim for fraud, due to the option holder's repudiation of the contract in filing for specific performance. *Henry v. Blankenship*, 284 Ga. App. 578, 644 S.E.2d 419 (2007).

### RESEARCH REFERENCES

**Am. Jur. Pleading and Practice Forms.** — 6 Am. Jur. Pleading and Practice Forms, Commercial Code, § 2:11.

**ALR.** — Satisfaction of statute of frauds by e-mail, 110 A.L.R.5th 277.

Applicability of UCC Article 2 to mixed contracts for sale of consumer goods and services, 1 A.L.R.7th 3.

Applicability of UCC Article 2 to mixed contracts for sale of goods and services: distributorship, franchise, and similar business contracts, 8 A.L.R.7th 4.

Applicability of UCC Article 2 to mixed contracts for sale of business goods and services: manufacturing, construction, and similar contracts, 15 A.L.R.7th 7.

### 11-2-202. Final written expression; parol or extrinsic evidence.

Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented:

(a) By course of performance, course of dealing, or usage of trade (Code Section 11-1-303); and

(b) By evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement. (Code 1933, § 109A-2—202, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 2015, p. 996, § 3B-2/SB 65.)

**The 2015 amendment**, effective January 1, 2016, substituted the present provisions of paragraph (a) for the former provisions, which read: "By course of dealing or usage of trade (Code Section

11-1-205) or by course of performance (Code Section 11-2-208); and".

**Editor's notes.** — Ga. L. 2015, p. 996, § 1-1/SB 65, not codified by the General Assembly, provides: "(a) This Act shall be

known and may be cited as the ‘Debtor-Creditor Uniform Law Modernization Act of 2015.’

“(b) To promote consistency among the states, it is the intent of the General Assembly to modernize certain existing

uniform laws promulgated by the Uniform Law Commission affecting debtor and creditor rights, responsibilities, and relationships and other federally recognized laws affecting such rights, responsibilities, and relationships.”

## JUDICIAL DECISIONS

### ANALYSIS

#### CONSTRUCTION AND APPLICATION PROCEDURE

##### Construction and Application

**Actual agreement not contained in one document.** — Trial court correctly considered matters outside a buyer’s request for quotation (RFQ) to determine the intended final obligations of the buyer and a seller under their agreement because the evidence supported the trial court’s finding that the parties’ actual agreement was not contained in any one document, such as the RFQ, since the RFQ anticipated that necessary terms such as material specifications, quantities, pricing information, and delivery dates would be supplied as part of the bidding and ordering process; because before, during, and after accepting the seller’s bid, the buyer was aware of the seller’s overseas supply chain and did not object to the seller’s stated reliance on a promised three-month forecast to obtain material, the trial court did not err in construing the written terms of the contract in light of that understanding and thereby denying the buyer cover damages for items exceeding the usage data provided to the seller. *Scovill Fasteners, Inc. v. Northern Metals, Inc.*, 303 Ga. App. 246, 692 S.E.2d 840 (2010).

**Parol evidence admissible if no final sales price.** — Where written contracts were not intended by the parties as a complete and exclusive statement of the agreed upon terms, because only a floor price, rather than the final sales price, was stated, parol evidence as to the parties’ prescribed method for fixing the final price was admissible. *Golden Peanut Co. v. Bass*, 275 Ga. 145, 563 S.E.2d 116 (2002), cert. denied, 537 U.S. 886, 123 S. Ct. 32, 154 L. Ed. 2d 146 (2002).

##### Procedure

**Objection requirements** of O.C.G.A. §§ 11-2-201(2), 11-2-202, and 11-2-207 applied to work orders issued by a home improvement store to a contractor for the purchase of carpeting because the contractor’s installation service was incidental to the purchase of carpeting by the store’s customers. On the other hand, change orders that dealt with services that the contractor was asked to provide over and above the initial installation of the carpeting were not subject to the requirements of the Uniform Commercial Code. *Ricciardelli v. Home Depot U.S.A., Inc.*, No. 08-10756, 2009 U.S. Dist. LEXIS 123344 (DC Jan. 15, 2009).

## RESEARCH REFERENCES

**ALR.** — Applicability of UCC Article 2 to mixed contracts for sale of consumer goods and services, 1 A.L.R.7th 3.

Applicability of UCC Article 2 to mixed contracts for sale of goods and services: distributorship, franchise, and similar business contracts, 8 A.L.R.7th 4.

Applicability of UCC Article 2 to mixed contracts for sale of business goods and services: manufacturing, construction, and similar contracts, 15 A.L.R.7th 7.

**11-2-204. Formation in general.****JUDICIAL DECISIONS****Formalities required for contract formation reduced.**

In a case in which a steel company signed a purchase order from a general contractor after it had rejected the terms of the purchase order and had submitted a counter-offer to the general contractor, a district court, in granting summary judgment in favor of the general contractor, correctly concluded that the record evidence disclosed no material fact in dispute; no reasonable jury could find that the general contractor and the steel company agreed to terms of a steel supply contract for the construction project. The requirement for a meeting of the minds necessary under O.C.G.A. § 13-3-2 had not been met, and there was no agreement between the parties under O.C.G.A. § 11-2-204. *South Cent. Steel, Inc. v. McKnight Constr. Co.*, No. 07-11292, 2008 U.S. App. LEXIS 1771 (11th Cir. Jan. 25, 2008) (Unpublished).

**No meeting of the minds or mutual-ity established.** — In a cottonseed buyer's suit for breach of contract against a cottonseed seller, the trial court properly granted summary judgment to the seller as no mutuality as to the contract terms existed since the buyer never obtained credit approval. Further, the buyer's reli-

ance on the purported promise was unreasonable as a matter of law; thus, promissory estoppel did not apply as the buyer never received credit approval, which was an essential element of the cottonseed business. *AgriCommodities, Inc. v. J. D. Heiskell & Co.*, 297 Ga. App. 210, 676 S.E.2d 847 (2009).

**Valid, enforceable contract.**

When a car dealer admitted that a contract existed for the sale of a specific quantity of goods, namely, one vehicle, via the dealer's representative's deposition, but on different terms and conditions than those alleged by the car's potential buyer, the oral agreement between the parties was enforceable under the exception to the statute of frauds set forth in O.C.G.A. § 11-2-201(3)(b). *Jones v. Baran Co., LLC*, 290 Ga. App. 578, 660 S.E.2d 420 (2008).

Under O.C.G.A. § 11-2-204(3), a contract between a hospital and medical supplier consisting of a contingency-based purchase order and an invoice did not fail for indefiniteness because, by the deliverance of the goods and the acceptance of the goods without protest in writing within ten days of receipt, the parties were deemed to have agreed upon quantity and price terms. *Ardus Med., Inc. v. Emanuel County Hosp. Auth.*, 558 F. Supp. 2d 1301 (S.D. Ga. 2008).

**RESEARCH REFERENCES**

**ALR.** — Applicability of UCC Article 2 to mixed contracts for sale of consumer goods and services, 1 A.L.R.7th 3.

Applicability of UCC Article 2 to mixed contracts for sale of goods and services: distributorship, franchise, and similar business contracts, 8 A.L.R.7th 4.

Applicability of UCC Article 2 to mixed contracts for sale of business goods and services: manufacturing, construction, and similar contracts, 15 A.L.R.7th 7.

**11-2-207. Additional terms in acceptance or confirmation.****JUDICIAL DECISIONS**

**Written agreement, rather than oral agreement, was contract to be followed.** — Jury's finding that the air-

craft purchase agreement (APA), rather than an oral agreement, was the contract between the parties was supported by the



evidence because the plaintiff's own complaint asserted that the APA was the agreement between the parties and the Uniform Commercial Code, specifically O.C.G.A. § 11-2-207, requires the writing to be followed. *Eagle Jets, LLC v. Atlanta Jet, Inc.*, 321 Ga. App. 386, 740 S.E.2d 439 (2013).

**Objection requirements** of O.C.G.A. §§ 11-2-201(2), 11-2-202, and 11-2-207 applied to work orders issued by a home improvement store to a contractor for the

purchase of carpeting because the contractor's installation service was incidental to the purchase of carpeting by the store's customers. On the other hand, change orders that dealt with services that the contractor was asked to provide over and above the initial installation of the carpeting were not subject to the requirements of the Uniform Commercial Code. *Ricciardelli v. Home Depot U.S.A., Inc.*, No. 08-10756, 2009 U.S. Dist. LEXIS 123344 (DC Jan. 15, 2009).

### 11-2-208. Course of performance or practical construction.

Reserved. Repealed by Ga. L. 2015, p. 996, § 3B-3/SB 65, effective January 1, 2016.

**Editor's notes.** — This Code section was based on Code 1933, § 109A-2—208, enacted by Ga. L. 1962, p. 156, § 1.

### 11-2-210. Delegation of performance; assignment of rights.

#### JUDICIAL DECISIONS

#### **Claim for breach of warranty is assignable.**

While a warranty cannot be assigned, the Uniform Commercial Code, O.C.G.A. § 11-1-101 et seq., does authorize the assignment of a purchaser's claim for an existing breach of the warranty—this assignment of the purchaser's claim, indeed, is expressly authorized by O.C.G.A. § 11-2-210(2)—any language, however informal, will be sufficient to constitute a legal assignment, if it shows the intention of the owner of the right to transfer it instantly, so that it will be the property of the transferee. Plaintiff's subrogation receipts clearly constituted sufficient evidence of a legal assignment of the implied warranty claim. *Kraft Reinsurance Ir., Ltd. v. Pallets Acquisitions, LLC*, No. 1:09-CV-3531-AT, 2011 U.S. Dist. LEXIS 131308 (N.D. Ga. Sept. 30, 2011).

**Repudiation of subcontract.** — Trial court could not have properly granted

summary judgment against a general contractor by reason of its apparent acquiescence in a subcontractor's breach of the subcontract by reason of its assignment because the contractor testified that it had a substantial interest in maintaining the subcontractor as the performer of the subcontract under O.C.G.A. § 11-2-210(1), and that it looked for, but was unable to retain, any other asphalt provider besides the assignee; the subcontractor could not prevail on summary judgment in the wake of its repudiation of the subcontract, including the provision not to delegate performance. *Western Sur. Co. v. APAC-Southeast, Inc.*, 302 Ga. App. 654, 691 S.E.2d 234, cert. denied, No. S10C1140, 2010 Ga. LEXIS 673 (Ga. 2010).

**Cited** in *Callaway Blue Springs, LLLP v. West Basin Capital, LLC*, 341 Ga. App. 535, 801 S.E.2d 325 (2017).

## RESEARCH REFERENCES

**Am. Jur. Pleading and Practice**

**Forms.** — 6 Am. Jur. Pleading and Practice Forms, Commercial Code, § 2:75.

## PART 3

GENERAL OBLIGATION AND CONSTRUCTION OF  
CONTRACT**11-2-302. Unconscionable contract or clause.**

**Law reviews.** — For article, “Giving Unconscionability More Muscle: Attorney’s Fees as a Remedy for Contractual Overreaching,” see 44 Ga. L. Rev. 317 (2010).

## JUDICIAL DECISIONS

## ANALYSIS

## APPLICATION

**Application****Contract provision not unconscionable.**

Plaintiffs failed to state a claim for breach of express warranty against a vehicle manufacturer and distributor when they did not allege that they presented their vehicles for repairs within the warranty period, and the court would not use the unconscionability provisions of O.C.G.A. § 11-2-302, Cal. Civ. Code § 1670.5, Fla. Stat. § 672.302, 810 ILCS 5/2-302, and Va. Code Ann. § 8.2-302 to strike the time and mileage limitations. Defendants’ knowledge of the alleged defect at the time of sale, standing alone, was insufficient to render the time and mileage limitations unconscionable. *McCabe v. Daimler AG*, No. 1:12-cv-2494-TCB, 2013 U.S. Dist. LEXIS 80161 (N.D. Ga. June 7, 2013).

**Guaranty not unconscionable.** — When the owner of a Chapter 11 debtor

signed a personal guaranty of the debtor’s debt, which included a waiver of defenses clause, in return for the withdrawal of a motion by a creditor for the appointment of a trustee, the guaranty was not unconscionable because the guaranty went through several iterations, the owner read the guaranty’s final terms, and the owner discussed the guaranty with counsel. *Abdulla v. Klosinski*, No. 110-159, 2012 U.S. Dist. LEXIS 137641 (S.D. Ga. Sept. 25, 2012).

**Bank charges not unconscionable.** — While plaintiff bank customers alleged defendant bank had a practice of manipulating the posting of transactions to impose overdraft fees, there was no substantive unconscionability under O.C.G.A. § 11-2-302 as the deposit agreement was consistent with O.C.G.A. § 11-4-303(b) as to the order items were paid. *White v. Wachovia Bank, N.A.*, 563 F. Supp. 2d 1358 (N.D. Ga. 2008).

## RESEARCH REFERENCES

**Am. Jur. Pleading and Practice Forms.** — 6 Am. Jur. Pleading and Practice Forms, Commercial Code, § 2:92.

**ALR.** — Electricity, gas, or water fur-

nished by public utility or alternative supplier as “goods” within provisions of Uniform Commercial Code, Article 2 on sales, 97 A.L.R.6th 1.

**11-2-305. Open price term.****JUDICIAL DECISIONS**

**Good-faith safe harbor applied in petroleum distribution.** — When plaintiff Jobber petroleum distributors' only allegations of wrongdoing was defendant oil company's purported recapture of the cost of a prompt-pay discount when setting its price, and the parties' contract imposed no limits on the costs that could be recouped in setting the price, the

good-faith safe harbor provided in O.C.G.A. § 11-2-305(2) applied; O.C.G.A. § 11-2-103 did not support imposing fundamental substantive limitations on the pricing methodology set out in the contract. *Autry Petroleum Co. v. BP Prods. North America, Inc.*, No. 08-11607, 2009 U.S. App. LEXIS 13978 (11th Cir. June 26, 2009) (Unpublished).

**RESEARCH REFERENCES**

**Am. Jur. Pleading and Practice Forms.** — 6 Am. Jur. Pleading and Practice Forms, Commercial Code, § 2:107.

**ALR.** — Electricity, gas, or water fur-

nished by public utility or alternative supplier as "goods" within provisions of Uniform Commercial Code, Article 2 on sales, 97 A.L.R.6th 1.

**11-2-306. Output, requirements, and exclusive dealings.****RESEARCH REFERENCES**

**Am. Jur. Pleading and Practice Forms.** — 6 Am. Jur. Pleading and Practice Forms, Commercial Code, § 2:143.

**ALR.** — Establishment and construc-

tion of requirements contracts under § 2-306(1) of Uniform Commercial Code, 94 A.L.R.5th 247.

**11-2-309. Absence of specific time provisions; notice of termination.****JUDICIAL DECISIONS**

**Plaintiff did not provide aggregate material within a timely manner.** — Trial court did not err in granting summary judgment in favor of the plaintiff on the defendants' counterclaim for breach of contract because, although the defendants alleged that the plaintiff was required to provide aggregate material within a specific schedule, but, on numerous occasions, it had failed to do so, the defendants failed to point to evidence of the contractual terms imposing the specific schedules, or, in other words, the dates by which

the plaintiff had to deliver the aggregate material for seven projects; and, without pointing to evidence of the contractually required delivery dates for the materials for the seven projects, the defendants could not show that the plaintiff failed to deliver the materials in a timely manner. *Douglas Asphalt Co. v. Martin Marietta Aggregates*, 339 Ga. App. 435, 793 S.E.2d 615 (2016).

**Cited** in *Club Car, Inc. v. Club Car (Quebec) Import, Inc.*, 276 F. Supp. 2d 1276 (S.D. Ga. 2003).



## RESEARCH REFERENCES

**Am. Jur. Pleading and Practice Forms.** — 6 Am. Jur. Pleading and Practice Forms, Commercial Code, § 2:118.

**11-2-310. Open time for payment or running of credit; authority to ship under reservation.**

Unless otherwise agreed:

(a) Payment is due at the time and place at which the buyer is to receive the goods even though the place of shipment is the place of delivery; and

(b) If the seller is authorized to send the goods he or she may ship them under reservation, and may tender the documents of title, but the buyer may inspect the goods after their arrival before payment is due unless such inspection is inconsistent with the terms of the contract (Code Section 11-2-513); and

(c) If delivery is authorized and made by way of documents of title otherwise than by subsection (b) of this Code section then payment is due regardless of where the goods are to be received (i) at the time and place at which the buyer is to receive delivery of the tangible documents or (ii) at the time the buyer is to receive delivery of the electronic documents and at the seller's place of business or if none, the seller's residence; and

(d) Where the seller is required or authorized to ship the goods on credit the credit period runs from the time of shipment but post-dating the invoice or delaying its dispatch will correspondingly delay the starting of the credit period. (Code 1933, § 109A-2—310, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 2010, p. 481, § 2-4/HB 451.)

**The 2010 amendment**, effective May 27, 2010, inserted “or she” near the beginning of paragraph (b); in paragraph (c), inserted “regardless of where the goods are to be received (i)” and substituted “delivery of the tangible documents or (ii) at the time the buyer is to receive delivery of the electronic documents and at the seller's place of business or if none, the seller's residence” for “the documents regardless of where the goods are to be received” near the end; and substituted “post-dating” for “postdating” in the middle of paragraph (d). See the Editor's notes for applicability.

**Editor's notes.** — Ga. L. 2010, p. 481,

§ 3-1, not codified by the General Assembly, provides that: “This Act applies to a document of title that is issued or a bailment that arises on or after the effective date of this Act. This Act does not apply to a document of title that is issued or a bailment that arises before the effective date of this Act even if the document of title or bailment would be subject to this Act if the document of title had been issued or bailment had arisen on or after the effective date of this Act. This Act does not apply to a right of action that has accrued before the effective date of this Act.” This Act became effective May 27, 2010.

Ga. L. 2010, p. 481, § 3-2, not codified by the General Assembly, provides that: “A document of title issued or a bailment that arises before the effective date of this Act and the rights, documents, and interests flowing from that document or bailment are governed by any statute or

other rule amended or repealed by this Act as if such amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute or other rule.” This Act became effective May 27, 2010.

### JUDICIAL DECISIONS

**Cited** in *Babbitt v. State*, 314 Ga. App. 115, 723 S.E.2d 10 (2012).

### RESEARCH REFERENCES

**Am. Jur. Pleading and Practice Forms.** — 6 Am. Jur. Pleading and Practice Forms, Commercial Code, § 2:118.

19A Am. Jur. Pleading and Practice Forms, Payment, § 3.

## 11-2-312. Warranty of title and against infringement; buyer's obligation against infringement.

### JUDICIAL DECISIONS

#### ANALYSIS

#### BREACH OF WARRANTY

#### Breach of Warranty

**Impleaded claims.** — Third-party claims of breach of warranty under O.C.G.A. § 11-2-312(3), and indemnity were proper to implead into a patent infringement case under Fed. R. Civ. P. 14(a) because the essence of the claims were to show that others were liable for any in-

fringement. However, because the claims involved separate areas of law and might be prejudicial or confuse the jury, severance was proper under Fed. R. Civ. P. 42(b). *Tillotson Corp. v. Shijiazhaung Hongray Plastic Prods.*, No. 4:05-CV-0118-RLV, 2006 U.S. Dist. LEXIS 76978 (N.D. Ga. Oct. 23, 2006).

### RESEARCH REFERENCES

**Am. Jur. Pleading and Practice Forms.** — 3 Am. Jur. Pleading and Practice Forms, Automobiles and Highway Traffic, § 66.

**ALR.** — Preemption of state law claim by federal copyright act — nature or type of claim asserted, 77 A.L.R.6th 543.

## 11-2-313. Express warranties by affirmation, promise, description, sample.

**Law reviews.** — For note, “Does the National Childhood Vaccine Injury Compensation Act Really Prohibit Design Defect Claims?: Examining Federal Preemp-

tion in Light of American Home Products Corp. v. Ferrari,” see 26 Ga. St. U.L. Rev. 617 (2010).

## JUDICIAL DECISIONS

## ANALYSIS

## GENERAL CONSIDERATION

## APPLICABILITY

## EVIDENCE

## General Consideration

**Express and implied warranties.**

Trial court erred in denying a corporation's motion for summary judgment on an individual's claim for breach of an express warranty when the individual's three-wheeled motorized scooter tipped over while the individual was operating the scooter in the individual's yard as the individual failed to present any evidence that the scooter was generally unsuitable for use on non-paved and sloped surfaces and, therefore, the individual had not identified any evidence that the scooter did not conform to a salesperson's description. *Foothills Pharms., Inc. v. Powers*, 313 Ga. App. 630, 722 S.E.2d 331 (2012).

**Learned intermediary doctrine.** — Plaintiff's breach of warranty claims against a drug manufacturer to the extent the claims were based upon failure to provide accurate or sufficient information regarding the use of the drug to the decedent, were barred by the learned intermediary doctrine, but the claims were not barred to the extent the claims were based upon failure to provide accurate or sufficient information regarding the use of the drug to others. *Lee v. Mylan Inc.*, 806 F. Supp. 2d 1320 (M.D. Ga. Apr. 15, 2011).

## Applicability

**Statements deemed opinion or commendation.**

Seller's opinions as to the working order of electrical components in a motor home and some other issues did not create a warranty. *Gill v. Bluebird Wanderlodge & Holland Motor Homes*, No. 5:02-CV-328-2(CAR), 2004 U.S. Dist. LEXIS 27436 (M.D. Ga. Feb. 4, 2004).

**Privity between manufacturer and ultimate consumer.** — To the extent the plaintiff's express warranty claim against a drug manufacturer was based upon affirmations of fact or promises to the decedent, the plaintiff asserted a claim upon

which relief could be granted because a manufacturer could extend an express warranty to the ultimate consumer. *Lee v. Mylan Inc.*, 806 F. Supp. 2d 1320 (M.D. Ga. Apr. 15, 2011).

**Medical device.** — In a case arising from surgical implantation of a medical device and the injuries sustained from the device's failure and removal, the plaintiff's claim for breach of express warranty was properly asserted because the manufacturer's limited warranty for the implantable pulse generator met the definition of an express warranty pursuant to O.C.G.A. § 11-2-313(1), and was not preempted under the Medical Device Amendments of 1976, 21 U.S.C. § 360c et seq. *Cline v. Advanced Neuromodulation Sys.*, No. 1:11-CV-4064-AT, 2012 U.S. Dist. LEXIS 123050 (N.D. Ga. June 15, 2012).

## Evidence

**Damages.** — In a consumer's suit against a car dealer for breach of an express warranty, regarding the sale of a used car which the dealer's salesman falsely represented had not been in a wreck, it was not error for the trial court to grant a directed verdict to the dealer because, while the salesman's representation was an express warranty, under O.C.G.A. § 11-2-313(1)(a), the consumer offered no probative evidence of damages. *Mitchell v. Backus Cadillac-Pontiac, Inc.*, 274 Ga. App. 330, 618 S.E.2d 87 (2005).

**Substantial repairs over three-year period.** — Trial court erred in entering summary judgment for a manufacturer on the owners' suit for breach of an express warranty where the owners made 22 trips to the dealership for repairs over a three-year period and, despite the replacement of multiple parts and extensive repairs to the vehicle, the problems continued, including: (1) that the check engine light and the fluid light came on; (2) that the radio's sound quality was inconsis-



Evidence (Cont'd)

tent; (3) that there was engine hesitation and jerking; (4) that squeaking occurred on entering and exiting the vehicle; and

(5) that the operation of the wiper blades was noisy. *Hill v. Mercedes Benz USA, LLC*, 274 Ga. App. 826, 619 S.E.2d 353 (2005).

RESEARCH REFERENCES

**Am. Jur. Pleading and Practice Forms.** — 20A Am. Jur. Pleading and Practice Forms, Products Liability, § 46.

**ALR.** — Statement in advertisements, product brochures or other promotional materials as constituting “affirmation of fact” giving rise to express warranty under UCC § 2-313(1)(a), 83 A.L.R.6th 1.

Statement in product packaging, user manuals, or other product documentation as constituting “affirmation of fact” giving rise to express warranty under UCC § 2-313(1)(a), 84 A.L.R.6th 1.

Oral Statement as constituting “affir-

mation of fact” giving rise to express warranty under UCC § 2-313(1)(a), 88 A.L.R.6th 1.

Statement in contract proposals, contract correspondence, or contract itself as constituting “affirmation of fact” giving rise to express warranty under U.C.C. § 2-313(1)(a), 94 A.L.R.6th 1.

Federal preemption of state common-law products liability claims pertaining to medical devices, implants, and other health-related items, 74 A.L.R. Fed. 2d 1.

11-2-314. Implied warranty: merchantability; usage of trade.

**Law reviews.** — For annual survey on product liability, see 69 Mercer L. Rev. 231 (2017).

JUDICIAL DECISIONS

ANALYSIS

- GENERAL CONSIDERATION
- TORTS
- EXCLUSION OR WAIVER
- EVIDENTIARY ISSUES
- PRIVITY
- DAMAGES

General Consideration

**Implied warranty is raised by statute, etc.**

Under Georgia’s Uniform Commercial Code, O.C.G.A. § 11-2-314(1), a warranty that the goods shall be merchantable is implied in a contract for the goods’ sale if the seller is a merchant with respect to goods of that kind. That warranty protects consumers from defects or conditions existing at the time of sale. *Paulk v. Thomasville Ford Lincoln Mercury, Inc.*, 317 Ga. App. 780, 732 S.E.2d 297 (2012).

**Implied warranties inapplicable to settlement agreements.** — Seller sued a

buyer who rejected the seller’s goods; the parties settled. As the parties’ agreement was a contract to settle litigation, with any sale of goods merely incidental, the implied warranties of merchantability and fitness, O.C.G.A. §§ 11-2-314 and 11-2-315, did not apply to their settlement agreement. *Ole Mexican Foods, Inc. v. Hanson Staple Co.*, 285 Ga. 288, 676 S.E.2d 169 (2009).

**Evidence negated buyer’s claim that vehicle was unmerchantable at time of sale.** — Summary judgment for the seller of a vehicle was proper in a case in which the buyer claimed breach of implied warranties under O.C.G.A.

§ 11-2-314; the buyer's complaints were minor and did not render the vehicle unusable, and the vehicle had 57,000 miles on it when the buyer purchased it, and the fact that the buyer drove it 25,000 more miles before abandoning it at the seller's lot negated the claim that the vehicle was unmerchantable when purchased. *Soto v. CarMax Auto Superstores, Inc.*, 271 Ga. App. 813, 611 S.E.2d 108 (2005).

**Pharmaceutical products.** — Patient who died after taking medicine which a pharmaceutical manufacturer gave to the doctor and which the doctor gave to the patient was not entitled to an extension of any implied warranty existing between the manufacturer and the doctor, and the appellate court upheld the trial court's judgment dismissing claims the patient's spouse filed against the manufacturer, alleging breach of express and implied warranties, but reversed the trial court's judgment dismissing the husband's claims against the manufacturer alleging strict liability and negligent failure to warn. *Bryant v. Hoffmann-La Roche, Inc.*, 262 Ga. App. 401, 585 S.E.2d 723 (2003).

**Federal law on medical devices preempted implied warranty.** — Medical Device Amendments, 21 U.S.C. § 360k, preempted state law claims in a products liability case alleging an implied warranty of merchantability under O.C.G.A. § 11-2-314 with respect to a Precision Spinal Cord Stimulator medical device. *Horn v. Boston Sci. Neuromodulation Corp.*, No. CV409-074, 2011 U.S. Dist. LEXIS 102164 (S.D. Ga. Aug. 26, 2011).

**“Learned intermediary” doctrine.**

Plaintiff's breach of warranty claims against a drug manufacturer, to the extent the claims were based upon failure to provide accurate or sufficient information regarding the use of the drug to the decedent, were barred by the learned intermediary doctrine but the claims were not barred to the extent the claims were based upon failure to provide accurate or sufficient information regarding the use of the drug to others. *Lee v. Mylan Inc.*, 806 F. Supp. 2d 1320 (M.D. Ga. Apr. 15, 2011).

**Essential elements not proved.** — Proof that the car was defective when sold was an essential element of the buyer's claim, which the buyer did not satisfy; the

evidence showed that the buyer drove the used car approximately 26,000 miles before the cooling system began to malfunction. *Dildine v. Town & Country Truck Sales, Inc.*, 259 Ga. App. 732, 577 S.E.2d 882 (2003).

To recover in Georgia under the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301 et seq., a plaintiff must show that a defendant breached the implied warranty of merchantability arising under Georgia law, and summary judgment for a car seller in a case alleging breach of implied warranties under 15 U.S.C. § 2301 et seq., and O.C.G.A. § 11-2-314(1) was correct because the buyers failed to show that car was defective when sold; numerous repairs to the car during first year of ownership were mostly for different items each time, and all of the needed repairs were made. *Crowe v. CarMax Auto Superstores, Inc.*, 272 Ga. App. 249, 612 S.E.2d 90 (2005).

Trial court did not err in granting a seller's motion for summary judgment in a customer's action seeking to recover damages for injuries the customer sustained when the customer was burned from a ceramic, scented-oil burner and alleging, among other things, that the seller breached an implied warranty of merchantability because the trial court's conclusion that the ceramic burner was not defective for the burner's ordinary purpose at the time of sale was supported by the evidence of record; the customer presented no evidence that some defect existed in the item such that it was inappropriate to use for the item's ordinary purpose as a ceramic oil burner other than the mere existence of the customer's injury, and the sellers' owners and employees deposed that the item and others like it were marketed by the manufacturer as oil burners and were displayed as such at various trade shows the seller's personnel attended. *Rivers v. H. S. Beauty Queen, Inc.*, 306 Ga. App. 866, 703 S.E.2d 416 (2010).

**Cited in** *Imex Int'l v. Wires Eng'g*, 261 Ga. App. 329, 583 S.E.2d 117 (2003).

**Torts**

**Liability for food served.** — Trial court erred by granting summary judgment



**Torts (Cont'd)**

ment to a restaurant on a customer's claim that the restaurant served the customer a hamburger that breached the implied warranties of merchantability and fitness for purpose when the hamburger contained a bit of bone that broke the customer's tooth when the customer bit into the hamburger. Because this material question had to be decided by a jury, the trial court erred in its grant of summary judgment to the restaurant. *Mitchell v. BBB Servs. Co.*, 261 Ga. App. 240, 582 S.E.2d 470 (2003).

**Existence of defect.** — In an action in which an insurance company filed suit against a company in a subrogation action to recover money paid by the insurance company to a restaurant in Norcross, Georgia, after a fire destroyed the restaurant, the company's motion for summary judgment was granted on the breach of implied warranty claim; the insurance company proffered no evidence in the record from which a jury could conclude that the defect existed when the power supply left the manufacturing facility or even after it was re-manufactured. *Colony Ins. Co. v. Coca-Cola Co.*, 239 F.R.D. 666 (N.D. Ga. 2007).

**Exclusion or Waiver****Waiver must be clear and certain.**

Because the language "THERE ARE NO ... IMPLIED WARRANTIES WITH RESPECT TO MERCHANTABILITY ... CONCERNING THE VEHICLE, PARTS, OR ACCESSORIES DESCRIBED HEREIN," appeared in bold type and all capital letters in the sales contract, the implied warranty of merchantability was excluded. *Gill v. Bluebird Wanderlodge & Holland Motor Homes*, No. 5:02-CV-328-2(CAR), 2004 U.S. Dist. LEXIS 27436 (M.D. Ga. Feb. 4, 2004).

**Evidentiary Issues****Evidence of defect at time of sale.**

Trial court erred in granting a manufacturer's summary judgment motion on a buyer's breach of the implied warranty of merchantability claim on a ground not raised in the motion because the manufac-

turer argued in its motion that the buyer failed to show that the vehicle was defective at the time it was purchased; at the hearing, the manufacturer claimed that the buyer's expert did not establish that the vehicle was unmerchantable under Georgia law. *Knight v. Am. Suzuki Motor Corp.*, 272 Ga. App. 319, 612 S.E.2d 546 (2005).

Trial court erred in entering summary judgment for a manufacturer on the owners' breach of the implied warranty of merchantability claim as there were triable issues as to the driveability of a car at the time of its delivery where an owner brought the vehicle to the dealership approximately one month after the owner picked it up and had driven only 1,923 miles, and, among other things, there was a recurrent problem with the coolant lamp. *Hill v. Mercedes Benz USA, LLC*, 274 Ga. App. 826, 619 S.E.2d 353 (2005).

**Evidence insufficient to show vehicle not merchantable.** — Because there was no evidence that a vehicle's driveability or usefulness was ever affected by alleged defects, and the purchaser did not allege that the vehicle was ever rendered inoperable or that its capacity to operate as a means of transportation was ever disabled by alleged defects, there was no basis for a decision that the vehicle was not merchantable as guaranteed by the implied warranty pursuant to O.C.G.A. § 11-2-314. *Hines v. Mercedes-Benz USA, LLC*, 358 F. Supp. 2d 1222 (N.D. Ga. 2005).

**Defective product.**

In a consumer's suit against a car dealer for breach of an implied warranty, under 15 U.S.C. § 2310(d)(1) of the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301 et seq., regarding the sale of a used car which the dealer's salesman falsely represented had not been in a wreck, it was not error for the trial court to grant a directed verdict to the dealer because the consumer did not show the vehicle was not merchantable, under O.C.G.A. § 11-2-314(1). *Mitchell v. Backus Cadillac-Pontiac, Inc.*, 274 Ga. App. 330, 618 S.E.2d 87 (2005).

Defendant's compliance with plaintiff's specifications did not eliminate the defendant's duty to supply merchantable pal-



lets; as there were genuine issues of material fact regarding plaintiff's claim for breach of the implied warranty of merchantability, summary judgment was inappropriate. Plaintiff's expert testimony indicated that many pallet manufacturers were aware of mold issues caused by surface moisture on green heat-treated wood and, as a result, were drying pallets used for export, however, neither the pallet manufacturing standards nor the heat-treatment standards required any specific moisture content; this conflicting evidence raised a question of fact as to whether pallets with high moisture content were defective and unfit for shipping products overseas. *Kraft Reinsurance Ir., Ltd. v. Pallets Acquisitions, LLC*, No. 1:09-CV-3531-AT, 2011 U.S. Dist. LEXIS 131308 (N.D. Ga. Sept. 30, 2011).

### Privity

#### Plaintiff must be purchaser.

Although a warranty of merchantability was implied in any sale of goods under O.C.G.A. § 11-2-314, the warranty only ran to a buyer in privity of contract with the seller and did not pass to a second or subsequent purchaser; thus, the buyers who were not placed on the title and title transferees had no cause of action against the seller under Georgia law under O.C.G.A. § 11-2-106(1) for breach of implied warranties because of their lack of privity as original purchasers. *Gill v. Blue Bird Body Co.*, No. 05-10466, 2005 U.S. App. LEXIS 11626 (11th Cir. June 17, 2005).

**Legal transaction conducted in name of corporate entity.** — Motor home seller's renewed motion for judgment as a matter of law was denied because the buyers presented sufficient evidence to support jury verdict in their favor as to state law breach of implied warranty claim; the buyers presented evidence showing that they were the real buyers of the motor home even though the legal transaction was done in the name of a corporate entity; thus, the seller could not

challenge the buyers' standing to assert breach of warranty claims because it assured the buyers that they were covered under the motor home's warranty and that the warranty was being honored. *Gill v. Bluebird Body Co.*, No. 5:02-CV-328 (CAR), 2005 U.S. Dist. LEXIS 4611 (M.D. Ga. Jan. 21, 2005).

#### Lack of privity between manufacturer and ultimate consumer.

Purchaser did not have a claim for breach of implied warranty against the manufacturers of component parts of the purchaser's recreational vehicle because there was no privity between the manufacturers and the purchaser. *Monticello v. Winnebago Indus.*, 369 F. Supp. 2d 1350 (N.D. Ga. 2005).

**Privity between manufacturer and ultimate consumer.** — Because the plaintiff established privity with respect to an express warranty claim against a drug manufacturer based upon affirmations of fact or promises to the decedent, the plaintiff also could bring claims for the implied warranties of merchantability and fitness for a particular purpose. *Lee v. Mylan Inc.*, 806 F. Supp. 2d 1320 (M.D. Ga. Apr. 15, 2011).

### Damages

**Emotional distress.** — Summary judgment, pursuant to O.C.G.A. § 9-11-56(c), to a restaurant was properly granted by a trial court in an action by a restaurant patron, alleging emotional distress when the patron discovered two blood spots on the french fry container, fearing that the patron would contract HIV or hepatitis, because the patron failed to provide evidence of more than the patron's "fear" of exposure to the diseases; accordingly, the patron's claims for negligence, negligence per se, and breach of the implied warranty of merchantability, under O.C.G.A. § 51-1-23 and O.C.G.A. § 11-2-314, failed due to the patron's failure to meet the damages requirement. *Wilson v. J & L Melton, Inc.*, 270 Ga. App. 1, 606 S.E.2d 47 (2004).

## RESEARCH REFERENCES

**Am. Jur. Pleading and Practice Forms.** — 6 Am. Jur. Pleading and Practice Forms, Commercial Code, §§ 2:234, 2:260. 20A Am. Jur. Pleading and Practice Forms, Products Liability, § 57.

**Am. Jur. Proof of Facts.** — Implied Warranty of Merchantability, 26 POF2d 1.

**ALR.** — Products liability: personal injury or death allegedly caused by defect in motorcycle or its parts or equipment, 14 A.L.R.7th 7.

## 11-2-315. Implied warranty: fitness for particular purpose.

**Law reviews.** — For note, “Does the National Childhood Vaccine Injury Compensation Act Really Prohibit Design Defect Claims?: Examining Federal Preemp-

tion in Light of American Home Products Corp. v. Ferrari,” see 26 Ga. St. U.L. Rev. 617 (2010).

## JUDICIAL DECISIONS

## ANALYSIS

### GENERAL CONSIDERATION ACTIONS

#### General Consideration

**Implied warranties inapplicable to settlement agreement.** — Seller sued a buyer who rejected the seller’s goods; the parties settled. As the parties’ agreement was a contract to settle litigation, with any sale of goods merely incidental, the implied warranties of merchantability and fitness, O.C.G.A. §§ 11-2-314 and 11-2-315, did not apply to their settlement agreement. *Ole Mexican Foods, Inc. v. Hanson Staple Co.*, 285 Ga. 288, 676 S.E.2d 169 (2009).

**Pharmaceutical products.** — Patient who died after taking medicine which a pharmaceutical manufacturer gave to the doctor and which the doctor gave to the patient was not entitled to an extension of any implied warranty existing between the manufacturer and the doctor, and the appellate court upheld the trial court’s judgment dismissing claims the patient’s spouse filed against the manufacturer, alleging breach of express and implied warranties, but reversed the trial court’s judgment dismissing the husband’s claims against the manufacturer alleging strict liability and negligent failure to warn. *Bryant v. Hoffmann-La Roche, Inc.*, 262 Ga. App. 401, 585 S.E.2d 723 (2003).

**Federal law preempted implied**

**warranty provisions.** — Medical Device Amendments, 21 U.S.C. § 360k, preempted state law claims in a products liability case alleging an implied warranty of fitness for a particular purpose under O.C.G.A. § 11-2-315 with respect to a precision spinal cord stimulator medical device. *Horn v. Boston Sci. Neuromodulation Corp.*, No. CV409-074, 2011 U.S. Dist. LEXIS 102164 (S.D. Ga. Aug. 26, 2011).

**Scented oil burner.** — Trial court did not err in granting a seller’s motion for summary judgment in a customer’s action seeking to recover damages for injuries the customer sustained when the customer was burned from a ceramic, scented-oil burner and alleging, among other things, that the seller breached the seller’s duty of implied warranty of fitness for a particular purpose because there was no evidence that the seller’s employees knew that the customer intended to use the product in any way other than its ordinary purpose, burning scented oil; the customer utilized the ceramic burner for the ordinary purpose for which the item was intended, i.e., using the receptacle on the item to hold scented oil over a burning candle, causing the scent to diffuse throughout the customer’s home. *Rivers v. H. S. Beauty Queen, Inc.*, 306 Ga. App.

866, 703 S.E.2d 416 (2010).

**Pallets.** — It was undisputed that the defendant knew the plaintiff would be using the heat-treated pallets to ship products overseas and it was similarly undisputed that plaintiff specifically requested certain heat-treated pallets and that the pallets supplied by the defendant met these specifications; however, it was also undisputed that the plaintiff did not specify any particular moisture content for the pallets the plaintiff ordered. There was conflicting evidence in the record as to whether the plaintiff requested green or raw wood or whether the defendant decided unilaterally to use green wood; accordingly, as there was a question of fact as to whether the plaintiff relied on the defendant's skill and judgment to supply it with pallets with appropriate moisture content for shipping products overseas in freight containers and whether the defendant failed to do so, summary judgment was inappropriate on the implied warranties claim. *Kraft Reinsurance Ir., Ltd. v. Pallets Acquisitions, LLC*, No. 1:09-CV-3531-AT, 2011 U.S. Dist. LEXIS 131308 (N.D. Ga. Sept. 30, 2011).

**Cited** in *Imex Int'l v. Wires Eng'g*, 261 Ga. App. 329, 583 S.E.2d 117 (2003).

### **Actions**

**Privity between manufacturer and ultimate consumer.** — Because the plaintiff established privity with respect to an express warranty claim against a drug manufacturer based upon affirmations of fact or promises to the decedent, the plaintiff also could bring claims for the implied warranties of merchantability and fitness for a particular purpose. *Lee v. Mylan Inc.*, 806 F. Supp. 2d 1320 (M.D. Ga. Apr. 15, 2011).

### **"Learned intermediary" doctrine.**

Plaintiff's breach of warranty claims against a drug manufacturer, to the extent they were based upon failure to provide accurate or sufficient information regarding the use of the drug to the decedent, were barred by the learned intermediary doctrine, but the claims were not barred to the extent they were based upon failure to provide accurate or sufficient information regarding the use of the drug to others. *Lee v. Mylan Inc.*, 806 F. Supp. 2d 1320 (M.D. Ga. Apr. 15, 2011).

## **RESEARCH REFERENCES**

**Am. Jur. Pleading and Practice Forms.** — 6 Am. Jur. Pleading and Practice Forms, Commercial Code, § 2:264. 20A Am. Jur. Pleading and Practice Forms, Commercial Code, § 57.

**Am. Jur. Proof of Facts.** — Implied Warranty of Fitness for Particular Purpose, 27 POF2d 243.

Misrepresentations in Sale of Animal, 35 POF2d 607.

Builder-Vendor's Liability to Purchaser of New Dwelling for Breach of Implied Warranty of Fitness or Habitability, 50 POF3d 543.

## **11-2-316. Exclusion or modification of warranties.**

**Law reviews.** — For article, "Giving Unconscionability More Muscle: Attorney's Fees as a Remedy for Contractual

Overreaching," see 44 Ga. L. Rev. 317 (2010).

## **JUDICIAL DECISIONS**

### **ANALYSIS**

#### **IMPLIED WARRANTY OF MERCHANTABILITY**



### **Implied Warranty of Merchantability**

**Exclusion by course of conduct.** — Implied warranty provisions of the Uniform Commercial Code (UCC) did not apply to a settlement between a supplier and a customer because the primary purpose of the settlement was not a sale of goods, but was to resolve a dispute about

whether the customer was obligated to purchase any goods and whether the goods were merchantable. Alternatively, under O.C.G.A. § 11-2-316(3)(c), the parties had excluded the UCC's implied warranties based upon the parties course of conduct. *Hanson Staple Co. v. Ole Mexican Foods, Inc.*, 293 Ga. App. 4, 666 S.E.2d 398 (2008), *aff'd*, 285 Ga. 288, 676 S.E.2d 169 (2009).

### **RESEARCH REFERENCES**

**Am. Jur. Pleading and Practice Forms.** — 6 Am. Jur. Pleading and Practice Forms, Commercial Code, § 2:285.

## **11-2-318. Third party beneficiaries of warranties express or implied.**

### **JUDICIAL DECISIONS**

#### **ANALYSIS**

#### **MANUFACTURER'S LIABILITY**

#### **Manufacturer's Liability**

**Pharmaceutical products.** — Patient who died after taking medicine which a pharmaceutical manufacturer gave to the doctor and which the doctor gave to the patient was not entitled to an extension of any implied warranty existing between the manufacturer and the doctor, and the appellate court upheld the trial court's

judgment dismissing claims the patient's spouse filed against the manufacturer, alleging breach of express and implied warranties, but reversed the trial court's judgment dismissing the husband's claims against the manufacturer alleging strict liability and negligent failure to warn. *Bryant v. Hoffmann-La Roche, Inc.*, 262 Ga. App. 401, 585 S.E.2d 723 (2003).

### **RESEARCH REFERENCES**

**Am. Jur. Pleading and Practice Forms.** — 6 Am. Jur. Pleading and Practice Forms, Commercial Code, § 2:307.

## **11-2-319. F.O.B. and F.A.S. terms.**

### **JUDICIAL DECISIONS**

**Cited in** *Diamond Crystal Brands, Inc. v. Food Movers Int'l*, 593 F.3d 1249 (11th Cir. 2010).

## RESEARCH REFERENCES

**Am. Jur. Pleading and Practice Forms.** — 6 Am. Jur. Pleading and Practice Forms, Commercial Code, § 2:135.

**11-2-323. Form of bill of lading required in overseas shipment; “overseas.”**

(1) Where the contract contemplates overseas shipment and contains a term C.I.F. or C. & F. or F.O.B. vessel, the seller unless otherwise agreed shall obtain a negotiable bill of lading stating that the goods have been loaded in board or, in the case of a term C.I.F. or C. & F., received for shipment.

(2) Where in a case within subsection (1) of this Code section a tangible bill of lading has been issued in a set of parts, unless otherwise agreed if the documents are not to be sent from abroad the buyer may demand tender of the full set; otherwise only one part of the bill of lading need be tendered. Even if the agreement expressly requires a full set:

(a) Due tender of a single part is acceptable within the provisions of this article on cure of improper delivery (subsection (1) of Code Section 11-2-508); and

(b) Even though the full set is demanded, if the documents are sent from abroad the person tendering an incomplete set may nevertheless require payment upon furnishing an indemnity which the buyer in good faith deems adequate.

(3) A shipment by water or by air or a contract contemplating such shipment is “overseas” insofar as by usage of trade or agreement it is subject to the commercial, financing, or shipping practices characteristic of international deep water commerce. (Code 1933, § 109A-2—323, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 2010, p. 481, § 2-5/HB 451.)

**The 2010 amendment**, effective May 27, 2010, in subsection (1), substituted “shall” for “must” and substituted “in board” for “on board”; and inserted “tangible” near the beginning of subsection (2). See the Editor’s notes for applicability.

**Editor’s notes.** — Ga. L. 2010, p. 481, § 3-1, not codified by the General Assembly, provides that: “This Act applies to a document of title that is issued or a bailment that arises on or after the effective date of this Act. This Act does not apply to a document of title that is issued or a bailment that arises before the effective date of this Act even if the document

of title or bailment would be subject to this Act if the document of title had been issued or bailment had arisen on or after the effective date of this Act. This Act does not apply to a right of action that has accrued before the effective date of this Act.” This Act became effective May 27, 2010.

Ga. L. 2010, p. 481, § 3-2, not codified by the General Assembly, provides that: “A document of title issued or a bailment that arises before the effective date of this Act and the rights, documents, and interests flowing from that document or bailment are governed by any statute or

other rule amended or repealed by this Act as if such amendment or repeal had not occurred and may be terminated, com-

pleted, consummated, or enforced under that statute or other rule." This Act became effective May 27, 2010.

### RESEARCH REFERENCES

**Am. Jur. Pleading and Practice Forms.** — 6 Am. Jur. Pleading and Practice Forms, Commercial Code, § 2:135.

### 11-2-326. Sale on approval and sale or return; rights of creditors.

### RESEARCH REFERENCES

**Am. Jur. Pleading and Practice Forms.** — 6 Am. Jur. Pleading and Practice Forms, Commercial Code, § 2:315.

**ALR.** — "Sale on approval" and "sale or return" contracts under Uniform Commercial Code § 2-326, 44 A.L.R.6th 441.

### 11-2-327. Special incidents of sale on approval and sale or return.

### JUDICIAL DECISIONS

**Cited** in *Eagle Jets, LLC v. Atlanta Jet, Inc.*, 321 Ga. App. 386, 740 S.E.2d 439 (2013).

### RESEARCH REFERENCES

**Am. Jur. Pleading and Practice Forms.** — 6 Am. Jur. Pleading and Practice Forms, Commercial Code, § 2:315.

## PART 4

### TITLE, CREDITORS, AND GOOD FAITH PURCHASERS

### 11-2-401. Passing of title; reservation for security; limited application of this Code section.

Each provision of this article with regard to the rights, obligations, and remedies of the seller, the buyer, purchasers, or other third parties applies irrespective of title to the goods except where the provision refers to such title. Insofar as situations are not covered by the other provisions of this article and matters concerning title become material the following rules apply:

- (1) Title to goods cannot pass under a contract for sale prior to their identification to the contract (Code Section 11-2-501), and unless otherwise explicitly agreed the buyer acquires by their iden-



tification a special property as limited by this title. Any retention or reservation by the seller of the title (property) in goods shipped or delivered to the buyer is limited in effect to a reservation of a security interest. Subject to these provisions and to the provisions of the article on secured transactions (Article 9 of this title), title to goods passes from the seller to the buyer in any manner and on any conditions explicitly agreed on by the parties.

(2) Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his or her performance with reference to the physical delivery of the goods, despite any reservation of a security interest and even though a document of title is to be delivered at a different time or place; and in particular and despite any reservation of a security interest by the bill of lading:

(a) If the contract requires or authorizes the seller to send the goods to the buyer but does not require him or her to deliver them at destination, title passes to the buyer at the time and place of shipment; but

(b) If the contract requires delivery at destination, title passes on tender there.

(3) Unless otherwise explicitly agreed where delivery is to be made without moving the goods:

(a) If the seller is to deliver a tangible document of title, title passes at the time when and the place where he or she delivers such documents and if the seller is to deliver an electronic document of title, title passes when the seller delivers the document; or

(b) If the goods are at the time of contracting already identified and no documents of title are to be delivered, title passes at the time and place of contracting.

(4) A rejection or other refusal by the buyer to receive or retain the goods, whether or not justified, or a justified revocation of acceptance reverts title to the goods in the seller. Such reversioning occurs by operation of law and is not a “sale.” (Code 1933, § 109A-2—401, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 2010, p. 481, § 2-6/HB 451.)

**The 2010 amendment**, effective May 27, 2010, inserted “or her” in subsection (2) and in paragraph (2)(a); inserted “the” in the introductory paragraph of subsection (3); in paragraph (3)(a), inserted “tangible”, inserted “or she”, and added “and if the seller is to deliver an electronic document of title, title passes when the seller delivers the document” at the end; and

inserted “of title” in paragraph (3)(b). See the Editor’s notes for applicability.

**Editor’s notes.** — Ga. L. 2010, p. 481, § 3-1, not codified by the General Assembly, provides that: “This Act applies to a document of title that is issued or a bailment that arises on or after the effective date of this Act. This Act does not apply to a document of title that is issued

or a bailment that arises before the effective date of this Act even if the document of title or bailment would be subject to this Act if the document of title had been issued or bailment had arisen on or after the effective date of this Act. This Act does not apply to a right of action that has accrued before the effective date of this Act.” This Act became effective May 27, 2010.

Ga. L. 2010, p. 481, § 3-2, not codified by the General Assembly, provides that:

“A document of title issued or a bailment that arises before the effective date of this Act and the rights, documents, and interests flowing from that document or bailment are governed by any statute or other rule amended or repealed by this Act as if such amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute or other rule.” This Act became effective May 27, 2010.

## JUDICIAL DECISIONS

### ANALYSIS

#### GENERAL CONSIDERATION

##### General Consideration

**Construction with other law.** — After obtaining consent from the probate court to sell construction equipment an executrix’s decedent secured with a promissory note, the executrix was entitled to summary judgment as to the tort claims alleged against the decedent’s corporation, after the corporation wrongfully retained possession of said equipment, converted two certificates of deposit, and the decedent’s liability on the notes was extinguished under a provision of a stock sales agreement; furthermore, evidence was presented that the corporation’s failure to release the equipment prevented its sale to third parties and thereby constituted a breach of a duty to mitigate damages. *Midway R.R. Constr. Co. v. Beck*, 281 Ga. App. 412, 636 S.E.2d 110 (2006).

**Attempted reservation of title amounted to a security interest.** — When the peanut growers completed the performance of the growers’ duties under the growers’ contracts with a peanut broker by delivering the growers’ peanuts to a peanut company, title passed to the broker. The growers’ attempted reservation of title amounted to a security interest. *Farm Credit of Northwest Fla., ACA v. Easom Peanut Co.*, 312 Ga. App. 374, 718 S.E.2d 590 (2011), cert. denied, No. S12C0444, 2012 Ga. LEXIS 315 (Ga. 2012).

##### **Delivery of automobile.**

Evidence showed that a car dealership

sold its interest in a car to the buyer before a collision since the father signed the purchase and financing documents relating to the car sale, a credit company financed the purchase in the buyer’s name and paid the dealership the car’s purchase price, and the buyer’s daughter took possession of the vehicle, regardless of whether an application for a certificate of title was filed before or after the collision. *West v. Village Ford-Mercury, Inc.*, 256 Ga. App. 18, 567 S.E.2d 355 (2002).

**Perfected security interest had priority over attempted reservation of title.** — Peanut growers’ attempted reservation of title when the growers’ delivered peanuts to a peanut company at a peanut broker’s direction amounted to a security interest; however, the growers never perfected the growers’ security interests. A cooperative bank’s security interest in the peanuts was perfected, as the bank had filed financing statements and the security interest had attached so that the bank’s perfected security interest had priority over the growers’ unperfected security interests. *Farm Credit of Northwest Fla., ACA v. Easom Peanut Co.*, 312 Ga. App. 374, 718 S.E.2d 590 (2011), cert. denied, No. S12C0444, 2012 Ga. LEXIS 315 (Ga. 2012).

**Legal title passed when goods tendered to third-party customer and bill of lading issued listing nonresident corporation as consignee.** — Under O.C.G.A. § 11-2-401(2), the nonresident corporation took legal title to goods

when the manufacturer tendered those goods to a third-party customer at the manufacturer's Georgia facility and issued a bill of lading listing the nonresident corporation as the consignee. Taking physical possession of the goods was not necessary; the nonresident corporation took legal title to goods located in Georgia, and that was sufficient for purposes of

"transacting business" under O.C.G.A. § 9-10-91(1). *Diamond Crystal Brands, Inc. v. Food Movers Int'l*, 593 F.3d 1249 (11th Cir.), cert. denied, 131 S. Ct. 158, 178 L. Ed. 2d 39 (2010).

**Cited** in *Edel v. Southtowne Motors of Newnan II, Inc.*, 338 Ga. App. 376, 789 S.E.2d 224 (2016).

## RESEARCH REFERENCES

**Am. Jur. Pleading and Practice Forms.** — 6 Am. Jur. Pleading and Practice Forms, Commercial Code, § 2:346.

### 11-2-403. Power to transfer; good faith purchase of goods; "entrusting."

## JUDICIAL DECISIONS

### ANALYSIS

#### GENERAL CONSIDERATION

#### GOOD FAITH PURCHASER FOR VALUE

#### APPLICATION

### General Consideration

**Cited** in *First Nat'l Bank v. Proceeding Ayres Aviation Holdings, Inc.* (In re Ayres Aviation Holdings, Inc.), 342 B.R. 104 (Bankr. M.D. Ga. 2006).

### Good Faith Purchaser for Value

#### Dealer acquiring vehicle from forger.

Because plaintiff cellular telephone trademark holder's packages contained terms and conditions inside and language on the outside of the packages that referenced those terms and conditions, there was a valid "shrink-wrap" contract between the holder and purchasers of the cell phones, and allegations that defendant competitor removed the phones from their original packaging and shipped the phones outside the United States sufficiently raised a reasonable expectation that discovery would reveal evidence that the competitor was aware of the terms and conditions, was afforded an opportunity to reject the terms and conditions,

and failed to reject the terms and conditions, such that a breach of contract claim was plausible, and, because the allegations indicated a lack of good faith by the competitor, the bona fide purchaser for value and buyer in the ordinary course defenses under O.C.G.A. §§ 11-1-201 and 11-2-403(1)(a) were not available. *Tracfone Wireless, Inc. v. Zip Wireless Prods.*, 716 F. Supp. 2d 1275 (N.D. Ga. 2010).

### Application

#### Placing automobile in hands of dealer.

In an action upon a consignment of a motor home between the consignors and a dealer, once a dealer transferred a motor home to the buyer other than by the creation of a security interest, whether the buyer obtained title to the motor home was governed by O.C.G.A. § 11-2-403(2); the fact that the dealer did not obtain a title certificate at the time of the consignment did not prevent it from transferring good title to the buyer. *Smith v.*



**Application (Cont'd)**

Hardeman, 281 Ga. App. 402, 636 S.E.2d 106 (2006).

**Where car is purchased by check later found to be worthless, etc.**

An insurer of a vehicle was not entitled to summary judgment on the insurer's claims of trover and conversion against a buyer as the buyer was a good faith purchaser for value who acquired good title to the car pursuant to the voidable title doctrine under O.C.G.A. § 11-2-403, despite the fact that the check paid by the buyer's seller was later dishonored. Moreover, because the insurer stood in the shoes of the insured, it could have no greater right of recovery than that insured. *Stein v. GEICO Indem. Ins. Co.*, 289 Ga. App. 739, 658 S.E.2d 153 (2008).

**Purchase of stolen goods.** — When items stolen from an electric company were sold to a supply company, the supply

company was not entitled to summary judgment dismissing the electric company's conversion claim against it as a good faith purchaser for value, under O.C.G.A. § 11-2-403, because the exception in that statute was designed to protect a purchaser acting in good faith, and whether the supply company or its principal were good faith purchasers was a jury question. *Fed. Ins. Co. v. Westside Supply Co.*, 264 Ga. App. 240, 590 S.E.2d 224 (2003).

**Preexisting security interest in collateral.** — Since O.C.G.A. § 11-2-403(2) would not give a buyer title free of a preexisting security interest, it did not alter the result reached by the trial court granting appellee lender's motion and request for a writ of possession of a machine against appellant corporation, a bona fide purchaser. *Intermet Corp. v. Fin. Fed. Credit, Inc.*, 263 Ga. App. 622, 588 S.E.2d 810 (2003).

**RESEARCH REFERENCES**

**Am. Jur. Pleading and Practice Forms.** — 6 Am. Jur. Pleading and Practice Forms, Commercial Code, § 2:363.

**PART 5****PERFORMANCE****11-2-503. Manner of seller's tender of delivery.**

(1) Tender of delivery requires that the seller put and hold conforming goods at the buyer's disposition and give the buyer any notification reasonably necessary to enable him to take delivery. The manner, time, and place for tender are determined by the agreement and this article, and in particular:

(a) Tender must be at a reasonable hour, and if it is of goods they must be kept available for the period reasonably necessary to enable the buyer to take possession; but

(b) Unless otherwise agreed the buyer must furnish facilities reasonably suited to the receipt of the goods.

(2) Where the case is within Code Section 11-2-504 respecting shipment tender requires that the seller comply with its provisions.

(3) Where the seller is required to deliver at a particular destination tender requires that he comply with subsection (1) of this Code section

and also in any appropriate case tender documents as described in subsections (4) and (5) of this Code section.

(4) Where goods are in the possession of a bailee and are to be delivered without being moved:

(a) Tender requires that the seller either tender a negotiable document of title covering such goods or procure acknowledgment by the bailee of the buyer's right to possession of the goods; but

(b) Tender to the buyer of a nonnegotiable document of title or of a record directing the bailee to deliver is sufficient tender unless the buyer seasonably objects, and except as otherwise provided in Article 9 of this title receipt by the bailee of notification of the buyer's rights fixes those rights as against the bailee and all third persons; but risk of loss of the goods and of any failure by the bailee to honor the nonnegotiable document of title or to obey the direction remains on the seller until the buyer has had a reasonable time to present the document or direction, and a refusal by the bailee to honor the document or to obey the direction defeats the tender.

(5) Where the contract requires the seller to deliver documents:

(a) He or she shall tender all such documents in correct form, except as provided in this article with respect to bills of lading in a set (subsection (2) of Code Section 11-2-323); and

(b) Tender through customary banking channels is sufficient and dishonor of a draft accompanying or associated with the documents constitutes nonacceptance or rejection. (Code 1933, § 109A-2—503, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 2010, p. 481, § 2-7/HB 451.)

**The 2010 amendment**, effective May 27, 2010, in paragraph (4)(b), substituted "record directing" for "written direction to" and inserted "except as otherwise provided in Article 9 of this title" near the beginning; substituted "or she shall" for "must" near the beginning of paragraph (5)(a); and inserted "or associated with" in the middle of paragraph (5)(b). See the Editor's notes for applicability.

**Editor's notes.** — Ga. L. 2010, p. 481, § 3-1, not codified by the General Assembly, provides that: "This Act applies to a document of title that is issued or a bailment that arises on or after the effective date of this Act. This Act does not apply to a document of title that is issued or a bailment that arises before the effective date of this Act even if the document of title or bailment would be subject to this

Act if the document of title had been issued or bailment had arisen on or after the effective date of this Act. This Act does not apply to a right of action that has accrued before the effective date of this Act." This Act became effective May 27, 2010.

Ga. L. 2010, p. 481, § 3-2, not codified by the General Assembly, provides that: "A document of title issued or a bailment that arises before the effective date of this Act and the rights, documents, and interests flowing from that document or bailment are governed by any statute or other rule amended or repealed by this Act as if such amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute or other rule." This Act became effective May 27, 2010.

## RESEARCH REFERENCES

**Am. Jur. Pleading and Practice Forms.** — 6 Am. Jur. Pleading and Practice Forms, Commercial Code, § 2:434.

**ALR.** — Applicability of UCC Article 2 to mixed contracts for sale of consumer goods and services, 1 A.L.R.7th 3.

Applicability of UCC Article 2 to mixed

contracts for sale of goods and services: distributorship, franchise, and similar business contracts, 8 A.L.R.7th 4.

Applicability of UCC Article 2 to mixed contracts for sale of business goods and services: manufacturing, construction, and similar contracts, 15 A.L.R.7th 7.

**11-2-505. Seller's shipment under reservation.**

(1) Where the seller has identified goods to the contract by or before shipment:

(a) His or her procurement of a negotiable bill of lading to his or her own order or otherwise reserves in him or her a security interest in the goods. His or her procurement of the bill to the order of a financing agency or of the buyer indicates in addition only the seller's expectation of transferring that interest to the person named.

(b) A nonnegotiable bill of lading to himself or herself or his or her nominee reserves possession of the goods as security but except in a case of conditional delivery (subsection (2) of Code Section 11-2-507) a nonnegotiable bill of lading naming the buyer as consignee reserves no security interest even though the seller retains possession or control of the bill of lading.

(2) When shipment by the seller with reservation of a security interest is in violation of the contract for sale it constitutes an improper contract for transportation within Code Section 11-2-504 but impairs neither the rights given to the buyer by shipment and identification of the goods to the contract nor the seller's powers as a holder of a negotiable document of title. (Code 1933, § 109A-2—505, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 2010, p. 481, § 2-8/HB 451.)

**The 2010 amendment**, effective May 27, 2010, in subsection (1), inserted “or her” throughout; in paragraph (1)(b), inserted “or herself” near the beginning and inserted “or control” near the end; and added “of title” at the end of subsection (2). See the Editor's notes for applicability.

**Editor's notes.** — Ga. L. 2010, p. 481, § 3-1, not codified by the General Assembly, provides that: “This Act applies to a document of title that is issued or a bailment that arises on or after the effective date of this Act. This Act does not apply to a document of title that is issued or a bailment that arises before the effective date of this Act even if the document

of title or bailment would be subject to this Act if the document of title had been issued or bailment had arisen on or after the effective date of this Act. This Act does not apply to a right of action that has accrued before the effective date of this Act.” This Act became effective May 27, 2010.

Ga. L. 2010, p. 481, § 3-2, not codified by the General Assembly, provides that: “A document of title issued or a bailment that arises before the effective date of this Act and the rights, documents, and interests flowing from that document or bailment are governed by any statute or other rule amended or repealed by this Act



as if such amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under

that statute or other rule." This Act became effective May 27, 2010.

### RESEARCH REFERENCES

**Am. Jur. Pleading and Practice Forms.** — 6 Am. Jur. Pleading and Prac-

tice Forms, Commercial Code, §§ 2:434, 2:456.

### 11-2-506. Rights of financing agency.

(1) A financing agency by paying or purchasing for value a draft which relates to a shipment of goods acquires to the extent of the payment or purchase and in addition to its own rights under the draft and any document of title securing it any rights of the shipper in the goods including the right to stop delivery and the shipper's right to have the draft honored by the buyer.

(2) The right to reimbursement of a financing agency which has in good faith honored or purchased the draft under commitment to or authority from the buyer is not impaired by subsequent discovery of defects with reference to any relevant document which was apparently regular. (Code 1933, § 109A-2—506, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 2010, p. 481, § 2-9/HB 451.)

**The 2010 amendment**, effective May 27, 2010, deleted "on its face" following "regular" at the end of subsection (2). See the Editor's notes for applicability.

**Editor's notes.** — Ga. L. 2010, p. 481, § 3-1, not codified by the General Assembly, provides that: "This Act applies to a document of title that is issued or a bailment that arises on or after the effective date of this Act. This Act does not apply to a document of title that is issued or a bailment that arises before the effective date of this Act even if the document of title or bailment would be subject to this Act if the document of title had been issued or bailment had arisen on or after the effective date of this Act. This Act does

not apply to a right of action that has accrued before the effective date of this Act." This Act became effective May 27, 2010.

Ga. L. 2010, p. 481, § 3-2, not codified by the General Assembly, provides that: "A document of title issued or a bailment that arises before the effective date of this Act and the rights, documents, and interests flowing from that document or bailment are governed by any statute or other rule amended or repealed by this Act as if such amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute or other rule." This Act became effective May 27, 2010.

### RESEARCH REFERENCES

**Am. Jur. Pleading and Practice Forms.** — 6 Am. Jur. Pleading and Prac-

tice Forms, Commercial Code, §§ 2:370, 2:434.

**11-2-507. Effect of seller's tender; delivery on condition.****JUDICIAL DECISIONS**

**Cited** in *Henry v. Blankenship*, 284 Ga. App. 578, 644 S.E.2d 419 (2007); *Mauk v. Pioneer Ford Mercury*, 308 Ga. App. 864, 709 S.E.2d 353 (2011).

**RESEARCH REFERENCES**

**Am. Jur. Pleading and Practice Forms.** — 6 Am. Jur. Pleading and Practice Forms, Commercial Code, § 2:434.

**11-2-508. Cure by seller of improper tender or delivery; replacement.****JUDICIAL DECISIONS**

**Breach of express warranty not found.** — Manufacturer did not breach its express warranty as the manufacturer addressed each defect in a vehicle as it arose, most repairs were made within days, and the only extended delay was the result of the buyer's decision to postpone bringing the vehicle into the repair facility. *Knight v. Am. Suzuki Motor Corp.*, 272 Ga. App. 319, 612 S.E.2d 546 (2005).

Manufacturer's express warranty on a

vehicle was not governed by the Magnuson-Moss Warranty Act, specifically 15 U.S.C. § 2304, but was governed by the Uniform Commercial Code, O.C.G.A. §§ 11-2-508, 11-2-605, and 11-2-607(3)(a) as the warranty was a limited warranty. *Knight v. Am. Suzuki Motor Corp.*, 272 Ga. App. 319, 612 S.E.2d 546 (2005).

**Cited** in *Mauk v. Pioneer Ford Mercury*, 308 Ga. App. 864, 709 S.E.2d 353 (2011).

**RESEARCH REFERENCES**

**Am. Jur. Pleading and Practice Forms.** — 6 Am. Jur. Pleading and Practice Forms, Commercial Code, § 2:434.

**11-2-509. Risk of loss in the absence of breach.**

(1) Where the contract requires or authorizes the seller to ship the goods by carrier:

(a) If it does not require him to deliver them at a particular destination, the risk of loss passes to the buyer when the goods are duly delivered to the carrier even though the shipment is under reservation (Code Section 11-2-505); but

(b) If it does require him to deliver them at a particular destination and the goods are there duly tendered while in the possession of the carrier, the risk of loss passes to the buyer when the goods are there duly so tendered as to enable the buyer to take delivery.

(2) Where the goods are held by a bailee to be delivered without being moved, the risk of loss passes to the buyer:

(a) On his or her receipt of possession or control of a negotiable document of title covering the goods; or

(b) On acknowledgment by the bailee of the buyer's right to possession of the goods; or

(c) After his or her receipt of possession or control of a nonnegotiable document of title or other direction to deliver in a record, as provided in subsection (4)(b) of Code Section 11-2-503.

(3) In any case not within subsection (1) or (2) of this Code section, the risk of loss passes to the buyer on his receipt of the goods if the seller is a merchant; otherwise the risk passes to the buyer on tender of delivery.

(4) The provisions of this Code section are subject to contrary agreement of the parties and to the provisions of this article on sale on approval (Code Section 11-2-327) and on effect of breach on risk of loss (Code Section 11-2-510). (Code 1933, § 109A-2—509, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 1963, p. 188, § 3; Ga. L. 2010, p. 481, § 2-10/HB 451.)

**The 2010 amendment**, effective May 27, 2010, inserted “or her” twice in subsection (2); inserted “possession or control of” in the middle of paragraph (2)(a); and, in the middle of paragraph (2)(c), inserted “possession or control of” in the beginning and substituted “direction to deliver in a record” for “written direction to deliver” in the middle. See the Editor's notes for applicability.

**Editor's notes.** — Ga. L. 2010, p. 481, § 3-1, not codified by the General Assembly, provides that: “This Act applies to a document of title that is issued or a bailment that arises on or after the effective date of this Act. This Act does not apply to a document of title that is issued or a bailment that arises before the effective date of this Act even if the document of title or bailment would be subject to this

Act if the document of title had been issued or bailment had arisen on or after the effective date of this Act. This Act does not apply to a right of action that has accrued before the effective date of this Act.” This Act became effective May 27, 2010.

Ga. L. 2010, p. 481, § 3-2, not codified by the General Assembly, provides that: “A document of title issued or a bailment that arises before the effective date of this Act and the rights, documents, and interests flowing from that document or bailment are governed by any statute or other rule amended or repealed by this Act as if such amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute or other rule.” This Act became effective May 27, 2010.

## JUDICIAL DECISIONS

**Risk of loss did not transfer.** — Jury properly determined that the defendant

did not bear the loss of a helicopter crash because there was some evidence upon



which the jury could rely in concluding that the defendant did not breach the agreement between the parties and the jury made a special finding that under the aircraft purchase agreement, the risk of loss remained with the plaintiff despite

the defendant agreeing to make additional repairs when the helicopter arrived at the helicopter's final destination. *Eagle Jets, LLC v. Atlanta Jet, Inc.*, 321 Ga. App. 386, 740 S.E.2d 439 (2013).

#### RESEARCH REFERENCES

**Am. Jur. Pleading and Practice Forms.** — 6 Am. Jur. Pleading and Practice Forms, Commercial Code, § 2:475.

#### 11-2-510. Effect of breach on risk of loss.

#### JUDICIAL DECISIONS

**No breach of contract established.** — Jury properly determined that the defendant did not bear the loss of a helicopter crash because there was some evidence upon which the jury could rely in concluding that the defendant did not breach the agreement between the parties

and the jury made a special finding that under the aircraft purchase agreement, the risk of loss remained with the plaintiff despite the defendant's agreement to make additional repairs. *Eagle Jets, LLC v. Atlanta Jet, Inc.*, 321 Ga. App. 386, 740 S.E.2d 439 (2013).

#### RESEARCH REFERENCES

**Am. Jur. Pleading and Practice Forms.** — 6 Am. Jur. Pleading and Practice Forms, Commercial Code, § 2:487.

#### 11-2-513. Buyer's right to inspection of goods.

**Law reviews.** — For survey article on construction law for the period from June

1, 2002 through May 31, 2003, see 55 *Mercer L. Rev.* 85 (2003).

#### JUDICIAL DECISIONS

**Cited in** *Imex Int'l v. Wires Eng'g*, 261 Ga. App. 329, 583 S.E.2d 117 (2003).

#### RESEARCH REFERENCES

**Am. Jur. Pleading and Practice Forms.** — 6 Am. Jur. Pleading and Practice Forms, Commercial Code, § 2:423.

## PART 6

## BREACH, REPUDIATION, AND EXCUSE

**11-2-602. Manner and effect of rightful rejection.****JUDICIAL DECISIONS****Issues of fact for trial court.**

Granting defendants a directed verdict on a truck buyer's revocation of acceptance claim under O.C.G.A. § 11-2-608 was error when the buyer testified that the truck had been in for repairs more than 30 times, that the buyer had tried to get a replacement or a refund, and that the buyer had continued to use the truck and to pay the note, taxes, and insurance on the truck because the buyer could not afford to buy another truck while attempting to resolve the problems with this one and because the buyer had no other

means of transportation; although certain provisions in O.C.G.A. §§ 11-2-602 and 11-2-606 might support the unqualified proposition that continued use was inconsistent with a revocation of acceptance, issues such as whether there was effective revocation of acceptance were ordinarily jury matters, and expecting a buyer to discontinue use could be contrary to the UCC's rule of reasonableness. *Franklin v. Augusta Dodge, Inc.*, 287 Ga. App. 818, 652 S.E.2d 862 (2007).

**Cited** in *Imex Int'l v. Wires Eng'g*, 261 Ga. App. 329, 583 S.E.2d 117 (2003).

**RESEARCH REFERENCES**

**Am. Jur. Pleading and Practice Forms.** — 6 Am. Jur. Pleading and Practice Forms, Commercial Code, §§ 2:506, 2:519.

**11-2-605. Waiver of buyer's objections by failure to particularize.**

(1) The buyer's failure to state in connection with rejection a particular defect which is ascertainable by reasonable inspection precludes him from relying on the unstated defect to justify rejection or to establish breach:

(a) Where the seller could have cured it if stated seasonably; or

(b) Between merchants when the seller has after rejection made a request in writing for a full and final written statement of all defects on which the buyer proposes to rely.

(2) Payment against documents made without reservation of rights precludes recovery of the payment for defects apparent in the documents. (Code 1933, § 109A-2—605, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 2010, p. 481, § 2-11/HB 451.)

**The 2010 amendment**, effective May 27, 2010, substituted "in the documents" for "on the face of the documents" at the end of subsection (2). See the Editor's notes for applicability.

**Editor's notes.** — Ga. L. 2010, p. 481, § 3-1, not codified by the General Assembly, provides that: "This Act applies to a document of title that is issued or a bailment that arises on or after the effec-

tive date of this Act. This Act does not apply to a document of title that is issued or a bailment that arises before the effective date of this Act even if the document of title or bailment would be subject to this Act if the document of title had been issued or bailment had arisen on or after the effective date of this Act. This Act does not apply to a right of action that has accrued before the effective date of this Act." This Act became effective May 27, 2010.

Ga. L. 2010, p. 481, § 3-2, not codified

by the General Assembly, provides that: "A document of title issued or a bailment that arises before the effective date of this Act and the rights, documents, and interests flowing from that document or bailment are governed by any statute or other rule amended or repealed by this Act as if such amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute or other rule." This Act became effective May 27, 2010.

### JUDICIAL DECISIONS

**Breach of express warranty not found.** — Manufacturer did not breach its express warranty as the manufacturer addressed each defect in a vehicle as it arose, most repairs were made within days, and the only extended delay was the result of the buyer's decision to postpone bringing the vehicle into the repair facility. *Knight v. Am. Suzuki Motor Corp.*, 272 Ga. App. 319, 612 S.E.2d 546 (2005).

Manufacturer's express warranty on a

vehicle was not governed by the Magnuson-Moss Warranty Act, specifically 15 U.S.C. § 2304, but was governed by the Uniform Commercial Code, O.C.G.A. §§ 11-2-508, 11-2-605, and 11-2-607(3)(a) as the warranty was a limited warranty. *Knight v. Am. Suzuki Motor Corp.*, 272 Ga. App. 319, 612 S.E.2d 546 (2005).

**Cited in** *Imex Int'l v. Wires Eng'g*, 261 Ga. App. 329, 583 S.E.2d 117 (2003).

### RESEARCH REFERENCES

**Am. Jur. Pleading and Practice Forms.** — 6 Am. Jur. Pleading and Practice Forms, Commercial Code, § 2:533.

## 11-2-606. What constitutes acceptance of goods.

**Law reviews.** — For survey article on construction law for the period from June

1, 2002 through May 31, 2003, see 55 *Mercer L. Rev.* 85 (2003).

### JUDICIAL DECISIONS

#### **Revocation of acceptance.**

Granting defendants a directed verdict on a truck buyer's revocation of acceptance claim under O.C.G.A. § 11-2-608 was error when the buyer testified that the truck had been in for repairs more than 30 times, that the buyer had tried to get a replacement or a refund, and that the buyer had continued to use the truck and to pay the note, taxes, and insurance on the truck because the buyer could not afford to buy another truck while attempting to resolve the problems with this one

and because the buyer had no other means of transportation; although certain provisions in O.C.G.A. §§ 11-2-602 and 11-2-606 might support the unqualified proposition that continued use was inconsistent with a revocation of acceptance, issues such as whether there was effective revocation of acceptance were ordinarily jury matters, and expecting a buyer to discontinue use could be contrary to the UCC's rule of reasonableness. *Franklin v. Augusta Dodge, Inc.*, 287 Ga. App. 818, 652 S.E.2d 862 (2007).



**Actions inconsistent with seller’s ownership constituting acceptance by buyer.**

Because the purchaser of an automobile continued to drive the vehicle, pay taxes on it, and insure it after the purchaser had complained of defects, these post-revocation acts constituted exercises in ownership that were inconsistent with the seller’s ownership; the buyer’s attempted revocation was ineffective under O.C.G.A. § 11-2-606(1)(c) and O.C.G.A. § 11-2-608(1)(b). *Hines v. Mercedes-Benz USA, LLC*, 358 F. Supp. 2d 1222 (N.D. Ga. 2005).

Hospital lost the right to revoke the hospital’s acceptance of pumps the hospital bought from a medical supplier as nonconforming goods pursuant to O.C.G.A. § 11-2-606 by the hospital’s course of conduct, i.e., by keeping the pumps for many months after the pumps were delivered without paying for the pumps, up to and including the time of suit. *Ardus Med., Inc. v. Emanuel County Hosp. Auth.*, 558 F. Supp. 2d 1301 (S.D. Ga. 2008).

Seller of trailers was entitled to judgment as a matter of law on a buyer’s

breach of contract claim; the buyer accepted delivery of the trailers pursuant to O.C.G.A. § 11-2-606(c) as the buyer acted inconsistently with the seller’s ownership by undertaking to resell the trailers, and the buyer failed to timely notify the seller of any alleged breach as required by O.C.G.A. § 11-2-607(3)(a). *Woodridge USA Props., L.P. v. Southeast Trailer Mart, Inc.*, No. 10-10060, 2011 U.S. App. LEXIS 2126 (11th Cir. Feb. 1, 2011) (Unpublished).

**Risk of loss did not transfer.** — Jury properly determined that the defendant did not bear the loss of a helicopter crash because there was some evidence upon which the jury could rely in concluding that the defendant did not breach the agreement between the parties and the jury made a special finding that under the aircraft purchase agreement, the risk of loss remained with the plaintiff despite the defendant agreeing to make additional repairs when the helicopter arrived at the helicopter’s final destination. *Eagle Jets, LLC v. Atlanta Jet, Inc.*, 321 Ga. App. 386, 740 S.E.2d 439 (2013).

**Cited in** *Imex Int’l v. Wires Eng’g*, 261 Ga. App. 329, 583 S.E.2d 117 (2003).

**RESEARCH REFERENCES**

**Am. Jur. Pleading and Practice Forms.** — 6 Am. Jur. Pleading and Practice Forms, Commercial Code, § 2:542.

**Am. Jur. Proof of Facts.** — Acceptance of Goods, 37 POF2d 593.

**11-2-607. Effect of acceptance; notice of breach; burden of establishing breach after acceptance; notice of claim or litigation to person answerable over.**

**JUDICIAL DECISIONS**

**ANALYSIS**

**GENERAL CONSIDERATION**

**NOTICE**

- 1. IN GENERAL
- 2. TIME

**General Consideration**

**Issues of fact for trial court.**

Manufacturer’s express warranty on a vehicle was not governed by the

Magnuson-Moss Warranty Act, specifically 15 U.S.C. § 2304, but was governed by the Uniform Commercial Code, O.C.G.A. §§ 11-2-508, 11-2-605, and 11-2-607(3)(a) as the warranty was a lim-

**General Consideration (Cont'd)**

ited warranty. *Knight v. Am. Suzuki Motor Corp.*, 272 Ga. App. 319, 612 S.E.2d 546 (2005).

**Effect of acceptance of goods.**

Trial court did not err in awarding a seller pre-judgment interest under O.C.G.A. § 7-4-16 in the seller's breach of contract action against a buyer to recover damages for unpaid principal on shipped material and unpurchased material because the seller's invoices were a due and payable liquidated debt on a commercial account subject to interest under § 7-4-16; because certain materials were delivered by the seller and accepted by the buyer, the buyer was responsible for payment according to the agreed-upon price. *Scovill Fasteners, Inc. v. Northern Metals, Inc.*, 303 Ga. App. 246, 692 S.E.2d 840 (2010).

**Burden of showing breach of express warranty.**

Manufacturer did not breach its express warranty as the manufacturer addressed each defect in a vehicle as it arose, most repairs were made within days, and the only extended delay was the result of the buyer's decision to postpone bringing the vehicle into the repair facility. *Knight v. Am. Suzuki Motor Corp.*, 272 Ga. App. 319, 612 S.E.2d 546 (2005).

**Cited in** *SunTrust Bank v. Hightower*, 291 Ga. App. 62, 660 S.E.2d 745 (2008).

**Notice****1. In General**

**Failure to give notice.** — When plaintiff buyers of distributorship opportunities

sued defendants, the seller and the seller's principal and relatives and other corporate entities, alleging all of the products shipped to the buyers were defective, the warranty claims failed because there was no proof that notice of the defects were given. *Brenner v. Future Graphics, LLC*, 258 F.R.D. 561 (N.D. Ga. 2007).

**2. Time****Failure to notify seller within reasonable time is a bar against recovery, etc.**

In an action alleging breach of implied warranties of merchantability and fitness for a particular purpose, the customer's failure to serve the seller with notice of the defect in the product until two years and three days after the customer suffered an injury did not bar relief; the delay alone, without prejudice to the seller caused by such delay, was insufficient to bar relief. *Wal-Mart Stores, Inc. v. Wheeler*, 262 Ga. App. 607, 586 S.E.2d 83 (2003).

Seller of trailers was entitled to judgment as a matter of law on a buyer's breach of contract claim; the buyer accepted delivery of the trailers pursuant to O.C.G.A. § 11-2-606(c) as the buyer acted inconsistently with the seller's ownership by undertaking to resell the trailers, and the buyer failed to timely notify the seller of any alleged breach as required by O.C.G.A. § 11-2-607(3)(a). *Woodridge USA Props., L.P. v. Southeast Trailer Mart, Inc.*, No. 10-10060, 2011 U.S. App. LEXIS 2126 (11th Cir. Feb. 1, 2011) (Unpublished).

**RESEARCH REFERENCES**

**Am. Jur. Pleading and Practice Forms.** — 6 Am. Jur. Pleading and Practice Forms, Commercial Code, § 2:549.

20A Am. Jur. Pleading and Practice Forms, Products Liability, § 38.

**11-2-608. Revocation of acceptance in whole or in part.****JUDICIAL DECISIONS****Continued use is inconsistent with a revocation of acceptance.**

Because the purchaser of an automobile

continued to drive the vehicle, pay taxes on it, and insure it after the purchaser complained of defects, these

post-revocation acts constituted exercises in ownership by the purchaser that were inconsistent with the seller's ownership; the buyer's attempted revocation was ineffective under O.C.G.A. §§ 11-2-606(1)(c) and 11-2-608(1)(b). *Hines v. Mercedes-Benz USA, LLC*, 358 F. Supp. 2d 1222 (N.D. Ga. 2005).

In a consumer's suit against a car dealer for revocation of acceptance, regarding the sale of a used car which the dealer's salesman falsely represented had not been in a wreck, it was not error for the trial court to grant a directed verdict to the dealer because, while there was evidence that the consumer attempted to revoke the acceptance and the dealer refused, the consumer subsequently acted inconsistently with the dealer's ownership by continuing to possess the car and by installing a sunroof in it. *Mitchell v. Backus Cadillac-Pontiac, Inc.*, 274 Ga. App. 330, 618 S.E.2d 87 (2005).

When a consumer sued a car dealer for revocation of acceptance concerning the car she bought from it, the consumer's continued use of the car and continued making payments on it were inconsistent with the dealer's ownership of the car and defeated the revocation of acceptance claim, under O.C.G.A. § 11-2-608(1). *Small v. Savannah Int'l Motors, Inc.*, 275 Ga. App. 12, 619 S.E.2d 738 (2005).

**Revocation required privity of contract and could only be asserted against seller.** — Summary judgment on an automobile purchaser's revocation claim was appropriate because revocation of a sale requires privity of contract and thus can be asserted only against a seller, but the purchaser was suing the automobile distributor, not the dealership which sold the purchaser the car. *Fedrick v. Mercedes-Benz USA, LLC*, 366 F. Supp. 2d 1190 (N.D. Ga. 2005).

**Reacceptance of goods.**

Buyer, who purported to revoke acceptance of goods, could be found to have re-accepted them if, after such revocation, the buyer performed acts which were inconsistent with the seller's ownership of the goods. *Olson v. Ford Motor Co.*, 258 Ga. App. 848, 575 S.E.2d 743 (2002).

Buyers revoked their acceptance of a motor home based on failure to repair

alleged defects; the buyers' continued and extensive use of the luxury motor home for traveling to exotic places was not shown to be necessary, was inconsistent with revocation, and instead indicated reacceptance of the motor home. *Gill v. Blue Bird Wanderlodge*, No. 5:02-CV-328-2(CAR), 2004 U.S. Dist. LEXIS 27437 (M.D. Ga. Feb. 24, 2004).

Trial court erred in granting summary judgment in favor of a dealership and a lender in a purchaser's action to recover damages for the dealership's failure to accept the purchaser's attempted revocation under O.C.G.A. § 11-2-608 of an automobile purchase because the dealership and lender argued that the purchaser re-accepted the car since the purchaser continued driving the car after sending the revocation letter, and questions of fact existed about whether the purchaser's revocation was timely, whether the purchaser reaccepted the car after the tender, and whether the alleged defects substantially impaired the car's value to the purchaser; whether the purchaser's revocation was timely, whether the purchaser reaccepted the car, and whether the alleged defects substantially impaired the car's value to the purchaser were questions of fact for the jury. *Mauk v. Pioneer Ford Mercury*, 308 Ga. App. 864, 709 S.E.2d 353 (2011).

**Issues of fact.**

Granting defendants a directed verdict on a truck buyer's revocation of acceptance claim under O.C.G.A. § 11-2-608 was error when the buyer testified that the truck had been in for repairs more than 30 times, that the buyer had tried to get a replacement or a refund, and that the buyer had continued to use the truck and to pay the note, taxes, and insurance on the truck because the buyer could not afford to buy another truck while attempting to resolve the problems with this one and because the buyer had no other means of transportation; although certain provisions in O.C.G.A. §§ 11-2-602 and 11-2-606 might support the unqualified proposition that continued use was inconsistent with a revocation of acceptance, issues such as whether there was effective revocation of acceptance were ordinarily jury matters, and expecting a buyer to



discontinue use could be contrary to the UCC's rule of reasonableness. *Franklin v. Augusta Dodge, Inc.*, 287 Ga. App. 818, 652 S.E.2d 862 (2007).

**Attempted revocation too long after purchase.** — Trial court properly granted a car dealership summary judgment on the purchasers' revocation of acceptance claim because pretermittting whether the car at issue was nonconforming at the time the car was sold, the purchasers' own undisputed evidence showed that the purchasers saw paint defects immediately before purchasing the car, asked if the car had been in a collision and the sales person replied that the sales person was "not sure" on that point, and the record also showed that the purchasers attempted revocation came long after the purchasers put thousands of miles on the car. *Paulk v. Thomasville Ford Lincoln Mercury, Inc.*, 317 Ga. App. 780, 732 S.E.2d 297 (2012).

Trial court properly granted the seller summary judgment on the buyers' revocation of acceptance claim because the 13-month delay of revocation after a substantial change in the condition of the vehicle was unreasonable as a matter of law. *Edel v. Southtowne Motors of Newnan II, Inc.*, 338 Ga. App. 376, 789 S.E.2d 224 (2016).

**No revocation for car buyer who could not show defective at purchase.** — There was no remedy of revocation because proof that the car was defective when sold was an essential element of the buyer's claim, which the buyer did not satisfy; the evidence showed that the buyer drove the used car approximately 26,000 miles before the cooling system began to malfunction. *Dildine v. Town & Country Truck Sales, Inc.*, 259 Ga. App. 732, 577 S.E.2d 882 (2003).

**Tender not required to revoke acceptance.** — Trial court erred in granting summary judgment in favor of a dealership and a lender in a purchaser's action to recover damages for the dealership's failure to accept the purchaser's attempted revocation under O.C.G.A. § 11-2-608 of an automobile purchase; the Uniform Commercial Code does not re-

quire that a buyer tender unconforming goods to effect the revocation of a sales contract and that portion of *Scott v. Team Toyota*, 276 Ga. App. 257 (2005) holding otherwise is overruled. *Mauk v. Pioneer Ford Mercury*, 308 Ga. App. 864, 709 S.E.2d 353 (2011).

Buyer need not tender nonconforming goods as a condition precedent to a claim based on a revocation of acceptance theory of recovery, much less make an unconditional tender, because the condition precedent to a claim for damages due to the seller's failure to accept the buyer's contract revocation under O.C.G.A. § 11-2-608(2) is that the buyer give the seller notice of the revocation within a reasonable time and before the condition of the goods changes substantially from unrelated causes. *Mauk v. Pioneer Ford Mercury*, 308 Ga. App. 864, 709 S.E.2d 353 (2011).

**Insufficient opportunity to cure.** — Motor coach buyer's revocation of acceptance claim under O.C.G.A. § 11-2-608(1)(b) failed because the buyer was barred by the doctrine of invited error from denying that the buyer was required under § 11-2-608(1)(b) to provide the seller with an opportunity to seasonably cure any nonconformities in the coach prior to revocation. *Car Transp. Brokerage Co. v. Blue Bird Body Co.*, No. 08-16103, 2009 U.S. App. LEXIS 7661 (11th Cir. Apr. 10, 2009) (Unpublished).

**Futility exception to opportunity cure requirement did not apply.** — Motor coach buyer's revocation of acceptance claim under O.C.G.A. § 11-2-608(1)(b) failed because the buyer's providing only one opportunity to repair before the extent of the defect was truly apparent was not reasonable under O.C.G.A. § 11-1-204; the futility exception to providing an opportunity to cure did not apply because there was no evidence that the buyer knew prior to revocation that the seller would have been unable to repair the coach. *Car Transp. Brokerage Co. v. Blue Bird Body Co.*, No. 08-16103, 2009 U.S. App. LEXIS 7661 (11th Cir. Apr. 10, 2009) (Unpublished).

**Cited in** *Imex Int'l v. Wires Eng'g*, 261 Ga. App. 329, 583 S.E.2d 117 (2003).

## RESEARCH REFERENCES

**Am. Jur. Pleading and Practice Forms.** — 6 Am. Jur. Pleading and Practice Forms, Commercial Code, § 2:569.

**11-2-609. Right to adequate assurance of performance.**

## JUDICIAL DECISIONS

**No request for adequate assurances found.** — Purchaser did not establish as a matter of law that the purchaser had made a demand on a supplier for adequate assurances under O.C.G.A. § 11-2-609(1) prior to the purchaser's breach of an agreement. A reasonable jury could have

found that an email inquiring whether there was a production issue with allegedly defective products constituted a writing that demanded adequate assurance. *Advanced BodyCare Solutions, LLC v. Thione Int'l, Inc.*, 615 F.3d 1352 (11th Cir. 2010).

## RESEARCH REFERENCES

**Am. Jur. Pleading and Practice Forms.** — 6 Am. Jur. Pleading and Practice Forms, Commercial Code, § 2:580.

**11-2-612. "Installment contract"; breach.**

## JUDICIAL DECISIONS

**Breach.** — Reasonable jury could have found that a supplier did not breach an installment contract as a whole under O.C.G.A. § 11-2-612(3) when less than 20 percent of the goods in one order delivered

to a purchaser were allegedly defective; the contract covered far more than the sale of the goods at issue. *Advanced BodyCare Solutions, LLC v. Thione Int'l, Inc.*, 615 F.3d 1352 (11th Cir. 2010).

## RESEARCH REFERENCES

**Am. Jur. Pleading and Practice Forms.** — 6 Am. Jur. Pleading and Practice Forms, Commercial Code, § 2:600.

**11-2-615. Excuse by failure of presupposed conditions.**

## JUDICIAL DECISIONS

## ANALYSIS

## APPLICATION

## Application

**Section not applicable to noncommercial goods sales contract.** — Trial

court did not err in awarding summary judgment to the State Medical Education Board, making a student liable for both the amount of the scholarship received

**Application (Cont'd)**

and attorney's fees, as: (1) estoppels were unfavored under Georgia law; (2) the student came forward with no more than hearsay to support a claim that oral misrepresentations of fact were made regarding said scholarship; (3) the contract was not rescinded by either party; (4) no mutual mistake of fact was found; and (5) any impossibility in performing the contract was personal to the student. Moreover, the defense under O.C.G.A. § 11-2-615 did not apply. *Calabro v. State Med. Educ. Bd.*, 283 Ga. App. 113, 640 S.E.2d 581 (2006).

**Defense of impracticability contemplates impracticability of perfor-**

**mance by seller of commercial goods, and therefore unavailable to those not in business of selling commercial goods.** — Defendants in a contract dispute could not defend their failure to continue to honor merchant referral requirements in the parties' contract on the ground that performance was impracticable under O.C.G.A. § 11-2-615 because the defense of impracticability contemplates the impracticability of performance by a seller of commercial goods and defendants were not in the business of selling commercial goods to the plaintiff. *Elavon, Inc. v. Wachovia Bank, NA*, No. 1:09-CV-139-ODE, 2011 U.S. Dist. LEXIS 152004 (N.D. Ga. May 23, 2011).

**RESEARCH REFERENCES**

**Am. Jur. Pleading and Practice Forms.** — 6 Am. Jur. Pleading and Practice Forms, Commercial Code, § 2:630.

**PART 7****REMEDIES****11-2-703. Seller's remedies in general.****JUDICIAL DECISIONS**

**Failure to make payment.** — In a suit involving an oral contract to sell a horse, it was error to grant summary judgment to the seller; there was a factual dispute as to whether the parties agreed on a deadline for payment and thus as to whether the seller was entitled to cancel

the contract under O.C.G.A. § 11-2-703 when the buyer did not send a payment until after the alleged deadline expired. *Rowland v. Scarborough Farms, LLC*, 285 Ga. App. 831, 648 S.E.2d 151 (2007).

**Cited** in *Imex Int'l v. Wires Eng'g*, 261 Ga. App. 329, 583 S.E.2d 117 (2003).

**RESEARCH REFERENCES**

**Am. Jur. Pleading and Practice Forms.** — 6 Am. Jur. Pleading and Practice Forms, Commercial Code, § 2:653.

**11-2-705. Seller's stoppage of delivery in transit or otherwise.**

(1) The seller may stop delivery of goods in the possession of a carrier or other bailee when he discovers the buyer to be insolvent (Code Section 11-2-702) and may stop delivery of carload, truckload, plane-load, or larger shipments of express or freight when the buyer repudi-



ates or fails to make a payment due before delivery or if for any other reason the seller has a right to withhold or reclaim the goods.

(2) As against such buyer the seller may stop delivery until:

- (a) Receipt of the goods by the buyer; or
- (b) Acknowledgment to the buyer by any bailee of the goods except a carrier that the bailee holds the goods for the buyer; or
- (c) Such acknowledgment to the buyer by a carrier by reshipment or as a warehouse; or
- (d) Negotiation to the buyer of any negotiable document of title covering the goods.

(3)(a) To stop delivery the seller shall so notify as to enable the bailee by reasonable diligence to prevent delivery of the goods.

(b) After such notification the bailee shall hold and deliver the goods according to the directions of the seller but the seller is liable to the bailee for any ensuing charges or damages.

(c) If a negotiable document of title has been issued for goods the bailee is not obliged to obey a notification to stop until surrender of possession or control of the document.

(d) A carrier who has issued a nonnegotiable bill of lading is not obliged to obey a notification to stop received from a person other than the consignor. (Code 1933, § 109A-2—705, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 2010, p. 481, § 2-12/HB 451.)

**The 2010 amendment**, effective May 27, 2010, substituted “a warehouse” for “warehouseman” in paragraph (2)(c); substituted “shall” for “must” in paragraphs (3)(a) and (3)(b); and inserted “of possession or control” in paragraph (3)(c). See the Editor’s notes for applicability.

**Editor’s notes.** — Ga. L. 2010, p. 481, § 3-1, not codified by the General Assembly, provides that: “This Act applies to a document of title that is issued or a bailment that arises on or after the effective date of this Act. This Act does not apply to a document of title that is issued or a bailment that arises before the effective date of this Act even if the document of title or bailment would be subject to this Act if the document of title had been issued or bailment had arisen on or after

the effective date of this Act. This Act does not apply to a right of action that has accrued before the effective date of this Act.” This Act became effective May 27, 2010.

Ga. L. 2010, p. 481, § 3-2, not codified by the General Assembly, provides that: “A document of title issued or a bailment that arises before the effective date of this Act and the rights, documents, and interests flowing from that document or bailment are governed by any statute or other rule amended or repealed by this Act as if such amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute or other rule.” This Act became effective May 27, 2010.

## RESEARCH REFERENCES

**Am. Jur. Pleading and Practice Forms.** — 6 Am. Jur. Pleading and Practice Forms, Commercial Code, § 2:675.

**11-2-706. Seller's resale including contract for resale.**

## RESEARCH REFERENCES

**Am. Jur. Pleading and Practice Forms.** — 6 Am. Jur. Pleading and Practice Forms, Commercial Code, § 2:681.

**ALR.** — Resale of goods under UCC § 2-706, 101 A.L.R.5th 563.

**11-2-709. Action for the price.**

## RESEARCH REFERENCES

**Am. Jur. Pleading and Practice Forms.** — 6 Am. Jur. Pleading and Practice Forms, Commercial Code, § 2:705.

**ALR.** — Applicability of UCC Article 2 to mixed contracts for sale of consumer goods and services, 1 A.L.R.7th 3.

Applicability of UCC Article 2 to mixed

contracts for sale of goods and services: distributorship, franchise, and similar business contracts, 8 A.L.R.7th 4.

Applicability of UCC Article 2 to mixed contracts for sale of business goods and services: manufacturing, construction, and similar contracts, 15 A.L.R.7th 7.

**11-2-711. Buyer's remedies in general; buyer's security interest in rejected goods.**

## JUDICIAL DECISIONS

**Cited in** *Mauk v. Pioneer Ford Mercury*, 308 Ga. App. 864, 709 S.E.2d 353 (2011).

## RESEARCH REFERENCES

**Am. Jur. Pleading and Practice Forms.** — 6 Am. Jur. Pleading and Practice Forms, Commercial Code, § 2:726.

**11-2-712. "Cover"; buyer's procurement of substitute goods.**

## JUDICIAL DECISIONS

**Expenses incident to breach.** — Jury may have been authorized to find that ultimately expenses incurred by a seller to test allegedly defective carpet matting material were incurred "in connection with effecting cover," or even "in inspection" of the goods, and more generally, a jury may have found the testing

costs to have been a "reasonable expense" incurred by the seller "incident to" a supplier's breach; therefore, the expenses may have been recoverable as incidental damages under O.C.G.A. § 11-2-715(1), and the trial court did not err in so ruling in entering partial summary judgment. *Mitchell Family Dev. Co. v. Universal Tex-*

tile Techs., LLC, 268 Ga. App. 869, 602 S.E.2d 878 (2004).

RESEARCH REFERENCES

**Am. Jur. Pleading and Practice Forms.** — 6 Am. Jur. Pleading and Practice Forms, Commercial Code, § 2:738.

11-2-713. Buyer’s damages for nondelivery or repudiation.

JUDICIAL DECISIONS

**Damages not speculative.** — In a suit brought by a buyer after an oral contract for the sale of a horse fell through, damages were not speculative; there was evidence that the seller had an offer of \$50,000 for the horse on the same day that the seller agreed to sell the horse to the buyer for \$35,000, and that the horse was eventually sold to another party for over \$200,000. *Rowland v. Scarborough Farms, LLC*, 285 Ga. App. 831, 648 S.E.2d 151 (2007).

**Insufficient proof of lost profits.** — Though a subcontractor successfully proved a breach of contract claim against a supplier, the damages award in the amount of \$160,000 was reversed on appeal as the subcontractor failed to present any evidence of anticipated expenses due to the loss of a construction project arising from the breach, and therefore the subcontractor’s proof of lost profits was insufficient as a matter of law and required a

new trial; further, because the damages award was reversed, the appellate court also reversed the award of attorney fees to the subcontractor since the award of attorney fees was contingent upon the damages award on the breach of contract claim. *Bldg. Materials Wholesale, Inc. v. Triad Drywall, LLC*, 287 Ga. App. 772, 653 S.E.2d 115 (2007).

**Breach of contract to sell vehicle.** — In an action arising from an alleged breach of a contract to sell a vehicle brought by a buyer against a car dealer, because a genuine issue of material fact remained over the amount of damages that should be awarded, as the evidence presented a dispute as to the market price of the vehicle at the time of the breach, and the dealer’s owner gave conflicting deposition testimony regarding the value of the vehicle, summary judgment was unwarranted. *Jones v. Baran Co., LLC*, 290 Ga. App. 578, 660 S.E.2d 420 (2008).

RESEARCH REFERENCES

**Am. Jur. Pleading and Practice Forms.** — 6 Am. Jur. Pleading and Practice Forms, Commercial Code, § 2:747.

11-2-714. Buyer’s damages for breach in regard to accepted goods.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION  
BREACH OF WARRANTY  
CONSEQUENTIAL DAMAGES



### General Consideration

#### Lay opinion as to diminished value.

— Trial court erred in entering summary judgment for a manufacturer on the owners' claim for damages due to the diminished value of a vehicle where the owner's opinion as to the diminished value of the vehicle was supported by: (1) experience in purchasing three other cars, (2) familiarity with information relating to the value of the vehicle; (3) research into the manufacturer's cars; (4) discussions as to price and features with several dealerships; (5) knowledge and familiarity with the vehicle and its defects acquired over a three-year time period; and (6) use of the car, its mileage, and purchase price. *Hill v. Mercedes Benz USA, LLC*, 274 Ga. App. 826, 619 S.E.2d 353 (2005).

### Breach of Warranty

**Proof as to value of warranted vehicle and vehicle as delivered, is required.** — Motor home seller's renewed motion for judgment as a matter of law was denied in part because buyers presented sufficient evidence to support their claim for damages arising out of company's breach of implied warranty; to establish their damage claims under O.C.G.A. § 11-2-714(2); buyers established both the motor home's value as warranted and its value as delivered to them. *Gill v. Bluebird Body Co.*, No. 5:02-CV-328 (CAR), 2005 U.S. Dist. LEXIS 4611 (M.D. Ga. Jan. 21, 2005).

#### Damages for breach of new car warranty.

Owners failed to present competent evidence of damages under O.C.G.A. § 11-2-714(2) because an owner's affidavit lacked a proper foundation as the owner failed to testify that any of the past purchases included the purchase of a vehicle with the defects at issue, the owner did not have any specialized knowledge, and the owner's testimony was not supported by objective information on vehicles found in published valuation guides, such as the "Blue Book"; the value of the defective vehicle could not be established by the repair invoices as few, if any, of the repairs reflected costs incurred by the owners. *Hill v. Mercedes-Benz USA, LLC*, 274 Ga. App. 826, 619 S.E.2d 353 (2005).

Because a manufacturer did not admit a customer's prima facie case breach of warranty case under O.C.G.A. § 11-2-714(2), the trial court erred in denying the manufacturer the right to open and close the final argument under Ga. Unif. Super. Ct. R. 13.4 and O.C.G.A. § 9-10-186. *Kia Motors Am., Inc. v. Range*, 276 Ga. App. 360, 623 S.E.2d 514 (2005).

**Proof of damages.** — Because the buyers provided an insufficient foundation for a lay opinion concerning the diminished value of a vehicle under O.C.G.A. § 11-2-714(2), the trial court did not err in granting summary judgment to the automobile manufacturer on the buyers' warranty claims. *Hill v. Mercedes-Benz USA, LLC*, 274 Ga. App. 826, 619 S.E.2d 353 (2005).

#### Repair costs.

Under Fed. R. Evid. 701, the buyer of motor home could give lay testimony as to market value of motor home following repairs performed by the seller and the buyer's market value opinion was relevant because the seller conceded that the market for the type of motor home at issue was extremely individualized and the buyers represented half of the entire market for that type of motor home during the year that it was purchased; the sales contract was relevant evidence on the issue of damages because the purchase price of the motor home was evidence of its value as warranted. *Gill v. Bluebird Body Co.*, No. 5:02-CV-328 (CAR), 2005 U.S. Dist. LEXIS 4611 (M.D. Ga. Jan. 21, 2005).

### Consequential Damages

#### Value of car not established for purposes of determining damages.

— Buyer did not produce admissible evidence of actual damages sufficient to preclude summary judgment as evidence that a car was defective, alone, did not establish the value of the goods as accepted for purposes of determining damages for breach of warranty; the trial court did not abuse its discretion in finding that the buyer's affidavit did not show a sufficient opportunity for forming a correct opinion as to damages and a proper basis for expressing the buyer's opinion. *Ficklin v. Hyundai Motor Am., Inc.*, 272 Ga. App. 61, 611 S.E.2d 732 (2005).

**Exclusion not unconscionable.** — After a car owner brought a breach of warranty claim under the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301 et seq., the trial court erred in denying a car manufacturer's motion to exclude evidence of incidental and conse-

quential damages, as recovery of those damages was excluded by the vehicle's warranty, pursuant to O.C.G.A. §§ 11-2-714(3) and 11-2-715, and the exclusion was not found to be unconscionable. *Lee v. Mercedes-Benz USA, LLC*, 276 Ga. App. 28, 622 S.E.2d 361 (2005).

## RESEARCH REFERENCES

**Am. Jur. Pleading and Practice Forms.** — 6 Am. Jur. Pleading and Practice Forms, Commercial Code, § 2:747.

### 11-2-715. Buyer's incidental and consequential damages.

## JUDICIAL DECISIONS

### ANALYSIS

#### GENERAL CONSIDERATION LOST PROFITS

#### General Consideration

##### **Drug distributor liability for user suicide.**

Jury may have been authorized to find that ultimately expenses incurred by a seller to test allegedly defective carpet matting material were incurred "in connection with effecting cover," or even "in inspection" of the goods, and more generally, a jury may have found the testing costs to have been a "reasonable expense" incurred by the seller "incident to" a supplier's breach; therefore, the expenses may have been recoverable as incidental damages under O.C.G.A. § 11-2-715(1), and the trial court did not err in so ruling in entering partial summary judgment. *Mitchell Family Dev. Co. v. Universal Textile Techs., LLC*, 268 Ga. App. 869, 602 S.E.2d 878 (2004).

**Exclusion of consequential damages found not unconscionable.** — After a car owner brought a breach of warranty claim under the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301 et seq., the trial court erred in denying a car manufacturer's motion to exclude evidence of incidental and consequential damages, as recovery of those damages was excluded by the vehicle's warranty, pursuant to O.C.G.A. § 11-2-714(3) and O.C.G.A. § 11-2-715, and the exclusion

was not found to be unconscionable. *Lee v. Mercedes-Benz USA, LLC*, 276 Ga. App. 28, 622 S.E.2d 361 (2005).

**Consequential damages award improper.** — An award in favor of a buyer, representing a mediation settlement, was not recoverable as consequential damages under the Uniform Commercial Code, O.C.G.A. § 11-2-715. The buyer failed to present evidence showing that the award bore any relationship to the breach of warranty. *Sunstate Indus. v. VP Group, Inc.*, 298 Ga. App. 269, 679 S.E.2d 824 (2009).

#### Lost Profits

**Insufficient proof of lost profits.** — Though a subcontractor successfully proved a breach of contract claim against a supplier, the damages award in the amount of \$160,000 was reversed on appeal as the subcontractor failed to present any evidence of anticipated expenses due to the loss of a construction project arising from the breach, and therefore the subcontractor's proof of lost profits was insufficient as a matter of law and required a new trial; further, because the damages award was reversed, the appellate court also reversed the award of attorney fees to the subcontractor since the award of attorney fees was contingent upon the dam-

Lost Profits (Cont'd)

claim. Bldg. Materials Wholesale, Inc. v. Triad Drywall, LLC, 287 Ga. App. 772, 653 S.E.2d 115 (2007).

ages award on the breach of contract

RESEARCH REFERENCES

**Am. Jur. Pleading and Practice Forms.** — 6 Am. Jur. Pleading and Practice Forms, Commercial Code, § 2:747.

11-2-719. Contractual modification or limitation of remedy.

JUDICIAL DECISIONS

**Parties cannot bar all remedies, avoid all damages.**  
Exclusion of consequential damages in a vehicle’s warranty was not invalid under O.C.G.A. § 11-2-719(2), as the car manufacturer did not attempt to exclude all express or implied warranties; rather, the implied warranties, although limited in duration, were not excluded, and accordingly, the limitation did not “fail of its essential purpose” within the meaning of § 11-2-719(2). *Lee v. Mercedes-Benz USA, LLC*, 276 Ga. App. 28, 622 S.E.2d 361 (2005).  
**Contract remedies not exclusive.** — Award of lost profits damages to a supplier on the supplier’s breach of contract coun-

terclaim against a purchaser was not precluded by O.C.G.A. § 11-2-719(1) as the contract did not clearly express that remedies listed therein were exclusive. *Advanced BodyCare Solutions, LLC v. Thione Int’l, Inc.*, 615 F.3d 1352 (11th Cir. 2010).  
**Warranty damage limitation unconscionable.** — Contractual provision regarding the sale of a particular medical device that attempted to limit damages for breach of the manufacturer’s express warranty regarding replacement of the product was prima facie unconscionable. *Horn v. Boston Sci. Neuromodulation Corp.*, No. CV409-074, 2011 U.S. Dist. LEXIS 102164 (S.D. Ga. Aug. 26, 2011).

RESEARCH REFERENCES

**Am. Jur. Pleading and Practice Forms.** — 6 Am. Jur. Pleading and Practice Forms, Commercial Code, § 2:797.

11-2-725. Statute of limitations in contracts for sale.

**Law reviews.** — For annual survey on product liability, see 69 Mercer L. Rev. 231 (2017).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION  
TIME OF BREACH  
APPLICATION



### General Consideration

**Cited** in *Herndon v. Heard*, 262 Ga. App. 334, 585 S.E.2d 637 (2003).

### Time of Breach

**Breach by buyer.** — Bank's action to recover a deficiency judgment after a borrower defaulted on a vehicle loan almost five years before the bank filed the instant action was time-barred because the action was filed outside the four-year statute of limitation. *Venable v. SunTrust Bank*, 335 Ga. App. 344, 780 S.E.2d 793 (2015), *aff'd*, 299 Ga. 655, 791 S.E.2d 5 (2016).

### Application

**Service of process beyond statute of limitation period.** — Trial court erred in granting a creditor summary judgment in the creditor's action against a guarantor to collect on a past due commercial account because the guarantor was served several years beyond either the two-year statute of limitation period, O.C.G.A. § 11-2-725, or the four-year limitation period, O.C.G.A. § 9-3-25; the creditor had notice of a service of process issue at least as early as March 2007 and knew of the service problem in January 2008, but the creditor did not serve the guarantor with process until September 2008, and the creditor failed to prove that the creditor exercised due diligence in attempting to effect service. *Scanlan v. Tate Supply Co.*, 303 Ga. App. 9, 692 S.E.2d 684 (2010).

**Contract was sale of goods and barred by statute of limitations.** — Grant of summary judgment in favor of a bank was properly reversed because the predominant purpose of the contract was the sale of a good; thus, the four year statute of limitation in O.C.G.A. § 11-2-725(1) applied and the bank's deficiency claim was barred since the claim was filed more than four years after the cause of action accrued. *SunTrust Bank v. Venable*, 299 Ga. 655, 791 S.E.2d 5 (2016).

**Secured transactions.** — While it appeared that O.C.G.A. § 9-3-24, rather than O.C.G.A. § 11-2-725, would most likely apply to defendant collection attorney's state court deficiency action against

plaintiff consumer, and it was not for the federal court to say what the Georgia courts would hold, the uncertainty meant there was no intentional unfair conduct and the consumer's Fair Debt Collection Practices Act claim was dismissed. *Almand v. Reynolds & Robin, P.C.*, 485 F. Supp. 2d 1361 (M.D. Ga. 2007).

Because an oral contract concerning the disposal of car skeletons on property operated as a junkyard did not violate the O.C.G.A. §§ 11-2-201 and 11-2-725, the trial court erred in granting summary judgment against a seller on his counterclaim for fraud, due to the option holder's repudiation of the contract in filing for specific performance. *Henry v. Blankenship*, 284 Ga. App. 578, 644 S.E.2d 419 (2007).

**Claims based on invoices.** — Trial court erred by granting summary judgment in favor of a debtor on all of the invoices that made up a creditor's claim against the debtor on the ground that the complaint was barred by the four-year limitation period for a suit on account because the trial court's grant of summary judgment was based on a purported admission by the creditor that the creditor's claims accrued on April 3, 2001, but the trial court misread the document, and the creditor submitted authenticated invoices, which showed dates more recent than four years prior to the date suit was filed; unless otherwise provided in the agreement, claims are barred if the claims are asserted more than four years after invoices are submitted to the buyer. *Avery Enters. v. Lyndhurst Builders, LLC*, 304 Ga. App. 353, 696 S.E.2d 389 (2010).

**Implied warranty.** — Plaintiffs' implied warranty claims against a vehicle manufacturer and a distributor were barred by the four-year statute of limitations in O.C.G.A. § 11-2-725(1) as the plaintiffs' claims accrued when the plaintiffs' vehicles were first sold. An implied warranty by its nature could not explicitly extend to future performance and thus did not fall within the exception in § 11-2-725(2). *McCabe v. Daimler AG*, No. 1:12-cv-2494-TCB, 2013 U.S. Dist. LEXIS 80161 (N.D. Ga. June 7, 2013).

RESEARCH REFERENCES

**Am. Jur. Pleading and Practice Forms.** — 6 Am. Jur. Pleading and Practice Forms, Commercial Code, § 2:823.

**ALR.** — Applicability of UCC Article 2 to mixed contracts for sale of consumer goods and services, 1 A.L.R.7th 3.

Applicability of UCC Article 2 to mixed

contracts for sale of goods and services: distributorship, franchise, and similar business contracts, 8 A.L.R.7th 4.

Applicability of UCC Article 2 to mixed contracts for sale of business goods and services: manufacturing, construction, and similar contracts, 15 A.L.R.7th 7.

ARTICLE 2A

LEASES

Part 1

General Provisions

Sec.

11-2A-103. Definitions and index of definitions.

Part 2

Formation and Construction of Lease Contract

11-2A-207. Course of performance or practical construction [Repealed].

Part 5

Default

Subpart A

In General

11-2A-501. Default: Procedure.

Subpart B

Default by Lessor

Sec.

11-2A-514. Waiver of lessee's objections.  
11-2A-518. Cover; substitute goods.  
11-2A-519. Lessee's damages for nondelivery, repudiation, default, and breach of warranty in regard to accepted goods.

Subpart C

Default by Lessee

11-2A-526. Lessor's stoppage of delivery in transit or otherwise.  
11-2A-527. Lessor's rights to dispose of goods.  
11-2A-528. Lessor's damages for nonacceptance, failure to pay, repudiation, or other default.

PART 1

GENERAL PROVISIONS

11-2A-101. Short title.

JUDICIAL DECISIONS

**Cited** in *Bo Phillips Company, Inc. v. R. L. King Properties, LLC*, 336 Ga. App. 705, 783 S.E.2d 445 (2016).

11-2A-103. Definitions and index of definitions.

(1) In this article unless the context otherwise requires:

(a) “Buyer in ordinary course of business” means a person who, in good faith and without knowledge that the sale to him or her is in violation of the ownership rights or security interest or leasehold interest of a third party in the goods, buys in ordinary course from a person in the business of selling goods of that kind, but does not include a pawnbroker. “Buying” may be for cash or by exchange of other property or on secured or unsecured credit and includes acquiring goods or documents of title under a preexisting contract for sale, but does not include a transfer in bulk or as security for or in total or partial satisfaction of a money debt.

(b) “Cancellation” occurs when either party puts an end to the lease contract for default by the other party.

(c) “Commercial unit” means such a unit of goods as by commercial usage is a single whole for purposes of lease and division of which materially impairs its character or value on the market or in use. A commercial unit may be a single article, as a machine, or a set of articles, as a suite of furniture or a line of machinery, or a quantity, as a gross or carload, or any other unit treated in use or in the relevant market as a single whole.

(d) “Conforming” goods or performance under a lease contract means goods or performance that are in accordance with the obligations under the lease contract.

(e) “Consumer lease” means a lease that a lessor regularly engaged in the business of leasing or selling makes to a lessee who is an individual and who takes under the lease primarily for a personal, family, or household purpose.

(f) “Fault” means wrongful act, omission, breach, or default.

(g) “Finance lease” means a lease with respect to which:

- (i) The lessor does not select, manufacture, or supply the goods;
- (ii) The lessor acquires the goods or the right to possession and use of the goods in connection with the lease; and
- (iii) One of the following occurs:

(A) The lessee receives a copy of the contract by which the lessor acquired the goods or the right to possession and use of the goods before signing the lease contract;

(B) The lessee’s approval of the contract by which the lessor acquired the goods or the right to possession and use of the goods is a condition to effectiveness of the lease contract;

(C) The lessee, before signing the lease contract, receives an accurate and complete statement designating the promises and



warranties, and any disclaimers of warranties, limitations or modifications of remedies, or liquidated damages, including those of a third party, such as the manufacturer of the goods, provided to the lessor by the person supplying the goods in connection with or as part of the contract by which the lessor acquired the goods or the right to possession and use of the goods; or

(D) If the lease is not a consumer lease, the lessor, before the lessee signs the lease contract, informs the lessee in writing (a) of the identity of the person supplying the goods to the lessor, unless the lessee has selected that person and directed the lessor to acquire the goods or the right to possession and use of the goods from that person, (b) that the lessee is entitled under this article to the promises and warranties, including those of any third party, provided to the lessor by the person supplying the goods in connection with or as part of the contract by which the lessor acquired the goods or the right to possession and use of the goods, and (c) that the lessee may communicate with the person supplying the goods to the lessor and receive an accurate and complete statement of those promises and warranties, including any disclaimers and limitations of them or of remedies.

(h) “Goods” means all things that are movable at the time of identification to the lease contract, or are fixtures (Code Section 11-2A-309), but the term does not include money, documents, instruments, accounts, chattel paper, general intangibles, or minerals or the like, including oil and gas, before extraction. The term also includes the unborn young of animals.

(i) “Installment lease contract” means a lease contract that authorizes or requires the delivery of goods in separate lots to be separately accepted, even though the lease contract contains a clause “each delivery is a separate lease” or its equivalent.

(j) “Lease” means a transfer of the right to possession and use of goods for a term in return for consideration, but a sale, including a sale on approval or a sale or return, or retention or creation of a security interest is not a lease. Unless the context clearly indicates otherwise, the term includes a sublease.

(k) “Lease agreement” means the bargain, with respect to the lease, of the lessor and the lessee in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in this article. Unless the context clearly indicates otherwise, the term includes a sublease agreement.

(l) “Lease contract” means the total legal obligation that results from the lease agreement as affected by this article and any other

applicable rules of law. Unless the context clearly indicates otherwise, the term includes a sublease contract.

(m) “Leasehold interest” means the interest of the lessor or the lessee under a lease contract.

(n) “Lessee” means a person who acquires the right to possession and use of goods under a lease. Unless the context clearly indicates otherwise, the term includes a sublessee.

(o) “Lessee in ordinary course of business” means a person who, in good faith and without knowledge that the lease to him or her is in violation of the ownership rights or security interest or leasehold interest of a third party in the goods, leases in ordinary course from a person in the business of selling or leasing goods of that kind, but does not include a pawnbroker. “Leasing” may be for cash or by exchange of other property or on secured or unsecured credit and includes acquiring goods or documents of title under a preexisting lease contract, but does not include a transfer in bulk or as security for or in total or partial satisfaction of a money debt.

(p) “Lessor” means a person who transfers the right to possession and use of goods under a lease. Unless the context clearly indicates otherwise, the term includes a sublessor.

(q) “Lessor’s residual interest” means the lessor’s interest in the goods after expiration, termination, or cancellation of the lease contract.

(r) “Lien” means a charge against or interest in goods to secure payment of a debt or performance of an obligation, but the term does not include a security interest.

(s) “Lot” means a parcel or a single article that is the subject matter of a separate lease or delivery, whether or not it is sufficient to perform the lease contract.

(t) “Merchant lessee” means a lessee that is a merchant with respect to goods of the kind subject to the lease.

(u) “Present value” means the amount as of a date certain of one or more sums payable in the future, discounted to the date certain. The discount is determined by the interest rate specified by the parties if the rate was not manifestly unreasonable at the time the transaction was entered into; otherwise, the discount is determined by a commercially reasonable rate that takes into account the facts and circumstances of each case at the time the transaction was entered into.

(v) “Purchase” includes taking by sale, lease, mortgage, security interest, pledge, gift, or any other voluntary transaction creating an interest in goods.

(w) "Sublease" means a lease of goods the right to possession and use of which was acquired by the lessor as a lessee under an existing lease.

(x) "Supplier" means a person from whom a lessor buys or leases goods to be leased under a finance lease.

(y) "Supply contract" means a contract under which a lessor buys or leases goods to be leased.

(z) "Termination" occurs when either party pursuant to a power created by agreement or law puts an end to the lease contract otherwise than for default.

(2) Other definitions applying to this article and the sections in which they appear are:

"Accessions." Code Section 11-2A-310(1).

"Construction mortgage." Code Section 11-2A-309(1)(d).

"Encumbrance." Code Section 11-2A-309(1)(e).

"Fixtures." Code Section 11-2A-309(1)(a).

"Fixture filing." Code Section 11-2A-309(1)(b).

"Purchase money lease." Code Section 11-2A-309(1)(c).

(3) The following definitions in other articles of this title apply to this article:

"Account." Code Section 11-9-102(a).

"Between merchants." Code Section 11-2-104(3).

"Buyer." Code Section 11-2-103(1)(a).

"Chattel paper." Code Section 11-9-102(a).

"Consumer goods." Code Section 11-9-102(a).

"Document." Code Section 11-9-102(a).

"Entrusting." Code Section 11-2-403(3).

"General intangible." Code Section 11-9-102(a).

"Instrument." Code Section 11-9-102(a).

"Merchant." Code Section 11-2-104(1).

"Mortgage." Code Section 11-9-102(a).

"Pursuant to commitment." Code Section 11-9-102(a).

"Receipt." Code Section 11-2-103(1)(c).



“Sale.” Code Section 11-2-106(1).

“Sale on approval.” Code Section 11-2-326.

“Sale or return.” Code Section 11-2-326.

“Seller.” Code Section 11-2-103(1)(d).

(4) In addition, Article 1 of this title contains general definitions and principles of construction and interpretation applicable throughout this article. (Code 1981, § 11-2A-103, enacted by Ga. L. 1993, p. 633, § 1; Ga. L. 2001, p. 362, § 9; Ga. L. 2010, p. 481, § 2-13/HB 451; Ga. L. 2013, p. 141, § 11/HB 79; Ga. L. 2015, p. 996, § 3B-4/SB 65.)

**The 2010 amendment**, effective May 27, 2010, in paragraphs (1)(a) and (1)(o), inserted “or her” in the first sentence, inserted commas throughout, and substituted “acquiring” for “receiving” in the middle of the second sentence. See the Editor’s notes for applicability.

**The 2013 amendment**, effective April 24, 2013, part of an Act to revise, modernize, and correct the Code, revised punctuation in paragraphs (1)(a) and (1)(o).

**The 2015 amendment**, effective January 1, 2016, in paragraph (3), deleted the definition which read: “‘Good faith.’ Code Section 11-2-103(1)(b).”

**Editor’s notes.** — Ga. L. 2010, p. 481, § 3-1, not codified by the General Assembly, provides that: “This Act applies to a document of title that is issued or a bailment that arises on or after the effective date of this Act. This Act does not apply to a document of title that is issued or a bailment that arises before the effective date of this Act even if the document of title or bailment would be subject to this Act if the document of title had been issued or bailment had arisen on or after the effective date of this Act. This Act does not apply to a right of action that has

accrued before the effective date of this Act.” This Act became effective May 27, 2010.

Ga. L. 2010, p. 481, § 3-2, not codified by the General Assembly, provides that: “A document of title issued or a bailment that arises before the effective date of this Act and the rights, documents, and interests flowing from that document or bailment are governed by any statute or other rule amended or repealed by this Act as if such amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute or other rule.” This Act became effective May 27, 2010.

Ga. L. 2015, p. 996, § 1-1/SB 65, not codified by the General Assembly, provides: “(a) This Act shall be known and may be cited as the ‘Debtor-Creditor Uniform Law Modernization Act of 2015.’

“(b) To promote consistency among the states, it is the intent of the General Assembly to modernize certain existing uniform laws promulgated by the Uniform Law Commission affecting debtor and creditor rights, responsibilities, and relationships and other federally recognized laws affecting such rights, responsibilities, and relationships.”

## JUDICIAL DECISIONS

### Lease.

Claimant’s unwritten agreement with an individual concerning a vehicle was not a lease because the claimant offered no evidence that the individual had the right to voluntarily terminate the individual’s payment obligation under the agreement,

i.e., to pay less than the full amount of consideration under the lease, or that the individual could purchase the vehicle only after paying additional consideration. *United States v. Bushay*, 34 F. Supp. 3d 1260 (N.D. Ga. Aug. 5, 2014).

## RESEARCH REFERENCES

**Am. Jur. Proof of Facts.** — Status as “Buyer in Ordinary Course of Business,” 2 POF2d 165.

## PART 2

## FORMATION AND CONSTRUCTION OF LEASE CONTRACT

**11-2A-201. Statute of frauds.**

**Law reviews.** — For article, “The Cost of Consent: Optimal Standardization in the Law of Contract,” see 58 Emory L.J. 1401 (2009).

**11-2A-207. Course of performance or practical construction.**

Reserved. Repealed by Ga. L. 2015, p. 996, § 3B-5/SB 65, effective January 1, 2016.

**Editor’s notes.** — This Code section was based on Code 1981, § 11-2A-207, enacted by Ga. L. 1993, p. 633, § 1.

## PART 5

## DEFAULT

## Subpart A

## In General

**11-2A-501. Default: Procedure.**

(1) Whether the lessor or the lessee is in default under a lease contract is determined by the lease agreement and this article.

(2) If the lessor or the lessee is in default under the lease contract, the party seeking enforcement has rights and remedies as provided in this article and, except as limited by this article, as provided in the lease agreement.

(3) If the lessor or the lessee is in default under the lease contract, the party seeking enforcement may reduce the party’s claim to judgment, or otherwise enforce the lease contract by self-help or any available judicial procedure or nonjudicial procedure, including administrative proceeding, arbitration, or the like, in accordance with this article.

(4) Except as otherwise provided in Code Section 11-1-305(a) or this article or the lease agreement, the rights and remedies referred to in subsections (2) and (3) are cumulative.

(5) If the lease agreement covers both real property and goods, the party seeking enforcement may proceed under this Part as to the goods, or under other applicable law as to both the real property and the goods in accordance with that party’s rights and remedies in respect of the real property, in which case this Part does not apply. (Code 1981, § 11-2A-501, enacted by Ga. L. 1993, p. 633, § 1; Ga. L. 2015, p. 996, § 3B-6/SB 65.)

**The 2015 amendment**, effective January 1, 2016, in subsection (4), substituted “Code Section 11-1-305(a)” for “Code Section 11-1-106(1)”.  
**Editor’s notes.** — Ga. L. 2015, p. 996, § 1-1/SB 65, not codified by the General Assembly, provides: “(a) This Act shall be known and may be cited as the ‘Debtor-Creditor Uniform Law Modernization Act of 2015.’

“(b) To promote consistency among the states, it is the intent of the General Assembly to modernize certain existing uniform laws promulgated by the Uniform Law Commission affecting debtor and creditor rights, responsibilities, and relationships and other federally recognized laws affecting such rights, responsibilities, and relationships.”

11-2A-504. Liquidation of damages.

JUDICIAL DECISIONS

**Undisputed early termination charge formula in car lease.** — Summary judgment was granted in favor of the defendants, a leasing corporation and a bank, on the plaintiff’s, a car lessee, challenge to the legality of the early termination charge formula used by the bank under O.C.G.A. § 11-2A-504(1) because

the early termination charge formula did not violate the statute where there was no dispute as to the terms, mechanics, or the results produced in the transaction. *Torres v. Banc One Leasing Corp.*, 226 F. Supp. 1345 (N.D. Ga. 2002).  
**Cited** in *Baez v. Banc One Leasing Corp.*, 348 F.3d 972 (11th Cir. 2003).

Subpart B

Default by Lessor

11-2A-514. Waiver of lessee’s objections.

(1) In rejecting goods, a lessee’s failure to state a particular defect that is ascertainable by reasonable inspection precludes the lessee from relying on the defect to justify rejection or to establish default:

- (a) If, stated seasonably, the lessor or the supplier could have cured it (Code Section 11-2A-513); or
- (b) Between merchants if the lessor or the supplier after rejection has made a request in writing for a full and final written statement of all defects on which the lessee proposes to rely.

(2) A lessee’s failure to reserve rights when paying rent or other consideration against documents precludes recovery of the payment for



defects apparent in the documents. (Code 1981, § 11-2A-514, enacted by Ga. L. 1993, p. 633, § 1; Ga. L. 2010, p. 481, § 2-14/HB 451.)

**The 2010 amendment**, effective May 27, 2010, substituted “in the documents” for “on the face of the documents” at the end of subsection (2). See the Editor’s notes for applicability.

**Editor’s notes.** — Ga. L. 2010, p. 481, § 3-1, not codified by the General Assembly, provides that: “This Act applies to a document of title that is issued or a bailment that arises on or after the effective date of this Act. This Act does not apply to a document of title that is issued or a bailment that arises before the effective date of this Act even if the document of title or bailment would be subject to this Act if the document of title had been issued or bailment had arisen on or after the effective date of this Act. This Act does

not apply to a right of action that has accrued before the effective date of this Act.” This Act became effective May 27, 2010.

Ga. L. 2010, p. 481, § 3-2, not codified by the General Assembly, provides that: “A document of title issued or a bailment that arises before the effective date of this Act and the rights, documents, and interests flowing from that document or bailment are governed by any statute or other rule amended or repealed by this Act as if such amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute or other rule.” This Act became effective May 27, 2010.

### **11-2A-518. Cover; substitute goods.**

(1) After a default by a lessor under the lease contract of the type described in Code Section 11-2A-508(1) or, if agreed, after other default by the lessor, the lessee may cover by making any purchase or lease of or contract to purchase or lease goods in substitution for those due from the lessor.

(2) Except as otherwise provided with respect to damages liquidated in the lease agreement (Code Section 11-2A-504) or otherwise determined pursuant to agreement of the parties (Code Sections 11-1-302 and 11-2A-503), if a lessee’s cover is by a lease agreement substantially similar to the original lease agreement and the new lease agreement is made in good faith and in a commercially reasonable manner, the lessee may recover from the lessor as damages (i) the present value, as of the date of the commencement of the term of the new lease agreement, of the rent under the new lease agreement applicable to that period of the new lease term which is comparable to the then remaining term of the original lease agreement minus the present value as of the same date of the total rent for the then remaining lease term of the original lease agreement, and (ii) any incidental or consequential damages, less expenses saved in consequence of the lessor’s default.

(3) If a lessee’s cover is by lease agreement that for any reason does not qualify for treatment under subsection (2), or is by purchase or otherwise, the lessee may recover from the lessor as if the lessee had elected not to cover and Code Section 11-2A-519 governs. (Code 1981, § 11-2A-518, enacted by Ga. L. 1993, p. 633, § 1; Ga. L. 2015, p. 996, § 3B-7/SB 65.)

**The 2015 amendment**, effective January 1, 2016, substituted “(Code Sections 11-1-302” for “(Code Sections 11-1-102” in subsection (2).

**Editor’s notes.** — Ga. L. 2015, p. 996, § 1-1/SB 65, not codified by the General Assembly, provides: “(a) This Act shall be known and may be cited as the ‘Debtor-Creditor Uniform Law Modernization Act of 2015.’

“(b) To promote consistency among the states, it is the intent of the General Assembly to modernize certain existing uniform laws promulgated by the Uniform Law Commission affecting debtor and creditor rights, responsibilities, and relationships and other federally recognized laws affecting such rights, responsibilities, and relationships.”

**11-2A-519. Lessee’s damages for nondelivery, repudiation, default, and breach of warranty in regard to accepted goods.**

(1) Except as otherwise provided with respect to damages liquidated in the lease agreement (Code Section 11-2A-504) or otherwise determined pursuant to agreement of the parties (Code Sections 11-1-302 and 11-2A-503), if a lessee elects not to cover or a lessee elects to cover and the cover is by lease agreement that for any reason does not qualify for treatment under Code Section 11-2A-518(2), or is by purchase or otherwise, the measure of damages for non-delivery or repudiation by the lessor or for rejection or revocation of acceptance by the lessee is the present value, as of the date of the default, of the then market rent minus the present value as of the same date of the original rent, computed for the remaining lease term of the original lease agreement, together with incidental and consequential damages, less expenses saved in consequence of the lessor’s default.

(2) Market rent is to be determined as of the place for tender or, in cases of rejection after arrival or revocation of acceptance, as of the place of arrival.

(3) Except as otherwise agreed, if the lessee has accepted goods and given notification (Code Section 11-2A-516(3)), the measure of damages for nonconforming tender or delivery or other default by a lessor is the loss resulting in the ordinary course of events from the lessor’s default as determined in any manner that is reasonable together with incidental and consequential damages, less expenses saved in consequence of the lessor’s default.

(4) Except as otherwise agreed, the measure of damages for breach of warranty is the present value at the time and place of acceptance of the difference between the value of the use of the goods accepted and the value if they had been as warranted for the lease term, unless special circumstances show proximate damages of a different amount, together with incidental and consequential damages, less expenses saved in consequence of the lessor’s default or breach of warranty. (Code 1981, § 11-2A-519, enacted by Ga. L. 1993, p. 633, § 1; Ga. L. 2015, p. 996, § 3B-8/SB 65.)

**The 2015 amendment**, effective January 1, 2016, substituted “(Code Sections 11-1-302” for “(Code Sections 11-1-102(3)” in subsection (1).

**Editor’s notes.** — Ga. L. 2015, p. 996, § 1-1/SB 65, not codified by the General Assembly, provides: “(a) This Act shall be known and may be cited as the ‘Debtor-Creditor Uniform Law Modernization Act of 2015.’

“(b) To promote consistency among the states, it is the intent of the General Assembly to modernize certain existing uniform laws promulgated by the Uniform Law Commission affecting debtor and creditor rights, responsibilities, and relationships and other federally recognized laws affecting such rights, responsibilities, and relationships.”

## Subpart C

### Default by Lessee

#### 11-2A-526. Lessor’s stoppage of delivery in transit or otherwise.

(1) A lessor may stop delivery of goods in the possession of a carrier or other bailee if the lessor discovers the lessee to be insolvent and may stop delivery of carload, truckload, planeload, or larger shipments of express or freight if the lessee repudiates or fails to make a payment due before delivery, whether for rent, security or otherwise under the lease contract, or for any other reason the lessor has a right to withhold or take possession of the goods.

(2) In pursuing its remedies under subsection (1) of this Code section, the lessor may stop delivery until:

(a) Receipt of the goods by the lessee;

(b) Acknowledgment to the lessee by any bailee of the goods, except a carrier, that the bailee holds the goods for the lessee; or

(c) Such an acknowledgment to the lessee by a carrier via reshipment or as a warehouse.

(3)(a) To stop delivery, a lessor shall so notify as to enable the bailee by reasonable diligence to prevent delivery of the goods.

(b) After notification, the bailee shall hold and deliver the goods according to the directions of the lessor, but the lessor is liable to the bailee for any ensuing charges or damages.

(c) A carrier who has issued a nonnegotiable bill of lading is not obliged to obey a notification to stop received from a person other than the consignor. (Code 1981, § 11-2A-526, enacted by Ga. L. 1993, p. 633, § 1; Ga. L. 2010, p. 481, § 2-15/HB 451.)

**The 2010 amendment**, effective May 27, 2010, in subsection (2), in the introductory paragraph, inserted “of this Code section” in the middle and added a colon at

the end; and substituted “a warehouse” for “warehouseman” at the end of paragraph (2)(c). See the Editor’s notes for applicability.



**Editor's notes.** — Ga. L. 2010, p. 481, § 3-1, not codified by the General Assembly, provides that: "This Act applies to a document of title that is issued or a bailment that arises on or after the effective date of this Act. This Act does not apply to a document of title that is issued or a bailment that arises before the effective date of this Act even if the document of title or bailment would be subject to this Act if the document of title had been issued or bailment had arisen on or after the effective date of this Act. This Act does not apply to a right of action that has accrued before the effective date of this

Act." This Act became effective May 27, 2010.

Ga. L. 2010, p. 481, § 3-2, not codified by the General Assembly, provides that: "A document of title issued or a bailment that arises before the effective date of this Act and the rights, documents, and interests flowing from that document or bailment are governed by any statute or other rule amended or repealed by this Act as if such amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute or other rule." This Act became effective May 27, 2010.

### **11-2A-527. Lessor's rights to dispose of goods.**

(1) After a default by a lessee under the lease contract of the type described in Code Section 11-2A-523(1) or 11-2A-523(3)(a) or after the lessor refuses to deliver or takes possession of goods (Code Section 11-2A-525 or 11-2A-526), or, if agreed, after other default by a lessee, the lessor may dispose of the goods concerned or the undelivered balance thereof by lease, sale, or otherwise.

(2) Except as otherwise provided with respect to damages liquidated in the lease agreement (Code Section 11-2A-504) or otherwise determined pursuant to agreement of the parties (Code Sections 11-1-302 and 11-2A-503), if the disposition is by lease agreement substantially similar to the original lease agreement and the new lease agreement is made in good faith and in a commercially reasonable manner, the lessor may recover from the lessee as damages (i) accrued and unpaid rent as of the date of the commencement of the term of the new lease agreement, (ii) the present value, as of the same date, of the total rent for the then remaining lease term of the original lease agreement minus the present value, as of the same date, of the rent under the new lease agreement applicable to that period of the new lease term which is comparable to the then remaining term of the original lease agreement, and (iii) any incidental damages allowed under Code Section 11-2A-530, less expenses saved in consequence of the lessee's default.

(3) If the lessor's disposition is by lease agreement that for any reason does not qualify for treatment under subsection (2), or is by sale or otherwise, the lessor may recover from the lessee as if the lessor had elected not to dispose of the goods and Code Section 11-2A-528 governs.

(4) A subsequent buyer or lessee who buys or leases from the lessor in good faith for value as a result of a disposition under this section takes the goods free of the original lease contract and any rights of the original lessee even though the lessor fails to comply with one or more of the requirements of this article.

(5) The lessor is not accountable to the lessee for any profit made on any disposition. A lessee who has rightfully rejected or justifiably revoked acceptance shall account to the lessor for any excess over the amount of the lessee's security interest (Code Section 11-2A-508(5)). (Code 1981, § 11-2A-527, enacted by Ga. L. 1993, p. 633, § 1; Ga. L. 2015, p. 996, § 3B-9/SB 65.)

**The 2015 amendment**, effective January 1, 2016, substituted "(Code Sections 11-1-302" for "(Code Sections 11-1-102(3)" near the middle of subsection (2).

**Editor's notes.** — Ga. L. 2015, p. 996, § 1-1/SB 65, not codified by the General Assembly, provides: "(a) This Act shall be known and may be cited as the 'Debtor-Creditor Uniform Law Modernization Act of 2015.'

"(b) To promote consistency among the states, it is the intent of the General Assembly to modernize certain existing uniform laws promulgated by the Uniform Law Commission affecting debtor and creditor rights, responsibilities, and relationships and other federally recognized laws affecting such rights, responsibilities, and relationships."

### JUDICIAL DECISIONS

**Erroneous finding or interpretation.** — Because the trial court did not find any material miscalculation of figures in an arbitrator's award, mistake in the award's descriptions, or imperfection in the form of the award, but refused to apply O.C.G.A. § 11-2A-529(1)(b), opting instead to apply O.C.G.A. § 11-2A-528(1)(ii), it substituted its judgment for that of the arbitrator, in violation

of 9 U.S.C. § 11, as to whether a lessor had shown an inability to reasonably dispose of the leased equipment, and it penalized the lessor for not relitigating the issue at the trial court level, which amounted to reversible error. *Lanier Worldwide, Inc. v. BridgeCenters at Park Meadows, LLC*, 279 Ga. App. 879, 633 S.E.2d 49 (2006).

### **11-2A-528. Lessor's damages for nonacceptance, failure to pay, repudiation, or other default.**

(1) Except as otherwise provided with respect to damages liquidated in the lease agreement (Code Section 11-2A-504) or otherwise determined pursuant to agreement of the parties (Code Sections 11-1-302 and 11-2A-503), if a lessor elects to retain the goods or a lessor elects to dispose of the goods and the disposition is by lease agreement that for any reason does not qualify for treatment under Code Section 11-2A-527(2), or is by sale or otherwise, the lessor may recover from the lessee as damages for a default of the type described in Code Section 11-2A-523(1) or 11-2A-523(3)(a), or, if agreed, for other default of the lessee, (i) accrued and unpaid rent as of the date of default if the lessee has never taken possession of the goods, or, if the lessee has taken possession of the goods, as of the date the lessor repossesses the goods or an earlier date on which the lessee makes a tender of the goods to the lessor, (ii) the present value as of the date determined under clause (i) of the total rent for the then remaining lease term of the original lease agreement minus the present value as of the same date of the market



rent at the place where the goods are located computed for the same lease term, and (iii) any incidental damages allowed under Code Section 11-2A-530, less expenses saved in consequence of the lessee's default.

(2) If the measure of damages provided in subsection (1) is inadequate to put a lessor in as good a position as performance would have, the measure of damages is the present value of the profit, including reasonable overhead, the lessor would have made from full performance by the lessee, together with any incidental damages allowed under Code Section 11-2A-530, due allowance for costs reasonably incurred and due credit for payments or proceeds of disposition. (Code 1981, § 11-2A-528, enacted by Ga. L. 1993, p. 633, § 1; Ga. L. 2015, p. 996, § 3B-10/SB 65.)

**The 2015 amendment**, effective January 1, 2016, substituted "(Code Sections 11-1-302" for "(Code Sections 11-1-102(3)" near the middle of subsection (1).

**Editor's notes.** — Ga. L. 2015, p. 996, § 1-1/SB 65, not codified by the General Assembly, provides: "(a) This Act shall be known and may be cited as the 'Debtor-Creditor Uniform Law Modernization Act of 2015.'

"(b) To promote consistency among the states, it is the intent of the General Assembly to modernize certain existing uniform laws promulgated by the Uniform Law Commission affecting debtor and creditor rights, responsibilities, and relationships and other federally recognized laws affecting such rights, responsibilities, and relationships."

## JUDICIAL DECISIONS

**Erroneous finding or interpretation.** — Because the trial court did not find any material miscalculation of figures in an arbitrator's award, mistake in the award's descriptions, or imperfection in the form of the award, but refused to apply O.C.G.A. § 11-2A-529(1)(b), opting instead to apply O.C.G.A. § 11-2A-528(1)(ii), it substituted its judgment for that of the arbitrator, in violation

of 9 U.S.C. § 11, as to whether a lessor had shown an inability to reasonably dispose of the leased equipment, and it penalized the lessor for not relitigating the issue at the trial court level, which amounted to reversible error. *Lanier Worldwide, Inc. v. BridgeCenters at Park Meadows, LLC*, 279 Ga. App. 879, 633 S.E.2d 49 (2006).

## 11-2A-529. Lessor's action for the rent.

## JUDICIAL DECISIONS

**Erroneous finding or interpretation.** — Because the trial court did not find any material miscalculation of figures in an arbitrator's award, mistake in the award's descriptions, or imperfection in the form of the award, but refused to apply O.C.G.A. § 11-2A-529(1)(b), opting instead to apply O.C.G.A.

§ 11-2A-528(1)(ii), it substituted its judgment for that of the arbitrator, in violation of 9 U.S.C. § 11, as to whether a lessor had shown an inability to reasonably dispose of the leased equipment, and it penalized the lessor for not relitigating the issue at the trial court level, which amounted to reversible error. *Lanier*



Worldwide, Inc. v. BridgeCenters at Park  
Meadows, LLC, 279 Ga. App. 879, 633  
S.E.2d 49 (2006).

## ARTICLE 3

### NEGOTIABLE INSTRUMENTS

#### Part 1

#### General Provisions and Definitions

Sec.

11-3-103. Definitions.

#### PART 1

#### GENERAL PROVISIONS AND DEFINITIONS

#### 11-3-101. Short title.

#### JUDICIAL DECISIONS

**Cited** in HWA Props., Inc. v. Cmty. & S.  
Bank, 322 Ga. App. 877, 746 S.E.2d 609  
(2013).

#### RESEARCH REFERENCES

**Am. Jur. Pleading and Practice  
Forms.** — 5 Am. Jur. Pleading and Prac-  
tice Forms, Bills and Notes, § 3.

#### 11-3-103. Definitions.

(a) In this article:

- (1) “Acceptor” means a drawee who has accepted a draft.
- (2) “Drawee” means a person ordered in a draft to make payment.
- (3) “Drawer” means a person who signs or is identified in a draft as a person ordering payment.
- (4) Reserved.
- (5) “Maker” means a person who signs or is identified in a note as a person undertaking to pay.
- (6) “Order” means a written instruction to pay money signed by the person giving the instruction. The instruction may be addressed to any person, including the person giving the instruction, or to one or more persons jointly or in the alternative but not in succession. An authorization to pay is not an order unless the person authorized to pay is also instructed to pay.

(7) “Ordinary care” in the case of a person engaged in business means observance of reasonable commercial standards, prevailing in the area in which the person is located, with respect to the business in which the person is engaged. In the case of a bank that takes an instrument for processing for collection or payment by automated means, reasonable commercial standards do not require the bank to examine the instrument if the failure to examine does not violate the bank’s prescribed procedures and the bank’s procedures do not vary unreasonably from general banking usage not disapproved by this article or Article 4 of this title.

(8) “Party” means a party to an instrument.

(9) “Promise” means a written undertaking to pay money signed by the person undertaking to pay. An acknowledgment of an obligation by the obligor is not a promise unless the obligor also undertakes to pay the obligation.

(10) “Prove” with respect to a fact means to meet the burden of establishing the fact within the meaning of Code Section 11-1-201(b)(8).

(11) “Remitter” means a person who purchases an instrument from its issuer if the instrument is payable to an identified person other than the purchaser.

(b) Other definitions applying to this article and the Code sections in which they appear are:

“Acceptance.” Code Section 11-3-409.

“Accommodated party.” Code Section 11-3-419.

“Accommodation party.” Code Section 11-3-419.

“Alteration.” Code Section 11-3-407.

“Anomalous indorsement.” Code Section 11-3-205.

“Blank indorsement.” Code Section 11-3-205.

“Cashier’s check.” Code Section 11-3-104.

“Certificate of deposit.” Code Section 11-3-104.

“Certified check.” Code Section 11-3-409.

“Check.” Code Section 11-3-104.

“Consideration.” Code Section 11-3-303.

“Draft.” Code Section 11-3-104.

“Holder in due course.” Code Section 11-3-302.

“Incomplete instrument.” Code Section 11-3-115.  
“Indorsement.” Code Section 11-3-204.  
“Indorser.” Code Section 11-3-204.  
“Instrument.” Code Section 11-3-104.  
“Issue.” Code Section 11-3-105.  
“Issuer.” Code Section 11-3-105.  
“Negotiable instrument.” Code Section 11-3-104.  
“Negotiation.” Code Section 11-3-201.  
“Note.” Code Section 11-3-104.  
“Payable at a definite time.” Code Section 11-3-108.  
“Payable on demand.” Code Section 11-3-108.  
“Payable to bearer.” Code Section 11-3-109.  
“Payable to order.” Code Section 11-3-109.  
“Payment.” Code Section 11-3-602.  
“Person entitled to enforce.” Code Section 11-3-301.  
“Presentment.” Code Section 11-3-501.  
“Reacquisition.” Code Section 11-3-207.  
“Special indorsement.” Code Section 11-3-205.  
“Teller’s check.” Code Section 11-3-104.  
“Transfer of instrument.” Code Section 11-3-203.  
“Traveler’s check.” Code Section 11-3-104.  
“Value.” Code Section 11-3-303.

(c) The following definitions in other articles apply to this article:

“Bank.” Code Section 11-4-105.  
“Banking day.” Code Section 11-4-104.  
“Clearing house.” Code Section 11-4-104.  
“Collecting bank.” Code Section 11-4-105.  
“Depository bank.” Code Section 11-4-105.  
“Documentary draft.” Code Section 11-4-104.  
“Intermediary bank.” Code Section 11-4-105.  
“Item.” Code Section 11-4-104.



“Payor bank.” Code Section 11-4-105.

“Suspends payments.” Code Section 11-4-104.

(d) In addition, Article 1 of this title contains general definitions and principles of construction and interpretation applicable throughout this article. (Code 1981, § 11-3-103, enacted by Ga. L. 1996, p. 1306, § 3; Ga. L. 2015, p. 996, § 3B-11/SB 65.)

**The 2015 amendment**, effective January 1, 2016, substituted “Reserved” for “‘Good faith’ means honesty in fact and the observance of reasonable commercial standards of fair dealing” in paragraph (a)(4); and substituted “within the meaning of Code Section 11-1-201(b)(8)” for “as ‘burden of establishing’ is defined in subsection (8) of Code Section 11-1-201” in paragraph (a)(10).

**Editor’s notes.** — Ga. L. 2015, p. 996, § 1-1/SB 65, not codified by the General Assembly, provides: “(a) This Act shall be known and may be cited as the

‘Debtor-Creditor Uniform Law Modernization Act of 2015.’

“(b) To promote consistency among the states, it is the intent of the General Assembly to modernize certain existing uniform laws promulgated by the Uniform Law Commission affecting debtor and creditor rights, responsibilities, and relationships and other federally recognized laws affecting such rights, responsibilities, and relationships.”

**Law reviews.** — For annual survey of law of business associations, see 56 Mercer L. Rev. 77 (2004).

### JUDICIAL DECISIONS

**Bank as holder in due course.** — Where a fact question remained as to whether a bank accused of negligently accepting stolen checks for deposit and conversion acted in good faith in receiving forged checks, it could not achieve status as a holder in due course. *Gerber & Gerber, P.C. v. Regions Bank*, 266 Ga. App. 8, 596 S.E.2d 174 (2004).

**Good faith.** — On plaintiff commercial checking account customer’s suit against defendant, its employee embezzler’s depository bank, alleging the embezzler deposited checks made payable to the embezzler into the embezzler’s personal account, because those checks contained no indications of forgery, and because the evidence indicated, at most, that the depository bank may have been negligent due to the fact that the bank’s screening

system failed to detect the forgery scheme, but it did not indicate that the bank acted in an unfair or dishonest manner, and nothing showed that the bank’s failure to investigate the embezzler’s account activity was dishonest or unfair, and thus was not honest in fact or did not conform to reasonable commercial standards of fair dealing in accepting the checks, the checking account customer could not prevail in showing a lack of good faith under O.C.G.A. §§ 11-3-103(a)(4) and 11-3-302(a)(2)(ii). *Ownbey Enters. v. Wachovia Bank, N.A.*, 457 F. Supp. 2d 1341 (N.D. Ga. 2006).

**Cited in** *Consumer Solutions Fin. Servs. v. Heritage Bank*, 300 Ga. App. 272, 684 S.E.2d 682 (2009); *Burrowes v. Bank of Am., N.A.*, 340 Ga. App. 248, 797 S.E.2d 493 (2017).

### 11-3-104. Negotiable instrument.

### JUDICIAL DECISIONS

#### ANALYSIS

GENERAL CONSIDERATION  
CHECKS

### General Consideration

**Transfer from bank to holding company required party substitution.** — Bank effectively transferred the bank's interest in the promissory notes, deeds to secure debt, guaranties, and other accompanying documents to the holding company so that, whether the holding company was a holder in due course or not, the holding company was the real party in interest here and the trial court properly granted the motion to substitute the party. *Hampton Island, LLC v. Asset Holding Co. 5, LLC*, 320 Ga. App. 880, 740 S.E.2d 859 (2013).

**Cited in** *Ameritrust Co. v. White*, 73 F.3d 1553 (11th Cir. 1996).

### Checks

#### Check defined.

Defendant's filling out of a loan application with an internet lender for the purchase of a vehicle by falsely using the defendant's father's social security number, which caused the lender to issue a check that was used for the payment of the vehicle, provided sufficient evidence for a conviction under O.C.G.A. § 16-8-3 even though the lender stopped payment prior to purchase; the document received by the defendant from the lender was a "check" within the definition of O.C.G.A. § 11-3-104(f)(1), as it referenced itself in that manner and was drawn on a bank. *Scott v. State*, 277 Ga. App. 876, 627 S.E.2d 904 (2006).

**Blank payment checks were valueless.** — On cross-motions for summary judgment in a Fair Labor Standards Act case filed by plaintiff Mexican national agricultural laborers against defendant employers that included a claim for conversion of certain "reimbursement" checks in that the employers directed the laborers to endorse and return the checks, and the employers argued that it was entitled

to the returned checks due to the employers paying for bus fares and subsistence and additional transportation expenses in cash, and also argued that the checks were blank, the court agreed with the employers that because the checks were blank, under O.C.G.A. §§ 11-3-104(c) and 11-3-420(a), they were valueless, so there would be no damage from converting the checks. *Morales-Arcadio v. Shannon Produce Farms, Inc.*, No. 605CV062, 2007 U.S. Dist. LEXIS 51950 (S.D. Ga. July 18, 2007).

**Proof required for conversion of a check.** — Appellate court erred in reversing a trial court's grant of summary judgment pursuant to O.C.G.A. § 9-11-56 to an auto dealership in a conversion action against a bank, which alleged that the bank deliberately cashed a check after the dealership had placed a stop payment on the check. The law applicable to conversion of personal property applied to instruments pursuant to O.C.G.A. § 11-3-420(a), and checks were one form of instrument included in this provision, O.C.G.A. § 11-3-104(c), (f); therefore, the dealership was not required to establish the existence of specific dollars or coins in order to recover for the conversion of its check and the full value of the intangible rights identified with that check. *Decatur Auto Ctr., Inc. v. Wachovia Bank, N.A.*, 276 Ga. 817, 583 S.E.2d 6 (2003).

**Cashier's check properly paid to court.** — Trial court did not err in granting summary judgment to a bank because the bank acted properly in refusing to honor the cashier's check since the funds were the property of the payee and were within the control of the bank at the time the bank received the garnishment order; thus, O.C.G.A. § 18-4-4 required that the bank pay those funds into the court in the garnishment action and not to the payee. *Burrowes v. Bank of Am., N.A.*, 340 Ga. App. 248, 797 S.E.2d 493 (2017).

## 11-3-108. Payable on demand or at definite time.

### JUDICIAL DECISIONS

**Cited in** *West v. Diduro*, 312 Ga. App. 591, 718 S.E.2d 815 (2011).

**11-3-117. Other agreements affecting instrument.****JUDICIAL DECISIONS**

**Modification of obligation.** — Although it was true that the obligation of a party to an instrument could be modified, the bank was entitled to summary judgment on its breach of contract claim, which alleged that the obligors executed two promissory notes, that the notes were later in default, that the obligors did not

have a defense, especially since the obligors did not show how modification agreements, to which the obligors were not parties, relieved them of their obligations on the notes. *Reece v. Chestatee State Bank*, 260 Ga. App. 136, 579 S.E.2d 11 (2003).

**11-3-118. Statute of limitations.****JUDICIAL DECISIONS**

**Conversion and negligence action barred.** — Bank account holder's conversion and negligence action against a bank for paying two checks on the holder's account without authorization was barred by the Georgia Uniform Commercial Code's three-year statute of limitations set forth in O.C.G.A. § 11-3-118(g), which

applied to negotiable instruments, because the holder did not file a complaint until more than three years after the bank paid the checks at issue. *Ogundele v. Wachovia Bank, N.A.*, No. 1:04-CV-1852-CC, 2004 U.S. Dist. LEXIS 25396 (N.D. Ga. Dec. 6, 2004).

**PART 2****NEGOTIATION, TRANSFER, AND INDORSEMENT****11-3-201. Negotiation.****JUDICIAL DECISIONS****ANALYSIS****GENERAL CONSIDERATION****General Consideration**

**Cited in** *Gerber & Gerber, P.C. v. Regions Bank*, 266 Ga. App. 8, 596 S.E.2d 174 (2004).

**11-3-203. Transfer of instrument; rights acquired by transfer.****JUDICIAL DECISIONS**

**Delivery not a transfer.** — Issuer of the check was debtor and therefore delivery of the checks to the law firms was not a transfer for purposes of O.C.G.A. § 11-3-203. In *re Georgetown Square II*

LLC, No. 11-86382, 2012 Bankr. LEXIS 6253 (Bankr. N.D. Ga. Dec. 19, 2012).

**Bankruptcy.** — Mere delivery of a check by the check's issuer to a payee of that check is not a transfer of an interest



in property of the issuer other than as to the paper or other object on which the check was written because the delivery of the check, apart from any intrinsic value the check might have, does not reduce the issuer's net worth or give the holder of the check any claim on the property of the issuer other than the right to enforce the check. But if a check, whenever delivered, is honored when the issuer is a debtor in bankruptcy, the payment of the check is, in the parlance of 11 U.S.C. § 549, a "transfer of property of the estate." In re Georgetown Square II LLC, No. 11-86382, 2012 Bankr. LEXIS 6253 (Bankr. N.D. Ga. Dec. 19, 2012).

**Holder entitled to full amount regardless of amount paid or amounts received from others.** — Holder of a promissory note was entitled to enforce the note according to the note's terms, meaning for the full amount due and payable under the note, regardless of how much the holder paid for the note or whether the holder received other monies from third parties as a result of losses suffered due to the debtor's default as provided by O.C.G.A. § 11-3-203(b). *First Citizens Bank & Trust Co. v. River Walk Farm, L.P.*, 591 Fed. Appx. 590 (11th Cir. Aug. 18, 2015) (Unpublished).

**11-3-205. Special indorsement; blank indorsement; anomalous indorsement.**

**Cross references.** — Use of parol evidence to explain blank endorsements of negotiable paper, § 24-3-10.

**JUDICIAL DECISIONS**

**Cited** in *Gerber & Gerber, P.C. v. Regions Bank*, 266 Ga. App. 8, 596 S.E.2d 174 (2004); *Consumer Solutions Fin. Servs. v. Heritage Bank*, 300 Ga. App. 272, 684 S.E.2d 682 (2009).

**PART 3**

**ENFORCEMENT OF INSTRUMENTS**

**11-3-301. Person entitled to enforce instrument.**

**JUDICIAL DECISIONS**

**ANALYSIS**

**GENERAL CONSIDERATION**

**General Consideration**

**Bank as holder or holder in due course.**

Bank that acquired a promissory note and security deed that a Chapter 13 debtor executed before the debtor declared bankruptcy, transferred the note and deed to a loan trust, and acted as the trustee for the benefit of entities that purchased interests in the trust, had standing to request relief under 11 U.S.C. § 362(d) to foreclose on the debtor's property; the

bankruptcy court allowed the bank to proceed with a foreclosure sale and to record a deed of sale it obtained when it bought the debtor's property at the foreclosure sale because the debtor did not have equity in the property and did not have a reasonable prospect of proposing a viable Chapter 13 plan. The bank was a "holder" of the note and was entitled under O.C.G.A. § 11-3-301 to enforce the note. In *re Darlington*, No. 09-10691-WHD, 2009 Bankr. LEXIS 3577 (Bankr. N.D. Ga. Sept. 11, 2009).

Trial court did not err in granting a bank summary judgment on the bank's claims against an automobile seller for enforcement of drawer and signer obligations under the Georgia Uniform Commercial Code (UCC), O.C.G.A. § 11-3-414(b), and for a violation of the bad check statute, O.C.G.A. § 13-6-15, because there was no genuine issue of material fact as to whether the bank was a holder in due course of the check; the bank was entitled to enforce the drawer and signer obligations imposed upon the seller because the bank was the "holder" of the check pursuant to § 11-3-414(b), and since the bank was the depository bank, and the amount of the check was deposited to the bank's customer's account, the bank became the holder of the instrument when the bank received the check for collection. *Consumer Solutions Fin. Servs. v. Heritage Bank*, 300 Ga. App. 272, 684 S.E.2d 682 (2009).

Bank, who acquired the debtors' note, did not have to possess both the original note and the note modification to be a "holder" entitled to bring suit and enforce the underlying debt obligation against the debtors. *River Forest, Inc. v. Multibank 2009-1 Res-ADC Venture, LLC*, 331 Ga. App. 435, 771 S.E.2d 126 (2015), cert. denied, No. S15C1134, 2015 Ga. LEXIS 529 (Ga. 2015).

**Sufficient proof that bank was holder of note.** — In a bank's suit against the guarantor of a note, the affidavit of the bank's vice-president established that the note was among the bank's business records and in the bank's possession; as such, the bank submitted competent proof that the bank was the holder of the note for purposes of the bank's summary judgment motion. *Salahat v. FDIC*, 298 Ga. App. 624, 680 S.E.2d 638 (2009).

**Holder is one who has possession of a check.** — Pursuant to O.C.G.A. § 11-3-301(i), the holder of a check is entitled to negotiate the check, and a holder is one who has possession of the check. *Sun Nurseries, Inc. v. Lake Erma, LLC*, 316 Ga. App. 832, 730 S.E.2d 556 (2012).

**Payee of a check who does not take delivery of the check cannot recover against bank for fraudulent endorsement.** — Payee of a check who never received the check and was unaware that the check had been made out to the payee due to fraud by the payee's cousin was not a person who could enforce the check or recover against the bank for the bank's payment of the check over the fraudulent endorsement of the payee's cousin, pursuant to O.C.G.A. §§ 11-3-301 and 11-3-420. *Jenkins v. Wachovia Bank, Nat'l Ass'n*, 309 Ga. App. 562, 711 S.E.2d 80 (2011).

**Unclean hands did not apply.** — Since there was no dispute that the promissory notes at issue were authentic, that the buyers signed the notes, that the sellers' were the holders, or as to the amount due on the notes, and since a trial court did not err in finding that no novation occurred and that there were no other meritorious defenses, the trial court did not err in finding that the buyers had no defense to the sellers' suit seeking payment on the notes; however, the equitable doctrine of unclean hands had no application to an action at law, and the trial court was not authorized to reduce the amounts shown to be due and payable on the notes on account of its finding of unclean hands. *Park v. Fortune Ptnr., Inc.*, 279 Ga. App. 268, 630 S.E.2d 871 (2006).

**Cited in** *Gerber & Gerber, P.C. v. Regions Bank*, 266 Ga. App. 8, 596 S.E.2d 174 (2004).

## 11-3-302. Holder in due course.

### JUDICIAL DECISIONS

#### ANALYSIS

#### GENERAL CONSIDERATION

#### HOLDER

#### NOTICE

#### HOLDERS NOT IN DUE COURSE GENERALLY

### General Consideration

#### Bank as holder in due course.

Where a fact question remained as to whether a bank accused of negligently accepting stolen checks for deposit and conversion acted in good faith in receiving forged checks, it could not achieve status as a holder in due course. *Gerber & Gerber, P.C. v. Regions Bank*, 266 Ga. App. 8, 596 S.E.2d 174 (2004).

Trial court did not err in granting summary judgment to a bank and a credit union, on claims of conversion, civil conspiracy and for attorney fees and punitive damages, as: (1) no probative evidence existed that the buyer received delivery of the check, and thus, it never became a holder of the instrument at issue or entitled to enforce it; (2) no evidence was presented that the bank and credit union acted in concert against the buyer; (3) no evidence of misconduct or bad faith on the part of the bank or the credit union was presented; but, the trial court properly found that a genuine issue of material fact existed as to whether the bank and the credit union were holders in due course. *Hartsock v. Rich's Empl's. Credit Union*, 279 Ga. App. 724, 632 S.E.2d 476 (2006).

Trial court did not err in granting a bank summary judgment on the bank's claims against an automobile seller for enforcement of drawer and signer obligations under the Georgia Uniform Commercial Code (UCC), O.C.G.A. § 11-3-414(b), and for a violation of the bad check statute, O.C.G.A. § 13-6-15, because there was no genuine issue of material fact as to whether the bank was a holder in due course of the check; the bank was entitled to enforce the drawer and signer obligations imposed upon the seller because the bank was the "holder" of the check pursuant to § 11-3-414(b), and since the bank was the depository bank, and the amount of the check was deposited to the customer's account, the bank became the holder of the instrument when the bank received the check for collection. *Consumer Solutions Fin. Servs. v. Heritage Bank*, 300 Ga. App. 272, 684 S.E.2d 682 (2009).

**Cited in** *Provident Bank v. Morequity, Inc.*, 262 Ga. App. 331, 585 S.E.2d 625 (2003).

### Holder

#### Bank not liable for bookkeeper's embezzlement.

— A bank was properly granted summary judgment in a suit brought by a company seeking reimbursement for money its bookkeeper embezzled as the bank was a holder in due course and had paid the checks presented by the bookkeeper as it was authorized under a certificate of resolution; there was no bad faith shown on the part of the bank in paying the items presented by the bookkeeper. *Dalton Point, L.P. v. Regions Bank, Inc.*, 287 Ga. App. 468, 651 S.E.2d 549 (2007).

### Notice

**Good faith.** — On plaintiff commercial checking account customer's suit against defendant, its employee embezzler's depository bank, alleging the embezzler deposited checks made payable to the embezzler into the embezzler's personal account, because those checks contained no indications of forgery, and because the evidence indicated, at most, that the depository bank may have been negligent due to the fact that the bank's screening system failed to detect the forgery scheme, but it did not indicate that the bank acted in an unfair or dishonest manner, and nothing showed that the bank's failure to investigate the embezzler's account activity was dishonest or unfair, and thus was not honest in fact or did not conform to reasonable commercial standards of fair dealing in accepting the checks, the checking account customer could not prevail in showing a lack of good faith under O.C.G.A. § 11-3-302(a)(2)(ii). *Ownbey Enters. v. Wachovia Bank, N.A.*, 457 F. Supp. 2d 1341 (N.D. Ga. 2006).

#### Taking without notice of forgery.

— On plaintiff commercial checking account customer's suit against defendant, its employee embezzler's depository bank, alleging the embezzler deposited checks made payable to the embezzler into the embezzler's personal account, because those checks contained no indications of forgery, the depository bank's failure to verify signatures was not evidence that it acted without "honesty in fact" as a holder in due course under O.C.G.A.



§§ 11-3-302(a)(2) and 11-3-306; because the depository bank had no actual notice of the embezzlement scheme or that the checks contained unauthorized signatures, no material issue of fact existed as to the notice requirement set forth under O.C.G.A. § 11-3-302(a)(2)(iii), (iv), (v), (vi). *Ownbey Enters. v. Wachovia Bank, N.A.*, 457 F. Supp. 2d 1341 (N.D. Ga. 2006).

### **Holders Not in Due Course Generally**

**Possession.** — Although the corporation met the requirements for being a

holder in due course to the extent that it took the promissory note regarding the mortgage for value, in good faith, and without notice of any claim to the instrument, the corporation was not a holder in due course because it was not in possession of the promissory note at the time it purchased the mortgage; since it was not in possession, it failed to achieve holder-in-due-course status and the bank's security interest prevailed. *Provident Bank v. Morequity, Inc.*, 262 Ga. App. 331, 585 S.E.2d 625 (2003).

### **11-3-303. Value and consideration.**

#### **JUDICIAL DECISIONS**

**Lack of consideration not shown.** — There was no merit to the claim of a maker of a promissory note that the note failed for lack of consideration. The co-maker indicated that it was issued in payment of a debt owed by the co-makers and the maker's company; thus, it was

issued for value as payment of an antecedent claim under O.C.G.A. § 11-3-303, and no new consideration needed to pass between the parties. *Smith v. Thigpen*, 298 Ga. App. 572, 680 S.E.2d 604 (2009).

**Cited in** *Bonem v. Golf Club of Ga., Inc.*, 264 Ga. App. 573, 591 S.E.2d 462 (2003).

### **11-3-305. Defenses and claims in recoupment.**

#### **JUDICIAL DECISIONS**

**Bank not liable for bookkeeper's embezzlement.** — A bank was properly granted summary judgment in a suit brought by a company seeking reimbursement for money its bookkeeper embezzled as the bank was a holder in due course and had paid the checks presented by the bookkeeper as it was authorized under a certificate of resolution; there was no bad faith shown on the part of the bank in paying the items presented by the bookkeeper. *Dalton Point, L.P. v. Regions Bank, Inc.*, 287 Ga. App. 468, 651 S.E.2d 549 (2007).

**Holder in due course status irrelevant.** — Whether or not a bank was a holder in due course of a check made payable to a payee who never received possession of the check before an endorsement was forged on the check was irrelevant to the payee's right to recover against the bank, because the bank's status as a

holder in due course or not did not change the fact that the payee had no right to recover. *Jenkins v. Wachovia Bank, Nat'l Ass'n*, 309 Ga. App. 562, 711 S.E.2d 80 (2011).

**Taking without notice of forgery.** — On plaintiff commercial checking account customer's suit against defendant, its employee embezzler's depository bank, alleging the embezzler deposited checks made payable to the embezzler into the embezzler's personal account, because those checks contained no indications of forgery, the depository bank's failure to verify signatures was not evidence that it acted without "honesty in fact" as a holder in due course under O.C.G.A. §§ 11-3-302(a)(2) and 11-3-306; because the depository bank had no actual notice of the embezzlement scheme or that the checks contained unauthorized signatures, no material issue of fact existed as

to the notice requirement set forth under O.C.G.A. §§ 11-3-302(a)(2)(iii)-(vi) and 11-3-305. *Ownbey Enters. v. Wachovia Bank, N.A.*, 457 F. Supp. 2d 1341 (N.D. Ga. 2006).

**Cited** in *Consumer Solutions Fin. Servs. v. Heritage Bank*, 300 Ga. App. 272, 684 S.E.2d 682 (2009).

RESEARCH REFERENCES

**Am. Jur. Pleading and Practice Forms.** — 8C Am. Jur. Pleading and Prac-  
tice Forms, Duress and Undue Influence, § 1.

11-3-306. Claims to an instrument.

JUDICIAL DECISIONS

**Taking without notice of forgery.** — On plaintiff commercial checking account customer’s suit against defendant, its employee embezzler’s depository bank, alleging the embezzler deposited checks made payable to the embezzler into the embezzler’s personal account, because those checks contained no indications of forgery, the depository bank’s failure to verify signatures was not evidence that it acted without “honesty in fact” as a holder in due course under O.C.G.A. §§ 11-3-302(a)(2) and 11-3-306; because the depository bank had no actual notice of the embezzlement scheme or that the checks contained unauthorized signatures, no material issue of fact existed as to the notice requirement set forth under O.C.G.A. § 11-3-302(a)(2)(iii), (iv), (v), (vi). *Ownbey Enters. v. Wachovia Bank,*

N.A., 457 F. Supp. 2d 1341 (N.D. Ga. 2006).

**Bank not liable for bookkeeper’s embezzlement.** — A bank was properly granted summary judgment in a suit brought by a company seeking reimbursement for money its bookkeeper embezzled as the bank was a holder in due course and had paid the checks presented by the bookkeeper as it was authorized under a certificate of resolution; there was no bad faith shown on the part of the bank in paying the items presented by the bookkeeper. *Dalton Point, L.P. v. Regions Bank, Inc.*, 287 Ga. App. 468, 651 S.E.2d 549 (2007).

**Cited** in *Provident Bank v. Morequity, Inc.*, 262 Ga. App. 331, 585 S.E.2d 625 (2003).

11-3-308. Proof of signatures and status as holder in due course.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION  
SIGNATURES  
DEFENSES

General Consideration

**Guarantor personally liable on promissory note.** — Trial court did not err by finding a guarantor personally liable on a promissory note because the trial court correctly found that the language of the promissory note, the unconditional guaranty, and the modification to the

promissory note were unambiguous, and since the documents’ provisions were clear, the trial court’s proper role was to apply the terms as written; in the guaranty, the guarantor expressly waived all notices or defenses to which the guarantor could be entitled under the guaranty, to the extent permitted by law, and because the guarantor failed to assert any defense

based upon an alleged incompetency to enter into a contract at the time the guarantor executed the guaranty, and because the guarantor failed to show that the guaranty's broad waiver of defenses was prohibited by statute or public policy, the guarantor was bound thereby. *Core LaVista, LLC v. Cumming*, 308 Ga. App. 791, 709 S.E.2d 336 (2011).

### Signatures

#### **Equivocal testimony did not overcome presumption of authenticity.** —

Note that stated that it was "given under the hand and seal of each of the undersigned," and the appearance of the notation "(seal)" after the debtors' signatures was proof of the authenticity of the signatures; one debtor's equivocal testimony regarding recognizing the note as the one the debtor signed was insufficient to overcome the presumption of the signatures' authenticity. *Thomas v. Summers*, 329 Ga. App. 250, 764 S.E.2d 578 (2014).

Bankruptcy debtor failed to show that the debtor's signature on a personal guaranty of a substantial business loan debt was a forgery since conflicting expert testimony was equivocal and the debtor's asserted lack of memory of signing the guaranty was inconsistent with the intelligent debtor's business experience and acumen in dealing with the lender which always required personal guarantees. In *re Brooks*, No. 13-10860, 2015 Bankr. LEXIS 3301 (Bankr. S.D. Ga. Sept. 29, 2015).

**Summary judgment inappropriate when validity of signature questionable.** — Trial court erred in granting a bank's motion for summary judgment in the bank's action seeking the repayment of a loan because the debtor specifically denied in the answer the validity of the signature on a note, which raised the defense of non est factum, created a factual question as to the authenticity of the signature, and kept the signature from being deemed admitted under O.C.G.A.

§ 11-3-308; as the nonmoving party to a summary judgment motion, the debtor had to only produce or point to any evidence that gave rise to a triable issue of material fact, which the debtor did by submitting an affidavit attesting that the debtor did not sign the note, and given that the debtor's sworn statements were unrefuted, the affidavit had to be taken as true for purposes of deciding the motion. *Lee v. Suntrust Bank*, 314 Ga. App. 63, 722 S.E.2d 884 (2012).

### Defenses

#### **Failure to establish defense.**

Trial court erred in denying a seller's motion for summary judgment in the seller's action against the buyers to recover upon a promissory note because the buyers failed to make payments on the note, and the buyers did not show damages in any amount from the alleged failure of consideration; the note was supported by adequate consideration because the buyers took immediate possession of the seller's business and began operating the business as the buyers' own. *West v. Diduro*, 312 Ga. App. 591, 718 S.E.2d 815 (2011), cert. denied, No. S12C0522, 2012 Ga. LEXIS 279 (Ga. 2012).

**Unclean hands doctrine did not apply.** — Since there was no dispute that the promissory notes at issue were authentic, that the buyers signed the notes, that the sellers' were the holders, or as to the amount due on the notes, and since a trial court did not err in finding that no novation occurred and that there were no other meritorious defenses, the trial court did not err in finding that the buyers had no defense to the sellers' suit seeking payment on the notes; however, the equitable doctrine of unclean hands had no application to an action at law, and the trial court was not authorized to reduce the amounts shown to be due and payable on the notes on account of its finding of unclean hands. *Park v. Fortune Ptnr., Inc.*, 279 Ga. App. 268, 630 S.E.2d 871 (2006).



11-3-309. Enforcement of lost, destroyed, or stolen instrument.

JUDICIAL DECISIONS

**Holder is one who has possession of a check.** — Pursuant to O.C.G.A. § 11-3-309(a)(iii), a person cannot reasonably obtain possession of a check when the check's whereabouts cannot be determined. *Sun Nurseries, Inc. v. Lake Erma, LLC*, 316 Ga. App. 832, 730 S.E.2d 556 (2012).

**Burden of proof.** — Since a bank was not trying to enforce a note, but rather was seeking to foreclose on the property which secured a pro se borrower's loan, the bank was not, as the borrower contended, required to prove the bank's right to enforce the note under O.C.G.A. § 11-3-309(a) in order to exercise the power of sale in the security deed. *Morrison v. Bank of Am., N.A.*, No. 1:13-cv-1052-WSD, 2014 U.S. Dist. LEXIS 104426 (N.D. Ga. July 31, 2014).

11-3-311. Accord and satisfaction by use of instrument.

JUDICIAL DECISIONS

**Accord and satisfaction by check and accompanying letter.** — Deposit of a check constituted an accord and satisfaction under O.C.G.A. § 11-3-311 of a settlement agreement in a debt dispute as a dispute under O.C.G.A. § 13-4-103(b)(1) existed as to the fee portion of the settlement and the letter sent with the check contained a conspicuous statement under O.C.G.A. § 11-1-201(10) that the tender of the check was full payment and satisfaction of the settlement. *Blitch v. Walker Pharm.*, 295 Ga. App. 347, 671 S.E.2d 842 (2008).

PART 4

LIABILITY OF PARTIES

RESEARCH REFERENCES

**Am. Jur. Trials.** — Collection Practice, 12 Am. Jur. Trials 193.

Bank Liability for Negligence in Lending and Breach of Loan Agreement, 69 Am. Jur. Trials 119.

11-3-402. Signature by representative.

JUDICIAL DECISIONS

ANALYSIS

REPRESENTATIVE CAPACITY OF SIGNATURE

**Representative Capacity of Signature**

**An authorized representative was not personally liable, etc.**

In an action following the default of a promissory note, the trial court properly granted the defendant summary judgment because the defendant signed the promissory note solely in a representative capacity of a limited liability company and was not personally liable and the plaintiff

knew that the defendant had not signed in a personal capacity. *Envision Printing, LLC v. Evans*, 336 Ga. App. 635, 786 S.E.2d 250 (2016).

**Representative capacity of signature.**

Trial court did not err in granting a bank summary judgment on the bank's claims against an automobile seller for enforcement of drawer and signer obligations under the Georgia Uniform Commercial Code (UCC), O.C.G.A. § 11-3-414(b), and for a violation of the

bad check statute, O.C.G.A. § 13-6-15, because there was no genuine issue of material fact over whether the seller was the drawer and signer of the check for purposes of the UCC and the bad check statute; the seller admitted that the seller's representative was the actual signatory of the check and that the representative possessed authority to sign checks on the seller's behalf. *Consumer Solutions Fin. Servs. v. Heritage Bank*, 300 Ga. App. 272, 684 S.E.2d 682 (2009).

**11-3-403. Unauthorized signature.**

**JUDICIAL DECISIONS**

**ANALYSIS**

**GENERAL CONSIDERATION**

**General Consideration**

**Acceptance of forged checks.** — Bank was properly granted summary judgment in a suit filed against it by a law firm for negligently accepting stolen checks and for conversion with regards to blank-endorsed cashier's checks, as such were bearer paper transferable by possession alone; however, because a fact issue remained as to whether it acted in good faith in accepting forged checks, it could not be a holder in due course, and summary judgment on that issue was improper. *Gerber & Gerber, P.C. v. Regions Bank*, 266 Ga. App. 8, 596 S.E.2d 174 (2004).

**Note not enforceable against unau-**

**thorized signer.** — Trial court erred in finding that a bank took a note in good faith and in ruling that a co-owner was liable for a debt under O.C.G.A. § 11-3-403(a) because the undisputed testimony from the co-owner, the other owner, and the bank's own vice-president set forth that the co-owner was not authorized to sign a promissory note on behalf of the company and, therefore, the bank could not recover the debt from the co-owner in that regard. *Davison v. Citizens Bank & Trust Company*, 338 Ga. App. 671, 791 S.E.2d 437 (2016).

**Cited** in *Envision Printing, LLC v. Evans*, 336 Ga. App. 635, 786 S.E.2d 250 (2016).

**RESEARCH REFERENCES**

**Am. Jur. Proof of Facts.** — Ratification of Forged or Unauthorized Signature, 7 POF2d 675.

Commercial Paper — Negligence Con-

tributing to Alteration or Unauthorized Signature Under UCC § 3-406, 14 POF2d 693.

**11-3-406. Negligence contributing to forged signature or alteration of instrument.**

**JUDICIAL DECISIONS**

**ANALYSIS**

**COMMERCIAL REASONABLENESS**

**Commercial Reasonableness**

**Requirements for payor asserting estoppel.**

Fact question remained whether a bank violated the reasonable commercial standards of fair dealing when it violated known commercial banking practices by accepting checks made payable to a law firm into a thief's personal account, where the bank also serviced the firm's business

accounts and therefore knew that the firm normally placed a restrictive endorsement stamp on checks made payable to it, as the bank was on heightened notice of the irregularity of the endorsements and therefore could be held to have dealt with the firm unfairly by not making inquiry into the legitimacy of those endorsements. *Gerber & Gerber, P.C. v. Regions Bank*, 266 Ga. App. 8, 596 S.E.2d 174 (2004).

**RESEARCH REFERENCES**

**Am. Jur. Proof of Facts.** — Commercial Paper — Negligence Contributing to Alteration or Unauthorized Signature Under UCC § 3-406, 14 POF2d 693.

**11-3-411. Refusal to pay cashier's checks, teller's checks, and certified checks.**

**JUDICIAL DECISIONS**

**Bank properly refused to pay cashier's check.** — Trial court did not err in granting summary judgment to a bank because the bank acted properly in refusing to honor the cashier's check since the funds were the property of the payee and were within the control of the bank at the

time the bank received the garnishment order; thus, O.C.G.A. § 18-4-4 required that the bank pay those funds into the court in the garnishment action and not to the payee. *Burrowes v. Bank of Am., N.A.*, 340 Ga. App. 248, 797 S.E.2d 493 (2017).

**11-3-414. Obligation of drawer.**

**JUDICIAL DECISIONS**

**Bank as holder in due course.** — Trial court did not err in granting a bank summary judgment on the bank's claims against an automobile seller for enforcement of drawer and signer obligations under the Georgia Uniform Commercial Code (UCC), O.C.G.A. § 11-3-414(b), and for a violation of the bad check statute, O.C.G.A. § 13-6-15, because there was no genuine issue of material fact as to whether the bank was a holder in due course of the check; the bank was entitled to enforce the drawer and signer obligations imposed upon the seller because the bank was the "holder" of the check pursuant to § 11-3-414(b), and since the bank was the depository bank, and the amount of the check was deposited to the bank's customer's account, the bank became the holder of the instrument when the bank

received the check for collection. *Consumer Solutions Fin. Servs. v. Heritage Bank*, 300 Ga. App. 272, 684 S.E.2d 682 (2009).

**Enforcement of drawer and signer obligations.** — Trial court did not err in granting a bank summary judgment on the bank's claims against an automobile seller for enforcement of drawer and signer obligations under the Georgia Uniform Commercial Code (UCC), O.C.G.A. § 11-3-414(b), and for a violation of the bad check statute, O.C.G.A. § 13-6-15, because there was no genuine issue of material fact over whether the seller was the drawer and signer of the check for purposes of the UCC and the bad check statute; the seller admitted that the seller's representative was the actual signatory of the check and that the representa-



tive possessed authority to sign checks on the seller’s behalf. *Consumer Solutions Fin. Servs. v. Heritage Bank*, 300 Ga. App. 272, 684 S.E.2d 682 (2009).

11-3-419. Instruments signed for accommodation.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

General Consideration

**Plain and unambiguous terms of note did not show accommodated party.** — Trial court did not err by granting summary judgment to a bank in its action against the obligor on three prom-

issory notes because the clear and unambiguous terms of the notes did not show that there was an accommodated party as they simply identified the obligor as the obligated borrower. *Wooden v. Synovus Bank*, 325 Ga. App. 876, 756 S.E.2d 19 (2014).

11-3-420. Conversion of instrument.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

MEASURE OF DAMAGES

COMMERCIAL REASONABLENESS

General Consideration

Action for conversion not available.

— On plaintiff commercial checking account customer’s suit against defendant, its payor bank, for conversion, O.C.G.A. § 11-3-420(a) preempted any claim for conversion because O.C.G.A. § 11-3-420(a), by its plain terms, barred the customer, as the issuer of the forged checks, from bringing an action for conversion relating to the forged checks. *Ownbey Enters. v. Wachovia Bank, N.A.*, 457 F. Supp. 2d 1341 (N.D. Ga. 2006).

Payee of a check who never received the check and was unaware that the check had been made out to the payee due to fraud by the payee’s cousin was not a person who could enforce the check or recover against the bank for the bank’s payment of the check over the fraudulent endorsement of the payee’s cousin, pursuant to O.C.G.A. §§ 11-3-301 and 11-3-420. *Jenkins v. Wachovia Bank, Nat’l Ass’n*, 309 Ga. App. 562, 711 S.E.2d 80 (2011).

Nursery’s conversion claim under O.C.G.A. § 11-3-420 failed because the

nursery never had possession of a check as the first check which was mailed to the nursery was lost in the mail so that the nursery never received delivery or otherwise had possession of the check, while a second check, if the check even existed, was never mailed to the nursery. *Sun Nurseries, Inc. v. Lake Erma, LLC*, 316 Ga. App. 832, 730 S.E.2d 556 (2012).

**Proof required for conversion of a check.** — Appellate court erred in reversing a trial court’s grant of summary judgment pursuant to O.C.G.A. § 9-11-56 to an auto dealership in a conversion action against a bank, which alleged that the bank deliberately cashed a check after the dealership had placed a stop payment on the check. The law applicable to conversion of personal property applied to instruments pursuant to O.C.G.A. § 11-3-420(a), and checks were one form of instrument included in this provision, O.C.G.A. § 11-3-104(c), (f); therefore, the dealership was not required to establish the existence of specific dollars or coins in order to recover for the conversion of its check and the full value of the intangible

**General Consideration (Cont'd)**

rights identified with that check. *Decatur Auto Ctr., Inc. v. Wachovia Bank, N.A.*, 276 Ga. 817, 583 S.E.2d 6 (2003).

**Corporate officer's misuse of corporate account.** — Because a company's corporate resolution authorized one of its officers to make deposits to and withdrawals from an account maintained at a bank, and the officer, in the process of making deposits to the account, illegally took cash back from the deposits for personal use, the bank was not liable for conversion because the corporate resolution, as well as a signature card bearing the officer's signature, gave the officer authority to deal with the account. *Atlanta Sand & Supply Co. v. Citizens Bank*, 276 Ga. App. 149, 622 S.E.2d 484 (2005).

**Summary judgment precluded.** — Trial court did not err in granting summary judgment to a bank and a credit union, on claims of conversion, civil conspiracy and for attorney fees and punitive damages, as: (1) no probative evidence existed that the buyer received delivery of the check, and thus, it never became a holder of the instrument at issue or entitled to enforce it; (2) no evidence was presented that the bank and credit union acted in concert against the buyer; (3) no evidence of misconduct or bad faith on the part of the bank or the credit union was presented; but, the trial court properly found that a genuine issue of material fact existed as to whether the bank and the credit union were holders in due course and whether the check bore evidence of forgery or alteration so as to call into question its authenticity. *Hartsock v. Rich's Emples. Credit Union*, 279 Ga. App. 724, 632 S.E.2d 476 (2006).

**Measure of Damages**

**Blank payment checks were valueless.** — On cross-motions for summary judgment in a Fair Labor Standards Act case filed by plaintiff Mexican national agricultural laborers against defendant employers that included a claim for conversion of certain "reimbursement" checks in that the employers directed the laborers to endorse and return the checks, and the employers argued that it was entitled to the returned checks due to the employers paying for bus fares and subsistence and additional transportation expenses in cash, and also argued that the checks were blank, the court agreed with the employers that because the checks were blank, under O.C.G.A. §§ 11-3-104(c) and 11-3-420(a), they were valueless, so there would be no damage from converting the checks. *Morales-Arcadio v. Shannon Produce Farms, Inc.*, No. 605CV062, 2007 U.S. Dist. LEXIS 51950 (S.D. Ga. July 18, 2007).

**Commercial Reasonableness**

**Acceptance of blank-endorsed cashier's checks.** — Bank was properly granted summary judgment in a suit filed against it by a law firm for negligently accepting stolen checks and for conversion with regards to blank-endorsed cashier's checks, as such were bearer paper transferable by possession alone; however, because a fact issue remained as to whether it acted in good faith in accepting forged checks, it could not be a holder in due course, and summary judgment was improper. *Gerber & Gerber, P.C. v. Regions Bank*, 266 Ga. App. 8, 596 S.E.2d 174 (2004).

**RESEARCH REFERENCES**

**ALR.** — Drawer's right of recovery against depository bank that accepts check with missing endorsement or in

violation of restrictive covenant, 104 A.L.R.5th 459.

PART 5  
DISHONOR

11-3-502. Dishonor.

RESEARCH REFERENCES

**Am. Jur. Proof of Facts.** — Wrongful Dishonor of Check, 23 POF2d 407.

PART 6  
DISCHARGE AND PAYMENT

11-3-602. Payment.

JUDICIAL DECISIONS

**Plaintiffs could not assert claim based on instruments to which plaintiffs were not parties or third-party beneficiaries.** — Plaintiffs' claim that the defendant violated the "one satisfaction rule" by foreclosing on the plaintiffs' home failed because the plaintiffs could not assert a claim against the defendant based on a purported insurance policy or settlement agreement as the plaintiffs were not parties to, or third-party beneficiaries of, those instruments. *Fenello v. Bank of Am., N.A.*, No. 1:11-cv-4139-WSD, 2013 U.S. Dist. LEXIS 159925 (N.D. Ga. Nov. 8, 2013).

**Pooling of mortgage loan argument failed.** — In a case arising from a foreclosure, a pro se borrower's argument that the underlying debt had been paid was meritless. The pooling of the mortgage loan into a securitized trust did not ab-

solve the borrower from having to make loan payments or somehow shield the borrower's property from foreclosure. *Morrison v. Bank of Am., N.A.*, No. 1:13-cv-1052-WSD, 2014 U.S. Dist. LEXIS 104426 (N.D. Ga. July 31, 2014).

**Bankruptcy.** — In a case arising from a foreclosure, a pro se borrower's argument that the underlying debt had been paid was meritless. While the borrower was granted a bankruptcy discharge, it was axiomatic that a discharge in bankruptcy extinguished only the borrower's personal liability of the debtor, and a creditor's right to foreclose on the property secured by the loan survived or passed through the bankruptcy. *Morrison v. Bank of Am., N.A.*, No. 1:13-cv-1052-WSD, 2014 U.S. Dist. LEXIS 104426 (N.D. Ga. July 31, 2014).

11-3-605. Discharge of indorsers and accommodation parties.

JUDICIAL DECISIONS

ANALYSIS

IMPAIRMENT OF COLLATERAL



**Impairment of Collateral**

**Impairment of collateral defense rejected.**

Even if the obligors were accommodation parties who signed two promissory notes that went into default, a point they argued without factual support, the modification agreements signed by the other

people did not release them from their obligations under the notes as the obligors did not show that the agreement to extend the due date of the instrument at issue caused loss to them with respect to the right of recourse or that the value of the collateral had been impaired. *Reece v. Chestatee State Bank*, 260 Ga. App. 136, 579 S.E.2d 11 (2003).

**ARTICLE 4**

**BANK DEPOSITS AND COLLECTIONS**

**Part 1**

**General Provisions and Definitions**

Sec.

11-4-104. Definitions and index of definitions.

**Part 2**

**Collection of Items: Depositary and Collecting Banks**

11-4-210. Security interest of collecting

bank in items, accompanying documents, and proceeds.

**PART 1**

**GENERAL PROVISIONS AND DEFINITIONS**

**11-4-103. Variation by agreement; measure of damages; action constituting ordinary care.**

**JUDICIAL DECISIONS**

**Bank's deposit agreement with bank's customer was not unreasonable and permitted the bank to charge back to the customer's account the amount of a check upon the check's return** from another bank as fraudulent, although the bank had provided provisional funds that the customer had withdrawn or paid out. *Vadde v. Bank of Am.*, 301 Ga. App. 475, 687 S.E.2d 880 (2009), cert. denied, No. S10C0624, 2010 Ga. LEXIS 338 (Ga. 2010); cert. denied, 131 S. Ct. 298, 178 L. Ed. 2d 143 (2010).

**Shortening of notice period.** — The trial court properly upheld an agreement between a customer and a bank under which the bank could not be charged with liability for negligence because the customer had not notified the bank of dis-

puted checks within 30 days; under O.C.G.A. § 11-4-103(a), parties by agreement could change the 60-day notice period allowed for in O.C.G.A. § 11-4-406(f), and such an agreement was controlling unless it was manifestly unreasonable, which was not the case here, and shortening the time period did not excuse the bank from its duty of ordinary care or disclaim the bank's liability for negligence in the future inasmuch as the notice period started over again each time the bank sent a new statement to the customer. *Freese v. Regions Bank, N.A.*, 284 Ga. App. 717, 644 S.E.2d 549 (2007), cert. denied, No. S07C1190, 2007 Ga. LEXIS 691 (Ga. 2007).

**Negligence claims.** — Because the borrower failed to show that the loan

servicer breached an independent duty, the borrower could not state a claim for negligence against the loan servicer; O.C.G.A. § 11-4-103, standing alone, did not impose an independent duty to act or refrain from acting. *Phillips v. Ocwen Loan Servicing, LLC*, No. 1:12-cv-3861-WSD, 2013 U.S. Dist. LEXIS 129721 (N.D. Ga. Sept. 10, 2013).

#### 11-4-104. Definitions and index of definitions.

(a) In this article, unless the context otherwise requires:

(1) “Account” means any deposit or credit account with a bank, including a demand, time, savings, passbook, share draft, or like account, other than an account evidenced by a certificate of deposit;

(2) “Afternoon” means the period of a day between noon and midnight;

(3) “Banking day” means the part of a day on which a bank is open to the public for carrying on substantially all of its banking functions;

(4) “Clearing-house” means an association of banks or other payors regularly clearing items;

(5) “Customer” means a person having an account with a bank or for whom a bank has agreed to collect items, including a bank that maintains an account at another bank;

(6) “Documentary draft” means a draft to be presented for acceptance or payment if specified documents, certificated securities (Code Section 11-8-102) or instructions for uncertificated securities (Code Section 11-8-102), or other certificates, statements, or the like are to be received by the drawee or other payor before acceptance or payment of the draft;

(7) “Draft” means a draft as defined in Code Section 11-3-104 or an item, other than an instrument, that is an order;

(8) “Drawee” means a person ordered in a draft to make payment;

(9) “Item” means an instrument or a promise or order to pay money handled by a bank for collection or payment. The term does not include a payment order governed by Article 4A of this title or a credit or debit card slip;

(10) “Midnight deadline” with respect to a bank is midnight on its next banking day following the banking day on which it receives the relevant item or notice or from which the time for taking action commences to run, whichever is later;

(11) “Settle” means to pay in cash, by clearing-house settlement, in a charge or credit, or by remittance, or otherwise as agreed. A settlement may be either provisional or final; and

(12) "Suspends payments" with respect to a bank means that it has been closed by order of the supervisory authorities, that a public officer has been appointed to take it over, or that it ceases or refuses to make payments in the ordinary course of business.

(b) Other definitions applying to this article and the Code sections in which they appear are:

"Agreement for electronic presentment." Code Section 11-4-110.

"Bank." Code Section 11-4-105.

"Collecting bank." Code Section 11-4-105.

"Depository bank." Code Section 11-4-105.

"Intermediary bank." Code Section 11-4-105.

"Payor bank." Code Section 11-4-105.

"Presenting bank." Code Section 11-4-105.

"Presentment notice." Code Section 11-4-110.

(c) "Control" as provided in Code Section 11-7-106 and the following definitions in other articles of this title apply to this article:

"Acceptance." Code Section 11-3-409.

"Alteration." Code Section 11-3-407.

"Cashier's check." Code Section 11-3-104.

"Certificate of deposit." Code Section 11-3-104.

"Certified check." Code Section 11-3-409.

"Check." Code Section 11-3-104.

"Holder in due course." Code Section 11-3-302.

"Instrument." Code Section 11-3-104.

"Notice of dishonor." Code Section 11-3-503.

"Order." Code Section 11-3-103.

"Ordinary care." Code Section 11-3-103.

"Person entitled to enforce." Code Section 11-3-301.

"Presentment." Code Section 11-3-501.

"Promise." Code Section 11-3-103.

"Prove." Code Section 11-3-103.

"Teller's check." Code Section 11-3-104.



“Unauthorized signature.” Code Section 11-3-403.

(d) In addition Article 1 of this title contains general definitions and principles of construction and interpretation applicable throughout this article. (Code 1933, § 109A-4—104, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 1963, p. 188, § 9; Ga. L. 1974, p. 618, § 1; Ga. L. 1992, p. 2685, § 3; Ga. L. 1996, p. 1306, § 4; Ga. L. 1998, p. 1323, § 17; Ga. L. 2010, p. 481, § 2-16/HB 451; Ga. L. 2015, p. 996, § 3B-12/SB 65.)

**The 2010 amendment**, effective May 27, 2010, substituted “‘Control’ as provided in Code Section 11-7-106 and the” for “The” at the beginning of the introductory paragraph of subsection (c). See the Editor’s notes for applicability.

**The 2015 amendment**, effective January 1, 2016, deleted the definition that read: “‘Good faith.’ Code Section 11-3-103.” in subsection (c)

**Editor’s notes.** — Ga. L. 2010, p. 481, § 3-1, not codified by the General Assembly, provides that: “This Act applies to a document of title that is issued or a bailment that arises on or after the effective date of this Act. This Act does not apply to a document of title that is issued or a bailment that arises before the effective date of this Act even if the document of title or bailment would be subject to this Act if the document of title had been issued or bailment had arisen on or after the effective date of this Act. This Act does not apply to a right of action that has accrued before the effective date of this Act.” This Act became effective May 27, 2010.

Ga. L. 2010, p. 481, § 3-2, not codified by the General Assembly, provides that: “A document of title issued or a bailment that arises before the effective date of this Act and the rights, documents, and interests flowing from that document or bailment are governed by any statute or other rule amended or repealed by this Act as if such amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute or other rule.” This Act became effective May 27, 2010.

Ga. L. 2015, p. 996, § 1-1/SB 65, not codified by the General Assembly, provides: “(a) This Act shall be known and may be cited as the ‘Debtor-Creditor Uniform Law Modernization Act of 2015.’

“(b) To promote consistency among the states, it is the intent of the General Assembly to modernize certain existing uniform laws promulgated by the Uniform Law Commission affecting debtor and creditor rights, responsibilities, and relationships and other federally recognized laws affecting such rights, responsibilities, and relationships.”

## JUDICIAL DECISIONS

### ANALYSIS

#### GENERAL CONSIDERATION

##### General Consideration

**Midnight deadline.** — There was no issue of fact as to whether a check received by a bank was returned to the Federal Reserve Bank by the midnight deadline of June 19, although the Federal Reserve stamped the check received as of

June 22, because there was no evidence to contradict a bank officer’s deposition that the check was timely returned. The bank had no control over when the Federal Reserve processed the check. *Whooping Creek Constr., LLC v. Bartow County Bank*, 310 Ga. App. 690, 713 S.E.2d 871 (2011).

**11-4-111. Statute of limitations.****JUDICIAL DECISIONS**

**Conversion and negligence action barred.** — Bank account holder's conversion and negligence action against a bank for paying two checks on the holder's account without authorization was barred by the Georgia Uniform Commercial Code's three-year statute of limitations set forth in O.C.G.A. § 11-4-111, which

applied to bank-customer relationships, because the holder did not file a complaint until more than three years after the bank paid the checks at issue. *Ogundele v. Wachovia Bank, N.A.*, No. 1:04-CV-1852-CC, 2004 U.S. Dist. LEXIS 25396 (N.D. Ga. Dec. 6, 2004).

**PART 2****COLLECTION OF ITEMS: DEPOSITARY AND COLLECTING BANKS****11-4-202. Responsibility for collection or return; when action timely.****JUDICIAL DECISIONS**

**Notification of returned check on same date bank received notice.** — Bnk demonstrated that the bank satisfied O.C.G.A. § 11-4-202 by notifying the bank's customer that a check deposited by the customer had been returned due to fraud on the same date the bank received

notification from the payor bank that the check was counterfeit. *Vadde v. Bank of Am.*, 301 Ga. App. 475, 687 S.E.2d 880 (2009), cert. denied, No. S10C0624, 2010 Ga. LEXIS 338 (Ga. 2010); cert. denied, 131 S. Ct. 298, 178 L. Ed. 2d 143 (2010).

**11-4-205. Depositary bank holder of unindorsed item.****JUDICIAL DECISIONS**

**Bank as holder of instrument issued to it.**

Trial court did not err in granting a bank summary judgment on the bank's claims against an automobile seller for enforcement of drawer and signer obligations under the Georgia Uniform Commercial Code (UCC), O.C.G.A. § 11-3-414(b), and for a violation of the bad check statute, O.C.G.A. § 13-6-15, because there was no genuine issue of material fact as to whether the bank was a holder in due course of the check; the

bank was entitled to enforce the drawer and signer obligations imposed upon the seller because the bank was the "holder" of the check pursuant to § 11-3-414(b), and since the bank was the depository bank, and the amount of the check was deposited to the customer's account, the bank became the holder of the instrument when the bank received the check for collection. *Consumer Solutions Fin. Servs. v. Heritage Bank*, 300 Ga. App. 272, 684 S.E.2d 682 (2009).

**11-4-210. Security interest of collecting bank in items, accompanying documents, and proceeds.**

(a) A collecting bank has a security interest in an item and any accompanying documents or the proceeds of either:

(1) In case of an item deposited in an account, to the extent to which credit given for the item has been withdrawn or applied;

(2) In case of an item for which it has given credit available for withdrawal as of right, to the extent of the credit given, whether or not the credit is drawn upon or there is a right of charge-back; or

(3) If it makes an advance on or against the item.

(b) If credit given for several items received at one time or pursuant to a single agreement is withdrawn or applied in part, the security interest remains upon all the items, any accompanying documents, or the proceeds of either. For the purpose of this Code section, credits first given are first withdrawn.

(c) Receipt by a collecting bank of a final settlement for an item is a realization on its security interest in the item, accompanying documents, and proceeds. So long as the bank does not receive final settlement for the item or give up possession of the item or possession or control of the accompanying documents for purposes other than collection, the security interest continues to that extent and is subject to Article 9 of this title, but:

(1) No security agreement is necessary to make the security interest enforceable (subparagraph (b)(3)(A) of Code Section 11-9-203);

(2) No filing is required to perfect the security interest; and

(3) The security interest has priority over conflicting perfected security interests in the item, accompanying documents, or proceeds. (Code 1933, § 109A-4—208, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 1963, p. 188, § 12; Code 1981, § 11-4-210, as redesignated by Ga. L. 1996, p. 1306, § 9; Ga. L. 2001, p. 362, § 13; Ga. L. 2010, p. 481, § 2-17/HB 451.)

**The 2010 amendment**, effective May 27, 2010, inserted a comma after “credit given” near the middle of paragraph (a)(2); and inserted “possession or control of the”



in the middle of the second sentence of subsection (c). See the Editor's notes for applicability.

**Editor's notes.** — Ga. L. 2010, p. 481, § 3-1, not codified by the General Assembly, provides that: "This Act applies to a document of title that is issued or a bailment that arises on or after the effective date of this Act. This Act does not apply to a document of title that is issued or a bailment that arises before the effective date of this Act even if the document of title or bailment would be subject to this Act if the document of title had been issued or bailment had arisen on or after the effective date of this Act. This Act does not apply to a right of action that has

accrued before the effective date of this Act." This Act became effective May 27, 2010.

Ga. L. 2010, p. 481, § 3-2, not codified by the General Assembly, provides that: "A document of title issued or a bailment that arises before the effective date of this Act and the rights, documents, and interests flowing from that document or bailment are governed by any statute or other rule amended or repealed by this Act as if such amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute or other rule." This Act became effective May 27, 2010.

#### **11-4-212. Presentment by notice of item not payable by, through, or at a bank; liability of drawer or indorser.**

##### **JUDICIAL DECISIONS**

**Cited** in *Baker v. Campbell*, 255 Ga. App. 523, 565 S.E.2d 855 (2002).

#### **11-4-214. Right of charge-back or refund; liability of collecting bank; return of item.**

##### **JUDICIAL DECISIONS**

##### **Right to charge back credit.**

Bank's deposit agreement with the bank's customer was not unreasonable and permitted the bank to charge back to the customer's account the amount of a check upon the check's return from another bank as fraudulent, although the

bank had provided provisional funds that the customer had withdrawn or paid out. *Vadde v. Bank of Am.*, 301 Ga. App. 475, 687 S.E.2d 880 (2009), cert. denied, No. S10C0624, 2010 Ga. LEXIS 338 (Ga. 2010); cert. denied, 131 S. Ct. 298, 178 L. Ed. 2d 143 (2010).

#### **11-4-215. Final payment of item by payor bank; when provisional debits and credits become final; when certain credits become available for withdrawal.**

##### **JUDICIAL DECISIONS**

##### **ANALYSIS**

##### **GENERAL CONSIDERATION**

**General Consideration**

**Cited** in Baker v. Campbell, 255 Ga. App. 523, 565 S.E.2d 855 (2002).

**PART 3**

**COLLECTION OF ITEMS: PAYOR BANKS**

**11-4-301. Deferred posting; recovery of payment by return of items; time of dishonor; return of items by payor bank.**

**JUDICIAL DECISIONS**

**Midnight deadline.** — There was no issue of fact as to whether a check received by a bank was returned to the Federal Reserve Bank by the midnight deadline of June 19, although the Federal Reserve stamped the check received as of June 22, because there was no evidence to contradict a bank officer's deposition that the check was timely returned. The bank had no control over when the Federal Reserve processed the check. *Whooping Creek Constr., LLC v. Bartow County Bank*, 310 Ga. App. 690, 713 S.E.2d 871 (2011).

**11-4-302. Payor bank's responsibility for late return of item.**

**JUDICIAL DECISIONS**

**Compliance with midnight deadline.** — There was no issue of fact as to whether a check received by a bank was returned to the Federal Reserve Bank by the midnight deadline of June 19, although the Federal Reserve stamped the check received as of June 22, because there was no evidence to contradict a bank officer's deposition that the check was timely returned. The bank had no control over when the Federal Reserve processed the check. *Whooping Creek Constr., LLC v. Bartow County Bank*, 310 Ga. App. 690, 713 S.E.2d 871 (2011).

**11-4-303. When items subject to notice, stop-payment order, legal process, or setoff; order in which items may be charged or certified.**

**JUDICIAL DECISIONS**

**Order in which items are paid.** — While plaintiff bank customers alleged defendant bank had a practice of manipulating the posting of transactions to impose overdraft fees, there was no substantive unconscionability under O.C.G.A. § 11-2-302 as the deposit agreement was consistent with O.C.G.A. § 11-4-303(b) as to the order items were paid. *White v. Wachovia Bank, N.A.*, 563 F. Supp. 2d 1358 (N.D. Ga. 2008).

## PART 4

## RELATIONSHIP BETWEEN PAYOR BANK AND ITS CUSTOMER

**11-4-401. When bank may charge customer's account.**

## JUDICIAL DECISIONS

## ANALYSIS

## GENERAL CONSIDERATION

**General Consideration****Liability of bank for wrongful honor of forged endorsement.**

On plaintiff commercial checking account customer's suit against defendant, its payor bank, under O.C.G.A. § 11-4-401, alleging checks forged by it employee, although the customer reasonably should have detected the unauthorized payment by examining each check's

payee information and the statements, and the customer thus failed to comply with its duties under O.C.G.A. § 11-4-406(c), (d)(2), the payor bank made no showing that it complied with local industry standards or acted consistently with general banking usage; the comparative negligence test of O.C.G.A. § 11-4-406(e) applied. *Ownbey Enters. v. Wachovia Bank, N.A.*, 457 F. Supp. 2d 1341 (N.D. Ga. 2006).

**11-4-402. Bank's liability to customer for wrongful dishonor; time of determining insufficiency of account.**

## RESEARCH REFERENCES

**Am. Jur. Proof of Facts.** — Wrongful Dishonor of Check, 23 POF2d 407.

**11-4-406. Customer's duty to discover and report unauthorized signature or alteration.**

## JUDICIAL DECISIONS

## ANALYSIS

## GENERAL CONSIDERATION

## SIXTY-DAY AND ONE-YEAR NOTICE REQUIREMENTS

**General Consideration****Duty of depositor to minimize damages.**

On plaintiff commercial checking account customer's suit against defendant, its payor bank, under O.C.G.A. § 11-4-401, alleging checks forged by it employee, although the reduced check images returned with the monthly statements were difficult to read, the customer reasonably should have detected the un-

authorized payment by examining each check's payee information and the statements and thus, the customer failed to comply with its duties under O.C.G.A. § 11-4-406(c), (d)(2). *Ownbey Enters. v. Wachovia Bank, N.A.*, 457 F. Supp. 2d 1341 (N.D. Ga. 2006).

**Cited in** *Dalton Point, L.P. v. Regions Bank, Inc.*, 287 Ga. App. 468, 651 S.E.2d 549 (2007).



Sixty-Day and One-Year Notice Requirements

Applicability of subsection (f).

On plaintiff commercial checking account customer’s suit against defendant, its employee embezzler’s depository bank, O.C.G.A. § 11-4-406’s notice requirements applied to the embezzler’s depository bank and the depository bank was not liable for the forged checks paid more than 60 days before the customer reported the forgeries to its payor bank. *Ownbey Enters. v. Wachovia Bank, N.A.*, 457 F. Supp. 2d 1341 (N.D. Ga. 2006).

**Shortening of notice period by agreement.** — The trial court properly upheld an agreement between a customer and a bank under which the bank could not be charged with liability for negligence because the customer had not notified the bank of disputed checks within 30 days; under O.C.G.A. § 11-4-103(a), parties by agreement could change the 60-day notice period allowed for in O.C.G.A. § 11-4-406(f), and such an agreement was controlling unless it was manifestly un-

reasonable, which was not the case here, and shortening the time period did not excuse the bank from its duty of ordinary care or disclaim the bank’s liability for negligence in the future inasmuch as the notice period started over again each time the bank sent a new statement to the customer. *Freese v. Regions Bank, N.A.*, 284 Ga. App. 717, 644 S.E.2d 549 (2007), cert. denied, No. S07C1190, 2007 Ga. LEXIS 691 (Ga. 2007).

**Conversion and negligence action barred.** — Bank account holder’s conversion and negligence action against a bank for paying two checks on the holder’s account without authorization was barred by O.C.G.A. § 11-4-406(f) of Georgia’s Uniform Commercial Code, because the holder admitted receiving regular statements from the bank but did not open the statements until more than one year after the allegedly unauthorized checks had been paid. *Ogundele v. Wachovia Bank, N.A.*, No. 1:04-CV-1852-CC, 2004 U.S. Dist. LEXIS 25396 (N.D. Ga. Dec. 6, 2004).

RESEARCH REFERENCES

**Am. Jur. Pleading and Practice Forms.** — 6A Am. Jur. Pleading and Practice Forms, Commercial Code, § 4:212.

ARTICLE 4A  
FUNDS TRANSFERS

Part 1	Part 2
Subject Matter and Definitions	Issue and Acceptance of Payment Order
Sec. 11-4A-105. Other definitions.	Sec. 11-4A-204. Refund of payment and duty of customer to report with respect to unauthorized payment order.
11-4A-106. Time payment order is received.	
11-4A-108. Relationship to federal Electronic Fund Transfer Act.	

RESEARCH REFERENCES

**ALR.** — Construction and application to immediate parties of Uniform Commercial Code Article 4A governing funds transfers, 62 A.L.R. 6th 1.

## PART 1

## SUBJECT MATTER AND DEFINITIONS

## 11-4A-101. Short title.

## RESEARCH REFERENCES

**Am. Jur. Pleading and Practice Forms.** — 6A Am. Jur. Pleading and Practice Forms, Commercial Code, § 4A:3.

**ALR.** — Effect of Uniform Commercial

Code Article 4A on attachment, garnishment, forfeiture or other third-party process against funds transfers, 66 A.L.R.6th 567.

## 11-4A-102. Subject matter.

## RESEARCH REFERENCES

**ALR.** — Construction and application to immediate parties of Uniform Commercial Code Article 4A governing funds transfers, 62 A.L.R.6th 1.

Effect of Uniform Commercial Code Article 4A on attachment, garnishment, forfeiture or other third-party process against funds transfers, 66 A.L.R.6th 567.

## 11-4A-105. Other definitions.

(a) In this article:

(1) “Authorized account” means a deposit account of a customer in a bank designated by the customer as a source of payment of payment orders issued by the customer to the bank. If a customer does not so designate an account, any account of the customer is an authorized account if payment of a payment order from that account is not inconsistent with a restriction on the use of that account.

(2) “Bank” means a person engaged in the business of banking and includes a savings bank, savings and loan association, credit union, and trust company. A branch or separate office of a bank is a separate bank for purposes of this article.

(3) “Customer” means a person, including a bank, having an account with a bank or from whom a bank has agreed to receive payment orders.

(4) “Funds-transfer business day” of a receiving bank means the part of a day during which the receiving bank is open for the receipt, processing, and transmittal of payment orders and cancellations and amendments of payment orders.

(5) “Funds-transfer system” means a wire transfer network, automated clearing house, or other communication system of a clearing house or other association of banks through which a payment order

by a bank may be transmitted to the bank to which the order is addressed.

(6) Reserved.

(7) “Prove” with respect to a fact means to meet the burden of establishing the fact (Code Section 11-1-201(b)(8)).

(b) Other definitions applying to this article and the Code sections in which they appear are:

“Acceptance.” Code Section 11-4A-209.

“Beneficiary.” Code Section 11-4A-103.

“Beneficiary’s bank.” Code Section 11-4A-103.

“Executed.” Code Section 11-4A-301.

“Execution date.” Code Section 11-4A-301.

“Funds transfer.” Code Section 11-4A-104.

“Funds-transfer system rule.” Code Section 11-4A-501.

“Intermediary bank.” Code Section 11-4A-104.

“Originator.” Code Section 11-4A-104.

“Originator’s bank.” Code Section 11-4A-104.

“Payment by beneficiary’s bank to beneficiary.” Code Section 11-4A-405.

“Payment by originator to beneficiary.” Code Section 11-4A-406.

“Payment by sender to receiving bank.” Code Section 11-4A-403.

“Payment date.” Code Section 11-4A-401.

“Payment order.” Code Section 11-4A-103.

“Receiving bank.” Code Section 11-4A-103.

“Security procedure.” Code Section 11-4A-201.

“Sender.” Code Section 11-4A-103.

(c) The following definitions in Article 4 of this title apply to this article:

“Clearing house.” Code Section 11-4-104.

“Item.” Code Section 11-4-104.

“Suspends payments.” Code Section 11-4-104.

(d) In addition Article 1 of this title contains general definitions and principles of construction and interpretation applicable throughout this



article. (Code 1981, § 11-4A-105, enacted by Ga. L. 1992, p. 2685, § 4; Ga. L. 2015, p. 996, § 3B-13/SB 65.)

**The 2015 amendment**, effective January 1, 2016, substituted “Reserved” for “‘Good faith’ means honesty in fact and the observance of reasonable commercial standards of fair dealing” in paragraph (a)(6); and substituted “Section 11-1-201(b)(8)” for “Section 11-1-201(8)” in paragraph (a)(7).

**Editor’s notes.** — Ga. L. 2015, p. 996, § 1-1/SB 65, not codified by the General Assembly, provides: “(a) This Act shall be known and may be cited as the

‘Debtor-Creditor Uniform Law Modernization Act of 2015.’

“(b) To promote consistency among the states, it is the intent of the General Assembly to modernize certain existing uniform laws promulgated by the Uniform Law Commission affecting debtor and creditor rights, responsibilities, and relationships and other federally recognized laws affecting such rights, responsibilities, and relationships.”

### 11-4A-106. Time payment order is received.

(a) The time of receipt of a payment order or communication canceling or amending a payment order is determined by the rules applicable to receipt of a notice stated in Code Section 11-1-202. A receiving bank may fix a cut-off time or times on a funds-transfer business day for the receipt and processing of payment orders and communications canceling or amending payment orders. Different cut-off times may apply to payment orders, cancellations, or amendments, or to different categories of payment orders, cancellations, or amendments. A cut-off time may apply to senders generally or different cut-off times may apply to different senders or categories of payment orders. If a payment order or communication canceling or amending a payment order is received after the close of a funds-transfer business day or after the appropriate cut-off time on a funds-transfer business day, the receiving bank may treat the payment order or communication as received at the opening of the next funds-transfer business day.

(b) If this article refers to an execution date or payment date or states a day on which a receiving bank is required to take action, and the date or day does not fall on a funds-transfer business day, the next day that is a funds-transfer business day is treated as the date or day stated, unless the contrary is stated in this article. (Code 1981, § 11-4A-106, enacted by Ga. L. 1992, p. 2685, § 4; Ga. L. 2015, p. 996, § 3B-14/SB 65.)

**The 2015 amendment**, effective January 1, 2016, substituted “Section 11-1-202” for “Section 11-1-201(27)” at the end of subsection (a).

**Editor’s notes.** — Ga. L. 2015, p. 996, § 1-1/SB 65, not codified by the General Assembly, provides: “(a) This Act shall be known and may be cited as the

‘Debtor-Creditor Uniform Law Modernization Act of 2015.’

“(b) To promote consistency among the states, it is the intent of the General Assembly to modernize certain existing uniform laws promulgated by the Uniform Law Commission affecting debtor and creditor rights, responsibilities, and rela-

tionships and other federally recognized laws affecting such rights, responsibilities, and relationships.”

### **11-4A-108. Relationship to federal Electronic Fund Transfer Act.**

(a) Except as provided in subsection (b) of this Code section, this article does not apply to a funds transfer any part of which is governed by the federal Electronic Fund Transfer Act of 1978, 15 U.S.C. Section 1693, et seq.

(b) This article shall apply to a funds transfer that is a remittance transfer as defined in the federal Electronic Fund Transfer Act, 15 U.S.C. Section 1693o-1(g), unless the remittance transfer is an electronic fund transfer as defined in such act, 15 U.S.C. Section 1693(a).

(c) In the event of any conflict or inconsistency between the provisions of this article and the provisions of the federal Electronic Fund Transfer Act of 1978, 15 U.S.C. Section 1693, et seq., such act shall govern and control. (Code 1981, § 11-4A-108, enacted by Ga. L. 1992, p. 2685, § 4; Ga. L. 2002, p. 415, § 11; Ga. L. 2013, p. 1101, § 1/HB 289.)

**The 2013 amendment**, effective July 1, 2013, in the catchline substituted “Relationship to federal Electronic Fund Transfer Act” for “Exclusion of consumer transactions governed by federal law” and substituted the present provisions of this Code section for the former provisions, which read: “This article does not apply to a funds transfer any part of which is

governed by the Electronic Fund Transfer Act of 1978 (Title XX, Public Law 95-630, 92 Stat. 3728, 15 U.S.C. Section 1693, et seq.) as amended from time to time.”

**Editor’s notes.** — Ga. L. 2013, p. 1101, § 1, did not reenact and did not strike “(Title XX, Public Law 95-630, 92 Stat. 3728, 15 U.S.C. Section 1693, et seq.)” in this Code section.

## **RESEARCH REFERENCES**

**ALR.** — Validity, construction, and application of Electronic Fund Transfer Act (EFTA), and regulations promulgated

thereunder, 15 USCS §§ 1693 et seq., 46 A.L.R. Fed. 2d 473.

## **PART 2**

### **ISSUE AND ACCEPTANCE OF PAYMENT ORDER**

#### **11-4A-204. Refund of payment and duty of customer to report with respect to unauthorized payment order.**

(a) If a receiving bank accepts a payment order issued in the name of its customer as sender which is (i) not authorized and not effective as the order of the customer under Code Section 11-4A-202, or (ii) not enforceable, in whole or in part, against the customer under Code Section 11-4A-203, the bank shall refund any payment of the payment

order received from the customer to the extent the bank is not entitled to enforce payment and shall pay interest on the refundable amount calculated from the date the bank received payment to the date of the refund. However, the customer is not entitled to interest from the bank on the amount to be refunded if the customer fails to exercise ordinary care to determine that the order was not authorized by the customer and to notify the bank of the relevant facts within a reasonable time not exceeding 90 days after the date the customer received notification from the bank that the order was accepted or that the customer's account was debited with respect to the order. The bank is not entitled to any recovery from the customer on account of a failure by the customer to give notification as stated in this section.

(b) Reasonable time under subsection (a) of this Code section may be fixed by agreement as stated in subsection (b) of Code Section 11-1-302, but the obligation of a receiving bank to refund payment as stated in subsection (a) of this Code section may not otherwise be varied by agreement. (Code 1981, § 11-4A-204, enacted by Ga. L. 1992, p. 2685, § 4; Ga. L. 2015, p. 996, § 3B-15/SB 65.)

**The 2015 amendment**, effective January 1, 2016, substituted the present provisions of subsection (b) for the former provisions, which read: "Reasonable time under subsection (a) may be fixed by agreement as stated in Code Section 11-1-204(1), but the obligation of a receiving bank to refund payment as stated in subsection (a) may not otherwise be varied by agreement."

**Editor's notes.** — Ga. L. 2015, p. 996, § 1-1/SB 65, not codified by the General Assembly, provides: "(a) This Act shall be

known and may be cited as the 'Debtor-Creditor Uniform Law Modernization Act of 2015.'

"(b) To promote consistency among the states, it is the intent of the General Assembly to modernize certain existing uniform laws promulgated by the Uniform Law Commission affecting debtor and creditor rights, responsibilities, and relationships and other federally recognized laws affecting such rights, responsibilities, and relationships."

## ARTICLE 5

### LETTERS OF CREDIT

Sec.  
11-5-103. Scope.

#### 11-5-102. Definitions.

**Cross references.** — Requirement to satisfy definition of issuer, § 10-3-6.

#### 11-5-103. Scope.

(a) This article applies to letters of credit and to certain rights and obligations arising out of transactions involving letters of credit.



(b) The statement of a rule in this article does not by itself require, imply, or negate application of the same or a different rule to a situation not provided for or to a person not specified in this article.

(c) With the exception of subsections (a), (b), and (d) of this Code section, paragraphs (9) and (10) of subsection (a) of Code Section 11-5-102, subsection (d) of Code Section 11-5-106, and subsection (d) of Code Section 11-5-114 and except to the extent prohibited in Code Section 11-1-302 and subsection (d) of Code Section 11-5-117, the effect of this article may be varied by agreement or by a provision stated or incorporated by reference in an undertaking. A term in an agreement or undertaking generally excusing liability or generally limiting remedies for failure to perform obligations is not sufficient to vary obligations prescribed by this article.

(d) Rights and obligations of an issuer to a beneficiary or a nominated person under a letter of credit are independent of the existence, performance, or nonperformance of a contract or arrangement out of which the letter of credit arises or which underlies it including contracts or arrangements between the issuer and the applicant and between the applicant and the beneficiary. (Code 1981, § 11-5-103, enacted by Ga. L. 2002, p. 995, § 1; Ga. L. 2015, p. 996, § 3B-16/SB 65.)

**The 2015 amendment**, effective January 1, 2016, substituted “in Code Section 11-1-302” for “in subsection (3) of Code Section 11-1-102” in the first sentence of subsection (c).

**Editor’s notes.** — Ga. L. 2015, p. 996, § 1-1/SB 65, not codified by the General Assembly, provides: “(a) This Act shall be known and may be cited as the ‘Debtor-Creditor Uniform Law Modernization Act of 2015.’”

“(b) To promote consistency among the states, it is the intent of the General Assembly to modernize certain existing uniform laws promulgated by the Uniform Law Commission affecting debtor and creditor rights, responsibilities, and relationships and other federally recognized laws affecting such rights, responsibilities, and relationships.”

## 11-5-111. Remedies.

### RESEARCH REFERENCES

**Am. Jur. Proof of Facts.** — Reduction or Mitigation of Damages — Sales Contract, 11 POF2d 131.

## 11-5-114. Assignment of proceeds.

### JUDICIAL DECISIONS

**Breach of letter of credit.** — Buyer was not an indispensable party to a seller’s suit alleging that a bank breached a letter of credit by failing to honor its

obligation under O.C.G.A. § 11-5-114 to pay a demand because: (1) the buyer’s joinder was not necessary in order to afford complete relief between the seller and

the bank; (2) the bank could file suit against the buyer for indemnification or implead the buyer in the current suit; and (3) the bank would not be subject to multiple inconsistent judgment obligations if

the buyer were not joined. GE Credit Corp. of Tenn. v. First Nat’l Banc, Inc., No. CV205-112, 2005 U.S. Dist. LEXIS 19191 (S.D. Ga. Sept. 2, 2005).

ARTICLE 6

BULK TRANSFERS

Sec.  
11-6-101 through 11-6-111 [Repealed].

11-6-101 through 11-6-111.

Reserved. Repealed by Ga. L. 2015, p. 996, § 3D-1/SB 65, effective July 1, 2015.

**Editor’s notes.** — This article was based on Code 1933, §§ 109A-6—101 through 109A-6—111, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 1963, p. 188, §§ 15-17; Ga. L. 2000, p. 1589, § 3; Ga. L. 2001, p. 362, § 15.

ARTICLE 7

WAREHOUSE RECEIPTS, BILLS OF LADING, AND  
OTHER DOCUMENTS OF TITLE

Part 1		Sec.	
General			
Sec.		11-7-204.	Duty of care; contractual limitation of warehouse’s liability.
11-7-102.	Definitions and index of definitions.	11-7-205.	Title under warehouse receipt defeated in certain cases.
11-7-103.	Relation of article to treaty or statute.	11-7-206.	Termination of storage at warehouse’s option.
11-7-104.	Negotiable and nonnegotiable document of title.	11-7-207.	Goods shall be kept separate; fungible goods.
11-7-105.	Reissuance in alternative medium.	11-7-208.	Altered warehouse receipts.
11-7-106.	Control of electronic document of title.	11-7-209.	Lien of warehouse.
		11-7-210.	Enforcement of warehouse’s lien.
Part 2		Part 3	
Warehouse Receipts: Special Provisions		Bills of Lading: Special Provisions	
11-7-201.	Person that may issue a warehouse receipt; storage under bond.	11-7-301.	Liability for nonreceipt or misdescription; “said to contain”; “shipper’s weight, load, and count”; improper handling.
11-7-202.	Form of warehouse receipt; effect of omission.	11-7-302.	Through bills of lading and similar documents of title.
11-7-203.	Liability for nonreceipt or misdescription.	11-7-303.	Diversion; reconsignment; change of instructions.
		11-7-304.	Tangible bills of lading in a set.

- Sec.  
 11-7-305. Destination bills.  
 11-7-307. Lien of carrier.  
 11-7-308. Enforcement of carrier's lien.  
 11-7-309. Duty of care; contractual limitation of carrier's liability.

**Part 4**

**Warehouse Receipts and Bills of Lading: General Obligations**

- 11-7-401. Irregularities in issue of receipt or bill or conduct of issuer.  
 11-7-402. Duplicate document of title; overissue.  
 11-7-403. Obligation of bailee to deliver; excuse.  
 11-7-404. No liability for good-faith delivery pursuant to document of title.

**Part 5**

**Warehouse Receipts and Bills of Lading: Negotiation and Transfer**

- 11-7-501. Form of negotiation and requirements of due negotiation.  
 11-7-502. Rights acquired by due negotiation.

- Sec.  
 11-7-503. Document of title to goods defeated in certain cases.  
 11-7-504. Rights acquired in the absence of due negotiation; effect of diversion; stoppage of delivery.  
 11-7-505. Indorser not guarantor for other parties.  
 11-7-506. Delivery without indorsement; right to compel indorsement.  
 11-7-507. Warranties on negotiation or delivery of document of title.  
 11-7-508. Warranties of collecting bank as to documents of title.  
 11-7-509. Adequate compliance with commercial contract.

**Part 6**

**Warehouse Receipts and Bills of Lading: Miscellaneous Provisions**

- 11-7-601. Lost, stolen, or destroyed documents of title.  
 11-7-602. Judicial process against goods covered by negotiable document of title.  
 11-7-603. Conflicting claims; interpleader.

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**RESEARCH REFERENCES**

**Am. Jur. Proof of Facts.** — Warehouseman's Failure to Care for Stored Property — Deterioration of Perishable Goods, 20 POF2d 371.

**PART 1**

**GENERAL**

**11-7-101. Short title.**

**Editor's notes.** — Ga. L. 2010, p. 481, § 1-1, effective May 27, 2010, reenacted this Code section without change. Refer to bound volume for text of this Code section.

Ga. L. 2010, p. 481, § 3-1, not codified by the General Assembly, provides that: "This Act applies to a document of title that is issued or a bailment that arises on or after the effective date of this Act. This Act does not apply to a document of title that is issued or a bailment that arises

before the effective date of this Act even if the document of title or bailment would be subject to this Act if the document of title had been issued or bailment had arisen on or after the effective date of this Act. This Act does not apply to a right of action that has accrued before the effective date of this Act." This Act became effective May 27, 2010.

Ga. L. 2010, p. 481, § 3-2, not codified by the General Assembly, provides that:



“A document of title issued or a bailment that arises before the effective date of this Act and the rights, documents, and interests flowing from that document or bailment are governed by any statute or other rule amended or repealed by this Act

as if such amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute or other rule.” This Act became effective May 27, 2010.

## **11-7-102. Definitions and index of definitions.**

(a) In this article, unless the context otherwise requires:

(1) “Bailee” means a person that by a warehouse receipt, bill of lading, or other document of title acknowledges possession of goods and contracts to deliver them.

(2) “Carrier” means a person that issues a bill of lading.

(3) “Consignee” means a person named in a bill of lading to which or to whose order the bill promises delivery.

(4) “Consignor” means a person named in a bill of lading as the person from which the goods have been received for shipment.

(5) “Delivery order” means a record that contains an order to deliver goods directed to a warehouse, carrier, or other person that in the ordinary course of business issues warehouse receipts or bills of lading.

(6) “Good faith” means honesty in fact and the observance of reasonable commercial standards of fair dealing.

(7) “Goods” means all things that are treated as movable for the purposes of a contract of storage or transportation.

(8) “Issuer” means a bailee who issues a document of title or, in the case of an unaccepted delivery order, the person who orders the possessor of goods to deliver. The term includes a person for which an agent or employee purports to act in issuing a document if the agent or employee has real or apparent authority to issue documents, even if the issuer did not receive any goods, the goods were misdescribed, or in any other respect the agent or employee violated the issuer’s instructions.

(9) “Person entitled under the document” means the holder, in the case of a negotiable document of title, or the person to which delivery of the goods is to be made by the terms of, or pursuant to instructions in a record under, a nonnegotiable document of title.

(10) “Record” means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(11) “Sign” means, with present intent to authenticate or adopt a record:

(A) To execute or adopt a tangible symbol; or

(B) To attach to or logically associate with the record an electronic sound, symbol, or process.

(12) “Shipper” means a person that enters into a contract of transportation with a carrier.

(13) “Warehouse” means a person engaged in the business of storing goods for hire.

(b) Definitions in other articles of this title applying to this article and the Code sections in which they appear are:

(1) “Contract for sale.” Code Section 11-2-106.

(2) “Lessee in the ordinary course of business.” Code Section 11-2A-103.

(3) “Receipt” of goods. Code Section 11-2-103.

(c) In addition, Article 1 of this title contains general definitions and principles of construction and interpretation applicable throughout this article. (Code 1933, § 109A-7—102, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 2010, p. 481, § 1-1/HB 451.)

**The 2010 amendment**, effective May 27, 2010, redesignated former subsection (1) as present subsection (a); rewrote present subsection (a); deleted former subsection (2), which read: “Other definitions applying to this article or to specified parts thereof, and the Code sections in which they appear are:

“‘Duly negotiate.’ Code Section 11-7-501.

“‘Person entitled under the document.’ Code Section 11-7-403(4).”; redesignated former subsections (3) and (4) as present subsections (b) and (c), respectively; and, in present subsection (b), added the paragraph designations, deleted “‘Overseas.’ Code Section 11-2-323.” following “Section 11-2-106.”, and added paragraph (b)(2). See the Editor’s notes for applicability.

**Editor’s notes.** — Ga. L. 2010, p. 481, § 3-1, not codified by the General Assembly, provides that: “This Act applies to a document of title that is issued or a bailment that arises on or after the effective date of this Act. This Act does not

apply to a document of title that is issued or a bailment that arises before the effective date of this Act even if the document of title or bailment would be subject to this Act if the document of title had been issued or bailment had arisen on or after the effective date of this Act. This Act does not apply to a right of action that has accrued before the effective date of this Act.” This Act became effective May 27, 2010.

Ga. L. 2010, p. 481, § 3-2, not codified by the General Assembly, provides that: “A document of title issued or a bailment that arises before the effective date of this Act and the rights, documents, and interests flowing from that document or bailment are governed by any statute or other rule amended or repealed by this Act as if such amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute or other rule.” This Act became effective May 27, 2010.

**11-7-103. Relation of article to treaty or statute.**

(a) Except as otherwise provided in this article, this article is subject to any treaty or statute of the United States to the extent the treaty or statute is applicable.

(b) This article does not modify or repeal any law prescribing the form or content of a document of title or the services or facilities to be afforded by a bailee, or otherwise regulating a bailee's business in respects not specifically treated in this article. However, a violation of such a law does not affect the status of a document of title that otherwise is within the definition of a document of title.

(c) This article modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001, et seq., but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

(d) To the extent that there is a conflict between any provisions of the laws of this state regarding electronic transactions and this article, this article governs. (Code 1933, § 109A-7—103, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 2010, p. 481, § 1-1/HB 451.)

**The 2010 amendment**, effective May 27, 2010, substituted “treaty or statute” for “treaty, statute, tariff, classification, or regulation” in the catchline; designated the existing provisions as subsection (a); in subsection (a), substituted “Except as otherwise provided in this article, this article is subject to” for “To the extent that” at the beginning and substituted “to the extent the treaty or statute is applicable” for “, or tariff, classification, or regulation filed or issued pursuant thereto is applicable, the provisions of this article are subject thereto”; and added subsections (b) through (d). See the Editor's notes for applicability.

**Editor's notes.** — Ga. L. 2010, p. 481, § 3-1, not codified by the General Assembly, provides that: “This Act applies to a document of title that is issued or a bailment that arises on or after the effective date of this Act. This Act does not apply to a document of title that is issued

or a bailment that arises before the effective date of this Act even if the document of title or bailment would be subject to this Act if the document of title had been issued or bailment had arisen on or after the effective date of this Act. This Act does not apply to a right of action that has accrued before the effective date of this Act.” This Act became effective May 27, 2010.

Ga. L. 2010, p. 481, § 3-2, not codified by the General Assembly, provides that: “A document of title issued or a bailment that arises before the effective date of this Act and the rights, documents, and interests flowing from that document or bailment are governed by any statute or other rule amended or repealed by this Act as if such amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute or other rule.” This Act became effective May 27, 2010.



**11-7-104. Negotiable and nonnegotiable document of title.**

(a) Except as otherwise provided in subsection (c) of this Code section, a document of title is negotiable if by its terms the goods are to be delivered to bearer or to the order of a named person.

(b) A document of title other than one described in subsection (a) of this Code section is nonnegotiable. A bill of lading that states that the goods are consigned to a named person is not made negotiable by a provision that the goods are to be delivered only against an order in a record signed by the same or another named person.

(c) A document of title is nonnegotiable if, at the time it is issued, the document has a conspicuous legend, however expressed, that it is nonnegotiable. (Code 1933, § 109A-7—104, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 2010, p. 481, § 1-1/HB 451.)

**The 2010 amendment**, effective May 27, 2010, deleted “warehouse receipt, bill of lading, or other” preceding “document” in the catchline; redesignated former subsections (1) and (2) as present subsections (a) and (b), respectively; rewrote present subsection (a); in present subsection (b), substituted “A document of title other than one described in subsection (a) of this Code section” for “Any other document” at the beginning of the first sentence and, in the second sentence, substituted “that states” for “in which it is stated” near the beginning and substituted “an order in a record” for “a written order” near the end; and added subsection (c). See the Editor’s notes for applicability.

**Editor’s notes.** — Ga. L. 2010, p. 481, § 3-1, not codified by the General Assembly, provides that: “This Act applies to a document of title that is issued or a bailment that arises on or after the effective date of this Act. This Act does not

apply to a document of title that is issued or a bailment that arises before the effective date of this Act even if the document of title or bailment would be subject to this Act if the document of title had been issued or bailment had arisen on or after the effective date of this Act. This Act does not apply to a right of action that has accrued before the effective date of this Act.” This Act became effective May 27, 2010.

Ga. L. 2010, p. 481, § 3-2, not codified by the General Assembly, provides that: “A document of title issued or a bailment that arises before the effective date of this Act and the rights, documents, and interests flowing from that document or bailment are governed by any statute or other rule amended or repealed by this Act as if such amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute or other rule.” This Act became effective May 27, 2010.

**11-7-105. Reissuance in alternative medium.**

(a) Upon request of a person entitled under an electronic document of title, the issuer of the electronic document may issue a tangible document of title as a substitute for the electronic document if:

(1) The person entitled under the electronic document surrenders control of the document to the issuer; and

(2) The tangible document when issued contains a statement that it is issued in substitution for the electronic document.

(b) Upon issuance of a tangible document of title in substitution for an electronic document of title in accordance with subsection (a) of this Code section:

(1) The electronic document ceases to have any effect or validity; and

(2) The person that procured issuance of the tangible document warrants to all subsequent persons entitled under the tangible document that the warrantor was a person entitled under the electronic document when the warrantor surrendered control of the electronic document to the issuer.

(c) Upon request of a person entitled under a tangible document of title, the issuer of the tangible document may issue an electronic document of title as a substitute for the tangible document if:

(1) The person entitled under the tangible document surrenders possession of the document to the issuer; and

(2) The electronic document when issued contains a statement that it is issued in substitution for the tangible document.

(d) Upon issuance of an electronic document of title in substitution for a tangible document of title in accordance with subsection (c) of this Code section:

(1) The tangible document ceases to have any effect or validity; and

(2) The person that procured issuance of the electronic document warrants to all subsequent persons entitled under the electronic document that the warrantor was a person entitled under the tangible document when the warrantor surrendered possession of the tangible document to the issuer. (Code 1933, § 109A-7—105, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 2010, p. 481, § 1-1/HB 451.)

**The 2010 amendment**, effective May 27, 2010, substituted “Reissuance in alternative medium” for “Construction against negative implication” in the catchline; and rewrote this Code section. See the Editor’s notes for applicability.

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 2010, “in accordance” was substituted for “is accordance” in the introductory language of subsection (d).

**Editor’s notes.** — Ga. L. 2010, p. 481, § 3-1, not codified by the General Assembly, provides that: “This Act applies to a document of title that is issued or a bailment that arises on or after the effective

date of this Act. This Act does not apply to a document of title that is issued or a bailment that arises before the effective date of this Act even if the document of title or bailment would be subject to this Act if the document of title had been issued or bailment had arisen on or after the effective date of this Act. This Act does not apply to a right of action that has accrued before the effective date of this Act.” This Act became effective May 27, 2010.

Ga. L. 2010, p. 481, § 3-2, not codified by the General Assembly, provides that: “A document of title issued or a bailment that arises before the effective date of this

Act and the rights, documents, and interests flowing from that document or bailment are governed by any statute or other rule amended or repealed by this Act as if such amendment or repeal had not

occurred and may be terminated, completed, consummated, or enforced under that statute or other rule.” This Act became effective May 27, 2010.

### 11-7-106. Control of electronic document of title.

(a) A person has control of an electronic document of title if a system employed for evidencing the transfer of interests in the electronic document reliably establishes that person as the person to which the electronic document was issued or transferred.

(b) A system satisfies subsection (a) of this Code section, and a person is deemed to have control of an electronic document of title, if the document is created, stored, and assigned in a manner that:

(1) A single authoritative copy of the document exists which is unique, identifiable, and, except as otherwise provided in paragraphs (4), (5), and (6) of this subsection, unalterable;

(2) The authoritative copy identifies the person asserting control as:

(A) The person to which the document was issued; or

(B) If the authoritative copy indicates that the document has been transferred, the person to which the document was most recently transferred;

(3) The authoritative copy is communicated to and maintained by the person asserting control or its designated custodian;

(4) Copies or amendments that add or change an identified assignee of the authoritative copy can be made only with the consent of the person asserting control;

(5) Each copy of the authoritative copy and any copy of a copy is readily identifiable as a copy that is not the authoritative copy; and

(6) Any amendment of the authoritative copy is readily identifiable as authorized or unauthorized. (Code 1981, § 11-7-106, enacted by Ga. L. 2010, p. 481, § 1-1/HB 451.)

**Effective date.** — This Code section became effective May 27, 2010. See the Editor’s notes for applicability.

**Editor’s notes.** — Ga. L. 2010, p. 481, § 3-1, not codified by the General Assembly, provides that: “This Act applies to a document of title that is issued or a bailment that arises on or after the effective date of this Act. This Act does not

apply to a document of title that is issued or a bailment that arises before the effective date of this Act even if the document of title or bailment would be subject to this Act if the document of title had been issued or bailment had arisen on or after the effective date of this Act. This Act does not apply to a right of action that has accrued before the effective date of this



Act.” This Act became effective May 27, 2010.

Ga. L. 2010, p. 481, § 3-2, not codified by the General Assembly, provides that: “A document of title issued or a bailment that arises before the effective date of this Act and the rights, documents, and interests flowing from that document or

bailment are governed by any statute or other rule amended or repealed by this Act as if such amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute or other rule.” This Act became effective May 27, 2010.

## PART 2

### WAREHOUSE RECEIPTS: SPECIAL PROVISIONS

#### 11-7-201. Person that may issue a warehouse receipt; storage under bond.

(a) A warehouse receipt may be issued by any warehouse.

(b) If goods, including distilled spirits and agricultural commodities, are stored under a statute requiring a bond against withdrawal or a license for the issuance of receipts in the nature of warehouse receipts, a receipt issued for the goods is deemed to be a warehouse receipt even if issued by a person that is the owner of the goods and is not a warehouse. (Code 1933, § 109A-7—201, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 2010, p. 481, § 1-1/HB 451.)

**The 2010 amendment**, effective May 27, 2010, in the catchline, substituted “Person that” for “Who” at the beginning and deleted “government” preceding “bond” at the end; redesignated former subsections (1) and (2) as present subsections (a) and (b), respectively; substituted “warehouse” for “warehouseman” at the end of present subsections (a) and (b); and, in present subsection (b), substituted “If goods,” for “Where” at the beginning, substituted “is deemed to be” for “has like effect as”, and substituted “if issued by a person that” for “though issued by a person who” near the end. See the Editor’s notes for applicability.

**Editor’s notes.** — Ga. L. 2010, p. 481, § 3-1, not codified by the General Assembly, provides that: “This Act applies to a document of title that is issued or a bailment that arises on or after the effective date of this Act. This Act does not apply to a document of title that is issued

or a bailment that arises before the effective date of this Act even if the document of title or bailment would be subject to this Act if the document of title had been issued or bailment had arisen on or after the effective date of this Act. This Act does not apply to a right of action that has accrued before the effective date of this Act.” This Act became effective May 27, 2010.

Ga. L. 2010, p. 481, § 3-2, not codified by the General Assembly, provides that: “A document of title issued or a bailment that arises before the effective date of this Act and the rights, documents, and interests flowing from that document or bailment are governed by any statute or other rule amended or repealed by this Act as if such amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute or other rule.” This Act became effective May 27, 2010.

**11-7-202. Form of warehouse receipt; effect of omission.**

(a) A warehouse receipt need not be in any particular form.

(b) Unless a warehouse receipt provides for each of the following, the warehouse is liable for damages caused to a person injured by its omission:

(1) A statement of the location of the warehouse facility where the goods are stored;

(2) The date of issue of the receipt;

(3) The unique identification code of the receipt;

(4) A statement whether the goods received will be delivered to the bearer, to a named person, or to a named person or its order;

(5) The rate of storage and handling charges, unless goods are stored under a field warehousing arrangement, in which case a statement of that fact is sufficient on a nonnegotiable receipt;

(6) A description of the goods or the packages containing them;

(7) The signature of the warehouse or its agent;

(8) If the receipt is issued for goods that the warehouse owns, either solely, jointly, or in common with others, a statement of the fact of that ownership; and

(9) A statement of the amount of advances made and of liabilities incurred for which the warehouse claims a lien or security interest, unless the precise amount of advances made or liabilities incurred, at the time of the issue of the receipt, is unknown to the warehouse or to its agent that issued the receipt, in which case a statement of the fact that advances have been made or liabilities incurred and the purpose of the advances or liabilities is sufficient.

(c) A warehouse may insert in its receipt any terms that are not contrary to the provisions of this title and do not impair its obligation of delivery under Code Section 11-7-403 or its duty of care under Code Section 11-7-204. Any contrary provision is ineffective. (Code 1933, § 109A-7—202, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 2010, p. 481, § 1-1/HB 451.)

**The 2010 amendment**, effective May 27, 2010, rewrote this Code section. See the Editor's notes for applicability.

**Editor's notes.** — Ga. L. 2010, p. 481, § 3-1, not codified by the General Assembly, provides that: "This Act applies to a document of title that is issued or a bailment that arises on or after the effective date of this Act. This Act does not apply to a document of title that is issued or a bailment that arises before the effective date of this Act even if the document of title or bailment would be subject to this Act if the document of title had been issued or bailment had arisen on or after the effective date of this Act. This Act does

not apply to a right of action that has accrued before the effective date of this Act.” This Act became effective May 27, 2010.

Ga. L. 2010, p. 481, § 3-2, not codified by the General Assembly, provides that: “A document of title issued or a bailment that arises before the effective date of this Act and the rights, documents, and inter-

ests flowing from that document or bailment are governed by any statute or other rule amended or repealed by this Act as if such amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute or other rule.” This Act became effective May 27, 2010.

### 11-7-203. Liability for nonreceipt or misdescription.

A party to or purchaser for value in good faith of a document of title, other than a bill of lading, that relies upon the description of the goods in the document may recover from the issuer damages caused by the nonreceipt or misdescription of the goods, except to the extent that:

(1) The document conspicuously indicates that the issuer does not know whether all or part of the goods in fact were received or conform to the description, such as a case in which the description is in terms of marks or labels or kind, quantity, or condition, or the receipt or description is qualified by “contents, condition, and quality unknown,” “said to contain,” or words of similar import, if such indication is true; or

(2) The party or purchaser otherwise has notice of the nonreceipt or misdescription. (Code 1933, § 109A-7—203, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 2010, p. 481, § 1-1/HB 451.)

**The 2010 amendment**, effective May 27, 2010, rewrote this Code section. See the Editor’s notes for applicability.

**Editor’s notes.** — Ga. L. 2010, p. 481, § 3-1, not codified by the General Assembly, provides that: “This Act applies to a document of title that is issued or a bailment that arises on or after the effective date of this Act. This Act does not apply to a document of title that is issued or a bailment that arises before the effective date of this Act even if the document of title or bailment would be subject to this Act if the document of title had been issued or bailment had arisen on or after the effective date of this Act. This Act does not apply to a right of action that has

accrued before the effective date of this Act.” This Act became effective May 27, 2010.

Ga. L. 2010, p. 481, § 3-2, not codified by the General Assembly, provides that: “A document of title issued or a bailment that arises before the effective date of this Act and the rights, documents, and interests flowing from that document or bailment are governed by any statute or other rule amended or repealed by this Act as if such amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute or other rule.” This Act became effective May 27, 2010.

### 11-7-204. Duty of care; contractual limitation of warehouse’s liability.

(a) A warehouse is liable for damages for loss of or injury to the goods caused by its failure to exercise care with regard to the goods that a



reasonably careful person would exercise under similar circumstances. Unless otherwise agreed, the warehouse is not liable for damages that could not have been avoided by the exercise of that care.

(b) Damages may be limited by a term in the warehouse receipt or storage agreement limiting the amount of liability in case of loss or damage beyond which the warehouse is not liable. Such a limitation is not effective with respect to the warehouse's liability for conversion to its own use. On request of the bailor in a record at the time of signing the storage agreement or within a reasonable time after receipt of the warehouse receipt, the warehouse's liability may be increased on part or all of the goods covered by the storage agreement or the warehouse receipt. In this event, increased rates may be charged based on an increased valuation of the goods.

(c) Reasonable provisions as to the time and manner of presenting claims and commencing actions based on the bailment may be included in the warehouse receipt or storage agreement. (Code 1933, § 109A-7—204, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 2010, p. 481, § 1-1/HB 451.)

**The 2010 amendment**, effective May 27, 2010, rewrote this Code section. See the Editor's notes for applicability.

**Editor's notes.** — Ga. L. 2010, p. 481, § 3-1, not codified by the General Assembly, provides that: "This Act applies to a document of title that is issued or a bailment that arises on or after the effective date of this Act. This Act does not apply to a document of title that is issued or a bailment that arises before the effective date of this Act even if the document of title or bailment would be subject to this Act if the document of title had been issued or bailment had arisen on or after the effective date of this Act. This Act does not apply to a right of action that has

accrued before the effective date of this Act." This Act became effective May 27, 2010.

Ga. L. 2010, p. 481, § 3-2, not codified by the General Assembly, provides that: "A document of title issued or a bailment that arises before the effective date of this Act and the rights, documents, and interests flowing from that document or bailment are governed by any statute or other rule amended or repealed by this Act as if such amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute or other rule." This Act became effective May 27, 2010.

## JUDICIAL DECISIONS

**Debtor not a fiduciary.** — Where a farmer did not require that the proceeds of the debtor's sales of the farmer's seeds be kept in a separate account, and the debtor paid the debtor's company's operating expenses with the proceeds of the sale of the farmer's seeds, the debtor was not a fidu-

ciary under 11 U.S.C. § 523(a)(4) and the debt was discharged in the debtor's bankruptcy; neither O.C.G.A. § 11-9-315(a)(1) nor O.C.G.A. § 11-7-204(1) imposed any fiduciary duties on the debtor. *Bennett v. Wright (In re Wright)*, 282 B.R. 510 (Bankr. M.D. Ga. 2002).

**11-7-205. Title under warehouse receipt defeated in certain cases.**

A buyer in ordinary course of business of fungible goods sold and delivered by a warehouse that is also in the business of buying and selling such goods takes the goods free of any claim under a warehouse receipt even if the receipt is negotiable and has been duly negotiated. (Code 1933, § 109A-7—205, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 2010, p. 481, § 1-1/HB 451.)

**The 2010 amendment**, effective May 27, 2010, deleted “the” preceding “ordinary” near the beginning, substituted “warehouse that” for “warehouseman who”, inserted “the goods”, and substituted “if the receipt is negotiable and” for “though it” near the end. See the Editor’s notes for applicability.

**Editor’s notes.** — Ga. L. 2010, p. 481, § 3-1, not codified by the General Assembly, provides that: “This Act applies to a document of title that is issued or a bailment that arises on or after the effective date of this Act. This Act does not apply to a document of title that is issued or a bailment that arises before the effective date of this Act even if the document of title or bailment would be subject to this Act if the document of title had been

issued or bailment had arisen on or after the effective date of this Act. This Act does not apply to a right of action that has accrued before the effective date of this Act.” This Act became effective May 27, 2010.

Ga. L. 2010, p. 481, § 3-2, not codified by the General Assembly, provides that: “A document of title issued or a bailment that arises before the effective date of this Act and the rights, documents, and interests flowing from that document or bailment are governed by any statute or other rule amended or repealed by this Act as if such amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute or other rule.” This Act became effective May 27, 2010.

**11-7-206. Termination of storage at warehouse’s option.**

(a) A warehouse, by giving notice to the person on whose account the goods are held and any other person known to claim an interest in the goods, may require payment of any charges and removal of the goods from the warehouse at the termination of the period of storage fixed by the document of title or, if a period is not fixed, within a stated period not less than 30 days after the warehouse gives notice. If the goods are not removed before the date specified in the notice, the warehouse may sell them pursuant to Code Section 11-7-210.

(b) If a warehouse in good faith believes that goods are about to deteriorate or decline in value to less than the amount of its lien within the time provided in subsection (a) of this Code section and Code Section 11-7-210, the warehouse may specify in the notice given under subsection (a) of this Code section any reasonable shorter time for removal of the goods and, if the goods are not removed, may sell them at public sale held not less than one week after a single advertisement or posting.

(c) If, as a result of a quality or condition of the goods of which the warehouse did not have notice at the time of deposit, the goods are a hazard to other property, the warehouse facilities, or other persons, the warehouse may sell the goods at public or private sale without advertisement or posting on reasonable notification to all persons known to claim an interest in the goods. If the warehouse, after a reasonable effort, is unable to sell the goods, it may dispose of them in any lawful manner and does not incur liability by reason of that disposition.

(d) A warehouse shall deliver the goods to any person entitled to them under this article upon due demand made at any time before sale or other disposition under this Code section.

(e) A warehouse may satisfy its lien from the proceeds of any sale or disposition under this Code section but shall hold the balance for delivery on the demand of any person to which the warehouse would have been bound to deliver the goods. (Code 1933, § 109A-7—206, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 2010, p. 481, § 1-1/HB 451.)

**The 2010 amendment**, effective May 27, 2010, rewrote this Code section. See the Editor's notes for applicability.

**Editor's notes.** — Ga. L. 2010, p. 481, § 3-1, not codified by the General Assembly, provides that: "This Act applies to a document of title that is issued or a bailment that arises on or after the effective date of this Act. This Act does not apply to a document of title that is issued or a bailment that arises before the effective date of this Act even if the document of title or bailment would be subject to this Act if the document of title had been issued or bailment had arisen on or after the effective date of this Act. This Act does not apply to a right of action that has

accrued before the effective date of this Act." This Act became effective May 27, 2010.

Ga. L. 2010, p. 481, § 3-2, not codified by the General Assembly, provides that: "A document of title issued or a bailment that arises before the effective date of this Act and the rights, documents, and interests flowing from that document or bailment are governed by any statute or other rule amended or repealed by this Act as if such amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute or other rule." This Act became effective May 27, 2010.

## **11-7-207. Goods shall be kept separate; fungible goods.**

(a) Unless the warehouse receipt provides otherwise, a warehouse shall keep separate the goods covered by each receipt so as to permit at all times identification and delivery of those goods. However, different lots of fungible goods may be commingled.

(b) If different lots of fungible goods are commingled, the goods are owned in common by the persons entitled thereto and the warehouse is severally liable to each owner for that owner's share. If, because of overissue, a mass of fungible goods is insufficient to meet all the receipts the warehouse has issued against it, the persons entitled include all holders to whom overissued receipts have been duly nego-



tiated. (Code 1933, § 109A-7—207, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 2010, p. 481, § 1-1/HB 451.)

**The 2010 amendment**, effective May 27, 2010, substituted “shall” for “must” in the catchline; redesignated former subsections (1) and (2) as present subsections (a) and (b), respectively; in present subsection (a), substituted “provides otherwise, a warehouse shall” for “otherwise provides, a warehouseman must” near the beginning and substituted “goods. However,” for “goods except that” near the end; and, in present subsection (b), in the first sentence, substituted “If different lots of fungible goods are commingled, the goods” for “Fungible goods so commingled” near the beginning and substituted “warehouse” for “warehouseman”, and, in the second sentence, substituted “If, because of over-issue,” for “Where because of overissue” near the beginning and substituted “the warehouse” for “which the warehouseman” in the middle. See the Editor’s notes for applicability.

**Editor’s notes.** — Ga. L. 2010, p. 481, § 3-1, not codified by the General Assembly, provides that: “This Act applies to a document of title that is issued or a

bailment that arises on or after the effective date of this Act. This Act does not apply to a document of title that is issued or a bailment that arises before the effective date of this Act even if the document of title or bailment would be subject to this Act if the document of title had been issued or bailment had arisen on or after the effective date of this Act. This Act does not apply to a right of action that has accrued before the effective date of this Act.” This Act became effective May 27, 2010.

Ga. L. 2010, p. 481, § 3-2, not codified by the General Assembly, provides that: “A document of title issued or a bailment that arises before the effective date of this Act and the rights, documents, and interests flowing from that document or bailment are governed by any statute or other rule amended or repealed by this Act as if such amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute or other rule.” This Act became effective May 27, 2010.

## 11-7-208. Altered warehouse receipts.

If a blank in a negotiable warehouse receipt has been filled in without authority, a good-faith purchaser for value and without notice of the lack of authority may treat the insertion as authorized. Any other unauthorized alteration leaves any tangible or electronic warehouse receipt enforceable against the issuer according to its original tenor. (Code 1933, § 109A-7—208, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 2010, p. 481, § 1-1/HB 451.)

**The 2010 amendment**, effective May 27, 2010, in the first sentence, substituted “If” for “Where” at the beginning, inserted “good-faith”, and substituted “lack” for “want”; and inserted “tangible or electronic warehouse” in the second sentence. See the Editor’s notes for applicability.

**Editor’s notes.** — Ga. L. 2010, p. 481, § 3-1, not codified by the General Assembly, provides that: “This Act applies to a document of title that is issued or a bailment that arises on or after the effective date of this Act. This Act does not

apply to a document of title that is issued or a bailment that arises before the effective date of this Act even if the document of title or bailment would be subject to this Act if the document of title had been issued or bailment had arisen on or after the effective date of this Act. This Act does not apply to a right of action that has accrued before the effective date of this Act.” This Act became effective May 27, 2010.

Ga. L. 2010, p. 481, § 3-2, not codified by the General Assembly, provides that:

"A document of title issued or a bailment that arises before the effective date of this Act and the rights, documents, and interests flowing from that document or bailment are governed by any statute or other rule amended or repealed by this Act

as if such amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute or other rule." This Act became effective May 27, 2010.

### **11-7-209. Lien of warehouse.**

(a) A warehouse has a lien against the bailor on the goods covered by a warehouse receipt or storage agreement or on the proceeds thereof in its possession for charges for storage or transportation, including demurrage and terminal charges, insurance, labor, or other charges, present or future, in relation to the goods, and for expenses necessary for preservation of the goods or reasonably incurred in their sale pursuant to law. If the person on whose account the goods are held is liable for similar charges or expenses in relation to other goods whenever deposited and it is stated in the warehouse receipt or storage agreement that a lien is claimed for charges and expenses in relation to other goods, the warehouse also has a lien against the goods covered by the warehouse receipt or storage agreement or on the proceeds thereof in its possession for those charges and expenses, whether or not the other goods have been delivered by the warehouse. However, as against a person to which a negotiable warehouse receipt is duly negotiated, a warehouse's lien is limited to charges in an amount or at a rate specified in the warehouse receipt or, if no charges are so specified, to a reasonable charge for storage of the specific goods covered by the receipt subsequent to the date of the receipt.

(b) A warehouse may also reserve a security interest against the bailor for the maximum amount specified on the receipt for charges other than those specified in subsection (a) of this Code section, such as for money advanced and interest. The security interest is governed by Article 9 of this title.

(c) A warehouse's lien for charges and expenses under subsection (a) of this Code section or a security interest under subsection (b) of this Code section is also effective against any person that so entrusted the bailor with possession of the goods that a pledge of them by the bailor to a good-faith purchaser for value would have been valid. However, the lien or security interest is not effective against a person that before issuance of a document of title had a legal interest or a perfected security interest in the goods and that did not:

(1) Deliver or entrust the goods or any document of title covering the goods to the bailor or the bailor's nominee with:

(A) Actual or apparent authority to ship, store, or sell;

(B) Power to obtain delivery under Code Section 11-7-403; or

(C) Power of disposition under Code Section 11-2-403, subsection (2) of Code Section 11-2A-304, subsection (2) of Code Section 11-2A-305, Code Section 11-9-320, or subsection (c) of Code Section 11-9-321 or other statute or rule of law; or

(2) Acquiesce in the procurement by the bailor or its nominee of any document.

(d) A warehouse's lien on household goods for charges and expenses in relation to the goods under subsection (a) of this Code section is also effective against all persons if the depositor was the legal possessor of the goods at the time of deposit. In this subsection, "household goods" means furniture, furnishings, or personal effects used by the depositor in a dwelling.

(e) A warehouse loses its lien on any goods that it voluntarily delivers or unjustifiably refuses to deliver. (Code 1933, § 109A-7—209, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 1973, p. 437, § 1; Ga. L. 2010, p. 481, § 1-1/HB 451.)

**The 2010 amendment**, effective May 27, 2010, substituted "warehouse" for "warehouseman" in the section catchline; and rewrote this Code section. See the Editor's notes for applicability.

**Editor's notes.** — Ga. L. 2010, p. 481, § 3-1, not codified by the General Assembly, provides that: "This Act applies to a document of title that is issued or a bailment that arises on or after the effective date of this Act. This Act does not apply to a document of title that is issued or a bailment that arises before the effective date of this Act even if the document of title or bailment would be subject to this Act if the document of title had been issued or bailment had arisen on or after the effective date of this Act. This Act does

not apply to a right of action that has accrued before the effective date of this Act." This Act became effective May 27, 2010.

Ga. L. 2010, p. 481, § 3-2, not codified by the General Assembly, provides that: "A document of title issued or a bailment that arises before the effective date of this Act and the rights, documents, and interests flowing from that document or bailment are governed by any statute or other rule amended or repealed by this Act as if such amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute or other rule." This Act became effective May 27, 2010.

## JUDICIAL DECISIONS

**Warehouse receipt necessary to claim a warehouse lien.** — Absent a warehouse receipt, a peanut company which warehoused and processed peanuts could not claim a warehouse lien on the

proceeds from the peanuts. *Farm Credit of Northwest Fla., ACA v. Easom Peanut Co.*, 312 Ga. App. 374, 718 S.E.2d 590 (2011), cert. denied, No. S12C0444, 2012 Ga. LEXIS 315 (Ga. 2012).

### 11-7-210. Enforcement of warehouse's lien.

(a) Except as provided in subsection (b) of this Code section, a warehouse's lien may be enforced by public or private sale of the goods, in bulk or in packages, at any time or place and on any terms that are



commercially reasonable, after notifying all persons known to claim an interest in the goods. The notification shall include a statement of the amount due, the nature of the proposed sale, and the time and place of any public sale. The fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by the warehouse is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner. The warehouse sells in a commercially reasonable manner if the warehouse sells the goods in the usual manner in any recognized market therefor, sells at the price current in that market at the time of the sale, or otherwise sells in conformity with commercially reasonable practices among dealers in the type of goods sold. A sale of more goods than apparently necessary to be offered to insure satisfaction of the obligation is not commercially reasonable except in cases covered by the preceding sentence.

(b) A warehouse may enforce its lien on goods, other than goods stored by a merchant in the course of its business, only if the following requirements are satisfied:

(1) All persons known to claim an interest in the goods shall be notified.

(2) The notification shall include an itemized statement of the claim, a description of the goods subject to the lien, a demand for payment within a specified time not less than ten days after receipt of the notification, and a conspicuous statement that unless the claim is paid within that time the goods will be advertised for sale and sold by auction at a specified time and place.

(3) The sale shall conform to the terms of the notification.

(4) The sale shall be held at the nearest suitable place to where the goods are held or stored.

(5) After the expiration of the time given in the notification, an advertisement of the sale shall be published once a week for two weeks consecutively in a newspaper of general circulation where the sale is to be held. The advertisement shall include a description of the goods, the name of the person on whose account they are being held, and the time and place of the sale. The sale shall take place at least 15 days after the first publication. If there is no newspaper of general circulation where the sale is to be held, the advertisement shall be posted at least ten days before the sale in not fewer than six conspicuous places in the neighborhood of the proposed sale.

(c) Before any sale pursuant to this Code section, any person claiming a right in the goods may pay the amount necessary to satisfy the lien and the reasonable expenses incurred in complying with this Code section. In that event, the goods may not be sold but shall be retained by the warehouse subject to the terms of the receipt and this article.

(d) A warehouse may buy at any public sale held pursuant to this Code section.

(e) A purchaser in good faith of goods sold to enforce a warehouse's lien takes the goods free of any rights of persons against which the lien was valid, despite the warehouse's noncompliance with this Code section.

(f) A warehouse may satisfy its lien from the proceeds of any sale pursuant to this Code section but shall hold the balance, if any, for delivery on demand to any person to which the warehouse would have been bound to deliver the goods.

(g) The rights provided by this Code section shall be in addition to all other rights allowed by law to a creditor against a debtor.

(h) If a lien is on goods stored by a merchant in the course of its business, the lien may be enforced in accordance with subsection (a) or (b) of this Code section.

(i) A warehouse is liable for damages caused by failure to comply with the requirements for sale under this Code section and, in case of willful violation, is liable for conversion. (Code 1933, § 109A-7—210, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 2010, p. 481, § 1-1/HB 451.)

**The 2010 amendment**, effective May 27, 2010, substituted “warehouse’s” for “warehouseman’s” in the catchline; and rewrote this Code section. See the Editor’s notes for applicability.

**Editor’s notes.** — Ga. L. 2010, p. 481, § 3-1, not codified by the General Assembly, provides that: “This Act applies to a document of title that is issued or a bailment that arises on or after the effective date of this Act. This Act does not apply to a document of title that is issued or a bailment that arises before the effective date of this Act even if the document of title or bailment would be subject to this Act if the document of title had been issued or bailment had arisen on or after the effective date of this Act. This Act does

not apply to a right of action that has accrued before the effective date of this Act.” This Act became effective May 27, 2010.

Ga. L. 2010, p. 481, § 3-2, not codified by the General Assembly, provides that: “A document of title issued or a bailment that arises before the effective date of this Act and the rights, documents, and interests flowing from that document or bailment are governed by any statute or other rule amended or repealed by this Act as if such amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute or other rule.” This Act became effective May 27, 2010.

## PART 3

## BILLS OF LADING: SPECIAL PROVISIONS

**11-7-301. Liability for nonreceipt or misdescription; “said to contain”; “shipper’s weight, load, and count”; improper handling.**

(a) A consignee of a nonnegotiable bill of lading which has given value in good faith, or a holder to which a negotiable bill has been duly negotiated, relying upon the description of the goods in the bill or upon the date shown in the bill, may recover from the issuer damages caused by the misdating of the bill or the nonreceipt or misdescription of the goods, except to the extent that the bill indicates that the issuer does not know whether any part or all of the goods in fact were received or conform to the description, such as in a case in which the description is in terms of marks or labels or kind, quantity, or condition or the receipt or description is qualified by “contents or condition of contents of packages unknown,” “said to contain,” “shipper’s weight, load, and count,” or words of similar import, if that indication is true.

(b) If goods are loaded by the issuer of a bill of lading:

(1) The issuer shall count the packages of goods if shipped in packages and ascertain the kind and quantity if shipped in bulk; and

(2) Words such as “shipper’s weight, load, and count” or words of similar import indicating that the description was made by the shipper are ineffective except as to goods concealed in packages.

(c) If bulk goods are loaded by a shipper that makes available to the issuer of a bill of lading adequate facilities for weighing those goods, the issuer shall ascertain the kind and quantity within a reasonable time after receiving the shipper’s request to do so. In that case “shipper’s weight” or words of similar import are ineffective.

(d) The issuer of a bill of lading, by including in the bill the words “shipper’s weight, load, and count” or words of similar import, may indicate that the goods were loaded by the shipper, and, if that statement is true, the issuer is not liable for damages caused by the improper loading. However, omission of such words does not imply liability for damages caused by improper loading.

(e) A shipper guarantees to an issuer the accuracy at the time of shipment of the description, marks, labels, number, kind, quantity, condition, and weight, as furnished by the shipper, and the shipper shall indemnify the issuer against damage caused by inaccuracies in those particulars. This right of indemnity does not limit the issuer’s responsibility or liability under the contract of carriage to any person



other than the shipper. (Code 1933, § 109A-7—301, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 2010, p. 481, § 1-1/HB 451.)

**The 2010 amendment**, effective May 27, 2010, substituted “weight, load,” for “load” in the catchline; and rewrote this Code section. See the Editor’s notes for applicability.

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 2010, the word “be” was deleted preceding “liable” in the first sentence of subsection (d).

**Editor’s notes.** — Ga. L. 2010, p. 481, § 3-1, not codified by the General Assembly, provides that: “This Act applies to a document of title that is issued or a bailment that arises on or after the effective date of this Act. This Act does not apply to a document of title that is issued or a bailment that arises before the effective date of this Act even if the document of title or bailment would be subject to this Act if the document of title had been

issued or bailment had arisen on or after the effective date of this Act. This Act does not apply to a right of action that has accrued before the effective date of this Act.” This Act became effective May 27, 2010.

Ga. L. 2010, p. 481, § 3-2, not codified by the General Assembly, provides that: “A document of title issued or a bailment that arises before the effective date of this Act and the rights, documents, and interests flowing from that document or bailment are governed by any statute or other rule amended or repealed by this Act as if such amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute or other rule.” This Act became effective May 27, 2010.

### **11-7-302. Through bills of lading and similar documents of title.**

(a) The issuer of a through bill of lading, or other document of title embodying an undertaking to be performed in part by a person acting as its agent or by a performing carrier, is liable to any person entitled to recover on the bill or other document for any breach by the other person or the performing carrier of its obligation under the bill or other document. However, to the extent that the bill or other document covers an undertaking to be performed overseas or in territory not contiguous to the continental United States or an undertaking including matters other than transportation, this liability for breach by the other person or the performing carrier may be varied by agreement of the parties.

(b) If goods covered by a through bill of lading or other document of title embodying an undertaking to be performed in part by a person other than the issuer are received by that person, the person is subject, with respect to its own performance while the goods are in its possession, to the obligation of the issuer. The person’s obligation is discharged by delivery of the goods to another person pursuant to the bill or other document and does not include liability for breach by any other person or by the issuer.

(c) The issuer of a through bill of lading or other document of title described in subsection (a) of this Code section is entitled to recover from the performing carrier, or other person in possession of the goods when the breach of the obligation under the bill or other document occurred:

(1) The amount it may be required to pay to any person entitled to recover on the bill or other document for the breach, as may be evidenced by any receipt, judgment, or transcript of judgment; and

(2) The amount of any expense reasonably incurred by the issuer in defending any action commenced by any person entitled to recover on the bill or other document for the breach. (Code 1933, § 109A-7—302, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 2010, p. 481, § 1-1/HB 451.)

**The 2010 amendment**, effective May 27, 2010, added “of title” in the catchline; and rewrote this Code section. See the Editor’s notes for applicability.

**Editor’s notes.** — Ga. L. 2010, p. 481, § 3-1, not codified by the General Assembly, provides that: “This Act applies to a document of title that is issued or a bailment that arises on or after the effective date of this Act. This Act does not apply to a document of title that is issued or a bailment that arises before the effective date of this Act even if the document of title or bailment would be subject to this Act if the document of title had been issued or bailment had arisen on or after the effective date of this Act. This Act does

not apply to a right of action that has accrued before the effective date of this Act.” This Act became effective May 27, 2010.

Ga. L. 2010, p. 481, § 3-2, not codified by the General Assembly, provides that: “A document of title issued or a bailment that arises before the effective date of this Act and the rights, documents, and interests flowing from that document or bailment are governed by any statute or other rule amended or repealed by this Act as if such amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute or other rule.” This Act became effective May 27, 2010.

### 11-7-303. Diversion; reconsignment; change of instructions.

(a) Unless the bill of lading otherwise provides, a carrier may deliver the goods to a person or destination other than that stated in the bill or may otherwise dispose of the goods, without liability for misdelivery, on instructions from:

(1) The holder of a negotiable bill;

(2) The consignor on a nonnegotiable bill, even if the consignee has given contrary instructions;

(3) The consignee on a nonnegotiable bill in the absence of contrary instructions from the consignor, if the goods have arrived at the billed destination or if the consignee is in possession of the tangible bill or in control of the electronic bill; or

(4) The consignee on a nonnegotiable bill, if the consignee is entitled as against the consignor to dispose of the goods.

(b) Unless instructions described in subsection (a) of this Code section are included in a negotiable bill of lading, a person to which the bill is duly negotiated may hold the bailee according to the original terms. (Code 1933, § 109A-7—303, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 2010, p. 481, § 1-1/HB 451.)

**The 2010 amendment**, effective May 27, 2010, redesignated former subsections (1) and (2) as present subsections (a) and (b), respectively; rewrote present subsection (a); and, in present subsection (b), substituted “instructions described in subsection (a) of this Code section are included in” for “such instructions are noted on” near the beginning, substituted “which” for “whom”, and substituted “may” for “can” near the end. See the Editor’s notes for applicability.

**Editor’s notes.** — Ga. L. 2010, p. 481, § 3-1, not codified by the General Assembly, provides that: “This Act applies to a document of title that is issued or a bailment that arises on or after the effective date of this Act. This Act does not apply to a document of title that is issued or a bailment that arises before the effective date of this Act even if the document

of title or bailment would be subject to this Act if the document of title had been issued or bailment had arisen on or after the effective date of this Act. This Act does not apply to a right of action that has accrued before the effective date of this Act.” This Act became effective May 27, 2010.

Ga. L. 2010, p. 481, § 3-2, not codified by the General Assembly, provides that: “A document of title issued or a bailment that arises before the effective date of this Act and the rights, documents, and interests flowing from that document or bailment are governed by any statute or other rule amended or repealed by this Act as if such amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute or other rule.” This Act became effective May 27, 2010.

### 11-7-304. Tangible bills of lading in a set.

(a) Except as customary in international transportation, a tangible bill of lading may not be issued in a set of parts. The issuer is liable for damages caused by violation of this subsection.

(b) If a tangible bill of lading is lawfully issued in a set of parts, each of which contains an identification code and is expressed to be valid only if the goods have not been delivered against any other part, the whole of the parts constitutes one bill.

(c) If a tangible negotiable bill of lading is lawfully issued in a set of parts and different parts are negotiated to different persons, the title of the holder to which the first due negotiation is made prevails as to both the document of title and the goods even if any later holder may have received the goods from the carrier in good faith and discharged the carrier’s obligation by surrendering its part.

(d) A person that negotiates or transfers a single part of a tangible bill of lading issued in a set is liable to holders of that part as if it were the whole set.

(e) The bailee shall deliver in accordance with Part 4 of this article against the first presented part of a tangible bill of lading lawfully drawn in a set. Delivery in this manner discharges the bailee’s obligation on the whole bill. (Code 1933, § 109A-7—304, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 2010, p. 481, § 1-1/HB 451.)

**The 2010 amendment**, effective May 27, 2010, substituted “Tangible bills” for “Bills” at the beginning of the catchline; redesignated former subsections (1)



through (5) as present subsections (a) through (e), respectively; substituted “as customary in international transportation, a tangible bill of lading may” for “where customary in overseas transportation, a bill of lading must” in the first sentence of present subsection (a); in present subsection (b), substituted “If a tangible bill of lading is lawfully issued” for “Where a bill of lading is lawfully drawn”, substituted “contains an identification code and is” for “is numbered and”, and substituted “constitutes” for “constitute” near the end; in present subsection (c), substituted “If a tangible negotiable” for “Where a” at the beginning, substituted “which” for “whom”, inserted “of title”, substituted “if any” for “though any”, and deleted “surrender of his” preceding “surrendering” near the end; in present subsection (d), substituted “A person that” for “Any person who”, inserted “tangible”, and substituted “issued” for “drawn”; and, in present subsection (e), in the first sentence, substituted “shall deliver” for “is obliged to deliver” near the beginning and inserted “tangible”, and substituted “Delivery in this manner” for “Such delivery” at the beginning of the second sentence. See the Editor’s notes for applicability.

**Editor’s notes.** — Ga. L. 2010, p. 481, § 3-1, not codified by the General Assembly, provides that: “This Act applies to a document of title that is issued or a bailment that arises on or after the effective date of this Act. This Act does not apply to a document of title that is issued or a bailment that arises before the effective date of this Act even if the document of title or bailment would be subject to this Act if the document of title had been issued or bailment had arisen on or after the effective date of this Act. This Act does not apply to a right of action that has accrued before the effective date of this Act.” This Act became effective May 27, 2010.

Ga. L. 2010, p. 481, § 3-2, not codified by the General Assembly, provides that: “A document of title issued or a bailment that arises before the effective date of this Act and the rights, documents, and interests flowing from that document or bailment are governed by any statute or other rule amended or repealed by this Act as if such amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute or other rule.” This Act became effective May 27, 2010.

### 11-7-305. Destination bills.

(a) Instead of issuing a bill of lading to the consignor at the place of shipment, a carrier, at the request of the consignor, may procure the bill to be issued at destination or at any other place designated in the request.

(b) Upon request of any person entitled as against the carrier to control the goods while in transit and on surrender of possession or control of any outstanding bill of lading or other receipt covering such goods, the issuer, subject to Code Section 11-7-105, may procure a substitute bill to be issued at any place designated in the request. (Code 1933, § 109A-7—305, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 2010, p. 481, § 1-1/HB 451.)

**The 2010 amendment**, effective May 27, 2010, redesignated former subsections (1) and (2) as present subsections (a) and (b), respectively; substituted “shipment, a carrier, at the request of the consignor, may” for “shipment a carrier may at the request of the consignor” in present sub-

section (a); and, in present subsection (b), substituted “any person” for “anyone” near the beginning, inserted “of possession or control” in the middle, and inserted “, subject to Code Section 11-7-105,” near the end. See the Editor’s notes for applicability.

**Editor's notes.** — Ga. L. 2010, p. 481, § 3-1, not codified by the General Assembly, provides that: “This Act applies to a document of title that is issued or a bailment that arises on or after the effective date of this Act. This Act does not apply to a document of title that is issued or a bailment that arises before the effective date of this Act even if the document of title or bailment would be subject to this Act if the document of title had been issued or bailment had arisen on or after the effective date of this Act. This Act does not apply to a right of action that has accrued before the effective date of this

Act.” This Act became effective May 27, 2010.

Ga. L. 2010, p. 481, § 3-2, not codified by the General Assembly, provides that: “A document of title issued or a bailment that arises before the effective date of this Act and the rights, documents, and interests flowing from that document or bailment are governed by any statute or other rule amended or repealed by this Act as if such amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute or other rule.” This Act became effective May 27, 2010.

### 11-7-306. Altered bills of lading.

**Editor's notes.** — Ga. L. 2010, p. 481, § 1-1, effective May 27, 2010, reenacted this Code section without change. Refer to bound volume for text of this Code section.

Ga. L. 2010, p. 481, § 3-1, not codified by the General Assembly, provides that: “This Act applies to a document of title that is issued or a bailment that arises on or after the effective date of this Act. This Act does not apply to a document of title that is issued or a bailment that arises before the effective date of this Act even if the document of title or bailment would be subject to this Act if the document of title had been issued or bailment had arisen on or after the effective date of this Act. This Act does not apply to a right of action that

has accrued before the effective date of this Act.” This Act became effective May 27, 2010.

Ga. L. 2010, p. 481, § 3-2, not codified by the General Assembly, provides that: “A document of title issued or a bailment that arises before the effective date of this Act and the rights, documents, and interests flowing from that document or bailment are governed by any statute or other rule amended or repealed by this Act as if such amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute or other rule.” This Act became effective May 27, 2010.

### 11-7-307. Lien of carrier.

(a) A carrier has a lien on the goods covered by a bill of lading or on the proceeds thereof in its possession for charges after the date of the carrier's receipt of the goods for storage or transportation, including demurrage and terminal charges, and for expenses necessary for preservation of the goods incident to their transportation or reasonably incurred in their sale pursuant to law. However, against a purchaser for value of a negotiable bill of lading, a carrier's lien is limited to charges stated in the bill or the applicable tariffs or, if no charges are stated, a reasonable charge.

(b) A lien for charges and expenses under subsection (a) of this Code section on goods that the carrier was required by law to receive for transportation is effective against the consignor or any person entitled to the goods unless the carrier had notice that the consignor lacked authority to subject the goods to those charges and expenses. Any other



lien under subsection (a) of this Code section is effective against the consignor and any person that permitted the bailor to have control or possession of the goods unless the carrier had notice that the bailor lacked authority.

(c) A carrier loses its lien on any goods that it voluntarily delivers or unjustifiably refuses to deliver. (Code 1933, § 109A-7—307, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 2010, p. 481, § 1-1/HB 451.)

**The 2010 amendment**, effective May 27, 2010, redesignated former subsections (1) through (3) as present subsections (a) through (c), respectively; rewrote present subsection (a); in present subsection (b), substituted “subsection (a)” for “subsection (1)” twice, in the first sentence, substituted “that” for “which” and substituted “those” for “such”, and, in the second sentence, substituted “that” for “who” and deleted “such” preceding “authority” at the end. See the Editor’s notes for applicability.

**Editor’s notes.** — Ga. L. 2010, p. 481, § 3-1, not codified by the General Assembly, provides that: “This Act applies to a document of title that is issued or a bailment that arises on or after the effective date of this Act. This Act does not apply to a document of title that is issued or a bailment that arises before the effective date of this Act even if the document

of title or bailment would be subject to this Act if the document of title had been issued or bailment had arisen on or after the effective date of this Act. This Act does not apply to a right of action that has accrued before the effective date of this Act.” This Act became effective May 27, 2010.

Ga. L. 2010, p. 481, § 3-2, not codified by the General Assembly, provides that: “A document of title issued or a bailment that arises before the effective date of this Act and the rights, documents, and interests flowing from that document or bailment are governed by any statute or other rule amended or repealed by this Act as if such amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute or other rule.” This Act became effective May 27, 2010.

### 11-7-308. Enforcement of carrier’s lien.

(a) A carrier’s lien on goods may be enforced by public or private sale of the goods, in bulk or in packages, at any time or place and on any terms that are commercially reasonable, after notifying all persons known to claim an interest in the goods. The notification shall include a statement of the amount due, the nature of the proposed sale, and the time and place of any public sale. The fact that a better price could have been obtained by a sale at a different time or in a method different from that selected by the carrier is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner. The carrier sells goods in a commercially reasonable manner if the carrier sells the goods in the usual manner in any recognized market therefor, sells at the price current in that market at the time of the sale, or otherwise sells in conformity with commercially reasonable practices among dealers in the type of goods sold. A sale of more goods than apparently necessary to be offered to ensure satisfaction of the obligation is not commercially reasonable, except in cases covered by the preceding sentence.



(b) Before any sale pursuant to this Code section, any person claiming a right in the goods may pay the amount necessary to satisfy the lien and the reasonable expenses incurred in complying with this Code section. In that event, the goods may not be sold but shall be retained by the carrier, subject to the terms of the bill of lading and this article.

(c) The carrier may buy at any public sale pursuant to this Code section.

(d) A purchaser in good faith of goods sold to enforce a carrier's lien takes the goods free of any rights of persons against which the lien was valid, despite the carrier's noncompliance with this Code section.

(e) A carrier may satisfy its lien from the proceeds of any sale pursuant to this Code section but shall hold the balance, if any, for delivery on demand to any person to which the carrier would have been bound to deliver the goods.

(f) The rights provided by this Code section are in addition to all other rights allowed by law to a creditor against a debtor.

(g) A carrier's lien may be enforced pursuant to either subsection (a) of this Code section or the procedure set forth in subsection (b) of Code Section 11-7-210.

(h) A carrier is liable for damages caused by failure to comply with the requirements for sale under this Code section and, in case of willful violation, is liable for conversion. (Code 1933, § 109A-7—308, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 2010, p. 481, § 1-1/HB 451.)

**The 2010 amendment**, effective May 27, 2010, rewrote this Code section. See the Editor's notes for applicability.

**Editor's notes.** — Ga. L. 2010, p. 481, § 3-1, not codified by the General Assembly, provides that: "This Act applies to a document of title that is issued or a bailment that arises on or after the effective date of this Act. This Act does not apply to a document of title that is issued or a bailment that arises before the effective date of this Act even if the document of title or bailment would be subject to this Act if the document of title had been issued or bailment had arisen on or after the effective date of this Act. This Act does not apply to a right of action that has

accrued before the effective date of this Act." This Act became effective May 27, 2010.

Ga. L. 2010, p. 481, § 3-2, not codified by the General Assembly, provides that: "A document of title issued or a bailment that arises before the effective date of this Act and the rights, documents, and interests flowing from that document or bailment are governed by any statute or other rule amended or repealed by this Act as if such amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute or other rule." This Act became effective May 27, 2010.

# 11-7-309. Duty of care; contractual limitation of carrier's liability.

(a) A carrier that issues a bill of lading, whether negotiable or nonnegotiable, shall exercise the degree of care in relation to the goods which a reasonably careful person would exercise under similar circumstances. This subsection does not affect any statute, regulation, or rule of law that imposes liability upon a common carrier for damages not caused by its negligence.

(b) Damages may be limited by a term in the bill of lading or in a transportation agreement that the carrier's liability may not exceed a value stated in the bill or transportation agreement if the carrier's rates are dependent upon value and the consignor is afforded an opportunity to declare a higher value and the consignor is advised of the opportunity. However, such a limitation is not effective with respect to the carrier's liability for conversion to its own use.

(c) Reasonable provisions as to the time and manner of presenting claims and commencing actions based on the shipment may be included in a bill of lading or a transportation agreement. (Code 1933, § 109A-7—309, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 2010, p. 481, § 1-1/HB 451.)

**The 2010 amendment**, effective May 27, 2010, rewrote this Code section. See the Editor's notes for applicability.

**Editor's notes.** — Ga. L. 2010, p. 481, § 3-1, not codified by the General Assembly, provides that: "This Act applies to a document of title that is issued or a bailment that arises on or after the effective date of this Act. This Act does not apply to a document of title that is issued or a bailment that arises before the effective date of this Act even if the document of title or bailment would be subject to this Act if the document of title had been issued or bailment had arisen on or after the effective date of this Act. This Act does not apply to a right of action that has

accrued before the effective date of this Act." This Act became effective May 27, 2010.

Ga. L. 2010, p. 481, § 3-2, not codified by the General Assembly, provides that: "A document of title issued or a bailment that arises before the effective date of this Act and the rights, documents, and interests flowing from that document or bailment are governed by any statute or other rule amended or repealed by this Act as if such amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute or other rule." This Act became effective May 27, 2010.

## PART 4

## WAREHOUSE RECEIPTS AND BILLS OF LADING: GENERAL OBLIGATIONS

**11-7-401. Irregularities in issue of receipt or bill or conduct of issuer.**

The obligations imposed by this article on an issuer apply to a document of title even if:

- (1) The document does not comply with the requirements of this article or of any other statute, rule, or regulation regarding its issuance, form, or content;
- (2) The issuer violated laws regulating the conduct of its business;
- (3) The goods covered by the document were owned by the bailee when the document was issued; or
- (4) The person issuing the document is not a warehouse but the document purports to be a warehouse receipt. (Code 1933, § 109A-7—401, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 2010, p. 481, § 1-1/HB 451.)

**The 2010 amendment**, effective May 27, 2010, rewrote this Code section. See the Editor's notes for applicability.

**Editor's notes.** — Ga. L. 2010, p. 481, § 3-1, not codified by the General Assembly, provides that: "This Act applies to a document of title that is issued or a bailment that arises on or after the effective date of this Act. This Act does not apply to a document of title that is issued or a bailment that arises before the effective date of this Act even if the document of title or bailment would be subject to this Act if the document of title had been issued or bailment had arisen on or after the effective date of this Act. This Act does not apply to a right of action that has

accrued before the effective date of this Act." This Act became effective May 27, 2010.

Ga. L. 2010, p. 481, § 3-2, not codified by the General Assembly, provides that: "A document of title issued or a bailment that arises before the effective date of this Act and the rights, documents, and interests flowing from that document or bailment are governed by any statute or other rule amended or repealed by this Act as if such amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute or other rule." This Act became effective May 27, 2010.

**11-7-402. Duplicate document of title; overissue.**

A duplicate or any other document of title purporting to cover goods already represented by an outstanding document of the same issuer does not confer any right in the goods, except as provided in the case of tangible bills of lading in a set of parts, overissue of documents for fungible goods, substitutes for lost, stolen, or destroyed documents, or substitute documents issued pursuant to Code Section 11-7-105. The issuer is liable for damages caused by its overissue or failure to identify



a duplicate document by a conspicuous notation. (Code 1933, § 109A-7—402, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 2010, p. 481, § 1-1/HB 451.)

**The 2010 amendment**, effective May 27, 2010, substituted “document of title” for “receipt or bill” in the catchline; in the first sentence, substituted “A duplicate or” for “Neither a duplicate nor” at the beginning, substituted “does not confer” for “confers”, substituted “tangible bills of lading in a set of parts” for “bills in a set”, deleted “and” preceding “substitutes”, and added “, or substituted documents issued pursuant to Code Section 11-7-105” at the end; and, in the second sentence, substituted “The” for “But the” at the beginning, substituted “its” for “his”, and substituted “by a conspicuous notation” for “as such by conspicuous notation on its face” at the end. See the Editor’s notes for applicability.

**Editor’s notes.** — Ga. L. 2010, p. 481, § 3-1, not codified by the General Assembly, provides that: “This Act applies to a document of title that is issued or a bailment that arises on or after the effective date of this Act. This Act does not

apply to a document of title that is issued or a bailment that arises before the effective date of this Act even if the document of title or bailment would be subject to this Act if the document of title had been issued or bailment had arisen on or after the effective date of this Act. This Act does not apply to a right of action that has accrued before the effective date of this Act.” This Act became effective May 27, 2010.

Ga. L. 2010, p. 481, § 3-2, not codified by the General Assembly, provides that: “A document of title issued or a bailment that arises before the effective date of this Act and the rights, documents, and interests flowing from that document or bailment are governed by any statute or other rule amended or repealed by this Act as if such amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute or other rule.” This Act became effective May 27, 2010.

### **11-7-403. Obligation of bailee to deliver; excuse.**

(a) A bailee shall deliver the goods to a person entitled under a document of title if the person complies with subsections (b) and (c) of this Code section, unless and to the extent that the bailee establishes any of the following:

(1) Delivery of the goods to a person whose receipt was rightful as against the claimant;

(2) Damage to or delay, loss, or destruction of the goods for which the bailee is not liable;

(3) Previous sale or other disposition of the goods in lawful enforcement of a lien or on a warehouse’s lawful termination of storage;

(4) The exercise by a seller of its right to stop delivery pursuant to Code Section 11-2-705 or by a lessor of its right to stop delivery pursuant to Code Section 11-2A-526;

(5) A diversion, reconsignment, or other disposition pursuant to Code Section 11-7-303;

(6) Release, satisfaction, or any other personal defense against the claimant; or

(7) Any other lawful excuse.

(b) A person claiming goods covered by a document of title shall satisfy the bailee's lien if the bailee so requests or if the bailee is prohibited by law from delivering the goods until the charges are paid.

(c) Unless a person claiming the goods is a person against which the document of title does not confer a right under subsection (a) of Code Section 11-7-503:

(1) The person claiming under a document shall surrender possession or control of any outstanding negotiable document covering the goods for cancellation or indication of partial deliveries; and

(2) The bailee shall cancel the document or conspicuously indicate in the document the partial delivery or the bailee is liable to any person to which the document is duly negotiated. (Code 1933, § 109A-7—403, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 2010, p. 481, § 1-1/HB 451.)

**The 2010 amendment**, effective May 27, 2010, substituted “bailee” for “warehouseman or carrier” in the catchline; redesignated former paragraphs (1) through (3) as present subsections (a) through (c), respectively; rewrote present subsection (a); in present subsection (b), substituted “shall” for “must” and substituted “if” for “where” twice; rewrote present subsection (c); and deleted former subsection (4), which read: “Person entitled under the document’ means holder in the case of a negotiable document, or the person to whom delivery is to be made by the terms of or pursuant to written instructions under a nonnegotiable document.” See the Editor’s notes for applicability.

**Editor’s notes.** — Ga. L. 2010, p. 481, § 3-1, not codified by the General Assembly, provides that: “This Act applies to a document of title that is issued or a bailment that arises on or after the effective date of this Act. This Act does not

apply to a document of title that is issued or a bailment that arises before the effective date of this Act even if the document of title or bailment would be subject to this Act if the document of title had been issued or bailment had arisen on or after the effective date of this Act. This Act does not apply to a right of action that has accrued before the effective date of this Act.” This Act became effective May 27, 2010.

Ga. L. 2010, p. 481, § 3-2, not codified by the General Assembly, provides that: “A document of title issued or a bailment that arises before the effective date of this Act and the rights, documents, and interests flowing from that document or bailment are governed by any statute or other rule amended or repealed by this Act as if such amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute or other rule.” This Act became effective May 27, 2010.

**11-7-404. No liability for good-faith delivery pursuant to document of title.**

A bailee that in good faith has received goods and delivered or otherwise disposed of the goods according to the terms of the document of title or pursuant to this article is not liable for the goods even if:

- (1) The person from which the bailee received the goods did not have authority to procure the document or to dispose of the goods; or
- (2) The person to which the bailee delivered the goods did not have authority to receive the goods. (Code 1933, § 109A-7—404, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 2010, p. 481, § 1-1/HB 451.)

**The 2010 amendment**, effective May 27, 2010, rewrote this Code section. See the Editor’s notes for applicability.

**Editor’s notes.** — Ga. L. 2010, p. 481, § 3-1, not codified by the General Assembly, provides that: “This Act applies to a document of title that is issued or a bailment that arises on or after the effective date of this Act. This Act does not apply to a document of title that is issued or a bailment that arises before the effective date of this Act even if the document of title or bailment would be subject to this Act if the document of title had been issued or bailment had arisen on or after the effective date of this Act. This Act does not apply to a right of action that has

accrued before the effective date of this Act.” This Act became effective May 27, 2010.

Ga. L. 2010, p. 481, § 3-2, not codified by the General Assembly, provides that: “A document of title issued or a bailment that arises before the effective date of this Act and the rights, documents, and interests flowing from that document or bailment are governed by any statute or other rule amended or repealed by this Act as if such amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute or other rule.” This Act became effective May 27, 2010.

PART 5

WAREHOUSE RECEIPTS AND BILLS OF LADING:  
NEGOTIATION AND TRANSFER

**11-7-501. Form of negotiation and requirements of due negotiation.**

(a) The following rules apply to a negotiable tangible document of title:

- (1) If the document’s original terms run to the order of a named person, the document is negotiated by the named person’s indorsement and delivery. After the named person’s indorsement in blank or to bearer, any person may negotiate the document by delivery alone;
- (2) If the document’s original terms run to bearer, it is negotiated by delivery alone;



(3) If the document's original terms run to the order of a named person and it is delivered to the named person, the effect is the same as if the document had been negotiated;

(4) Negotiation of the document after it has been indorsed to a named person requires indorsement by the named person and delivery; and

(5) A document is duly negotiated if it is negotiated in the manner stated in this subsection to a holder that purchases it in good faith, without notice of any defense against or claim to it on the part of any person, and for value, unless it is established that the negotiation is not in the regular course of business or financing or involves receiving the document in settlement or payment of a money obligation.

(b) The following rules apply to a negotiable electronic document of title:

(1) If the document's original terms run to the order of a named person or to bearer, the document is negotiated by delivery of the document to another person. Indorsement by the named person is not required to negotiate the document;

(2) If the document's original terms run to the order of a named person and the named person has control of the document, the effect is the same as if the document had been negotiated; and

(3) A document is duly negotiated if it is negotiated in the manner stated in this subsection to a holder that purchases it in good faith, without notice of any defense against or claim to it on the part of any person, and for value, unless it is established that the negotiation is not in the regular course of business or financing or involves taking delivery of the document in settlement or payment of a monetary obligation.

(c) Indorsement of a nonnegotiable document of title neither makes it negotiable nor adds to the transferee's rights.

(d) The naming in a negotiable bill of lading of a person to be notified of the arrival of the goods does not limit the negotiability of the bill or constitute notice to a purchaser of the bill of any interest of that person in the goods. (Code 1933, § 109A-7—501, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 1963, p. 188, § 18; Ga. L. 2010, p. 481, § 1-1/HB 451.)

**The 2010 amendment**, effective May 27, 2010, deleted the quotation marks around "due negotiation" in the catchline; redesignated former subsections (1) through (4) as subsection (a); rewrote present subsection (a); added subsection (b); redesignated former subsections (5)

and (6) as present subsections (c) and (d), respectively; in present subsection (c), inserted "of title" in the middle; and, in present subsection (d), inserted "of lading", substituted "or" for "nor", substituted "of the bill" for "thereof", and substituted "that person" for "such person"

near the end. See the Editor's notes for applicability.

**Editor's notes.** — Ga. L. 2010, p. 481, § 3-1, not codified by the General Assembly, provides that: "This Act applies to a document of title that is issued or a bailment that arises on or after the effective date of this Act. This Act does not apply to a document of title that is issued or a bailment that arises before the effective date of this Act even if the document of title or bailment would be subject to this Act if the document of title had been issued or bailment had arisen on or after the effective date of this Act. This Act does not apply to a right of action that has

accrued before the effective date of this Act." This Act became effective May 27, 2010.

Ga. L. 2010, p. 481, § 3-2, not codified by the General Assembly, provides that: "A document of title issued or a bailment that arises before the effective date of this Act and the rights, documents, and interests flowing from that document or bailment are governed by any statute or other rule amended or repealed by this Act as if such amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute or other rule." This Act became effective May 27, 2010.

### 11-7-502. Rights acquired by due negotiation.

(a) Subject to Code Sections 11-7-205 and 11-7-503, a holder to which a negotiable document of title has been duly negotiated acquires thereby:

- (1) Title to the document;
- (2) Title to the goods;
- (3) All rights accruing under the law of agency or estoppel, including rights to goods delivered to the bailee after the document was issued; and
- (4) The direct obligation of the issuer to hold or deliver the goods according to the terms of the document free of any defense or claim by the issuer except those arising under the terms of the document or under this article, but in the case of a delivery order, the bailee's obligation accrues only upon the bailee's acceptance of the delivery order and the obligation acquired by the holder is that the issuer and any indorser will procure the acceptance of the bailee.

(b) Subject to Code Section 11-7-503, title and rights so acquired by due negotiation are not defeated by any stoppage of the goods represented by the document of title or by surrender of the goods by the bailee and are not impaired even if:

- (1) The due negotiation or any prior due negotiation constituted a breach of duty;
- (2) Any person has been deprived of possession of a negotiable tangible document or control of a negotiable electronic document by misrepresentation, fraud, accident, mistake, duress, loss, theft, or conversion; or

(3) A previous sale or other transfer of the goods or document has been made to a third person. (Code 1933, § 109A-7—502, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 2010, p. 481, § 1-1/HB 451.)

**The 2010 amendment**, effective May 27, 2010, redesignated subsections (1) and (2) as present subsections (a) and (b), respectively; substituted “Sections 11-7-205 and 11-7-503, a holder to which” for “Section 11-7-503 and to the provisions of Code Section 11-7-205 on fungible goods, a holder to whom” in the introductory paragraph; redesignated former paragraphs (1)(a) through (1)(d) as present paragraphs (a)(1) through (a)(4), respectively; in present paragraph (a)(4), substituted “the issuer” for “him”, substituted “article, but in the” for “article. In the”, inserted a comma, inserted “the bailee’s”, and inserted “of the delivery order”; in the introductory paragraph of present subsection (b), inserted “by due negotiation”, inserted “of title”, substituted “the goods” for “such goods”, deleted a comma following “bailee”, and substituted “if:” for “though the” at the end; added the paragraph designations in present subsection (b); in present paragraph (b)(1), added “The due” at the beginning and substituted a semicolon for “or even though any;”; in present paragraph (b)(2), added “Any” at the beginning, substituted “a negotiable tangible document or control of a negotiable electronic document” for “the document” in the middle, and substituted a semicolon for a comma; and substituted “A previous” for “even though a

previous” at the beginning of present paragraph (b)(3). See the Editor’s notes for applicability.

**Editor’s notes.** — Ga. L. 2010, p. 481, § 3-1, not codified by the General Assembly, provides that: “This Act applies to a document of title that is issued or a bailment that arises on or after the effective date of this Act. This Act does not apply to a document of title that is issued or a bailment that arises before the effective date of this Act even if the document of title or bailment would be subject to this Act if the document of title had been issued or bailment had arisen on or after the effective date of this Act. This Act does not apply to a right of action that has accrued before the effective date of this Act.” This Act became effective May 27, 2010.

Ga. L. 2010, p. 481, § 3-2, not codified by the General Assembly, provides that: “A document of title issued or a bailment that arises before the effective date of this Act and the rights, documents, and interests flowing from that document or bailment are governed by any statute or other rule amended or repealed by this Act as if such amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute or other rule.” This Act became effective May 27, 2010.

### **11-7-503. Document of title to goods defeated in certain cases.**

(a) A document of title confers no right in goods against a person that before issuance of the document had a legal interest or a perfected security interest in the goods and that did not:

(1) Deliver or entrust the goods or any document of title covering the goods to the bailor or the bailor’s nominee with:

(A) Actual or apparent authority to ship, store, or sell;

(B) Power to obtain delivery under Code Section 11-7-403; or

(C) Power of disposition under Code Section 11-2-403, subsection (2) of Code Section 11-2A-304, subsection (2) of Code Section



11-2A-305, Code Section 11-9-320, or subsection (c) of Code Section 11-9-321 or other statute or rule of law; or

(2) Acquiesce in the procurement by the bailor or its nominee of any document.

(b) Title to goods based upon an unaccepted delivery order is subject to the rights of any person to which a negotiable warehouse receipt or bill of lading covering the goods has been duly negotiated. That title may be defeated under Code Section 11-7-504 to the same extent as the rights of the issuer or a transferee from the issuer.

(c) Title to goods based upon a bill of lading issued to a freight forwarder is subject to the rights of any person to which a bill issued by the freight forwarder is duly negotiated. However, delivery by the carrier in accordance with Part 4 of this article pursuant to its own bill of lading discharges the carrier's obligation to deliver. (Code 1933, § 109A-7—503, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 2001, p. 362, § 16; Ga. L. 2010, p. 481, § 1-1/HB 451.)

**The 2010 amendment**, effective May 27, 2010, redesignated former subsections (1) through (3) as present subsections (a) through (c), respectively; rewrote present subsection (a); in present subsection (b), substituted “any person to which” for “anyone to whom” in the middle of the first sentence and substituted “That title” for “Such a title” at the beginning of the second sentence; and, in present subsection (c), substituted “any person to which” for “anyone to whom” and substituted “negotiated. However,” for “negotiated; but” in the middle. See the Editor's notes for applicability.

**Editor's notes.** — Ga. L. 2010, p. 481, § 3-1, not codified by the General Assembly, provides that: “This Act applies to a document of title that is issued or a bailment that arises on or after the effective date of this Act. This Act does not apply to a document of title that is issued

or a bailment that arises before the effective date of this Act even if the document of title or bailment would be subject to this Act if the document of title had been issued or bailment had arisen on or after the effective date of this Act. This Act does not apply to a right of action that has accrued before the effective date of this Act.” This Act became effective May 27, 2010.

Ga. L. 2010, p. 481, § 3-2, not codified by the General Assembly, provides that: “A document of title issued or a bailment that arises before the effective date of this Act and the rights, documents, and interests flowing from that document or bailment are governed by any statute or other rule amended or repealed by this Act as if such amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute or other rule.” This Act became effective May 27, 2010.

### **11-7-504. Rights acquired in the absence of due negotiation; effect of diversion; stoppage of delivery.**

(a) A transferee of a document of title, whether negotiable or nonnegotiable, to which the document has been delivered but not duly negotiated, acquires the title and rights that its transferor had or had actual authority to convey.

(b) In the case of a transfer of a nonnegotiable document of title, until but not after the bailee receives notice of the transfer, the rights of the transferee may be defeated:

(1) By those creditors of the transferor which could treat the transfer as void under Code Section 11-2-402 or 11-2A-308;

(2) By a buyer from the transferor in ordinary course of business if the bailee has delivered the goods to the buyer or received notification of the buyer's rights;

(3) By a lessee from the transferor in ordinary course of business if the bailee has delivered the goods to the lessee or received notification of the lessee's rights; or

(4) As against the bailee, by good-faith dealings of the bailee with the transferor.

(c) A diversion or other change of shipping instructions by the consignor in a nonnegotiable bill of lading which causes the bailee not to deliver the goods to the consignee defeats the consignee's title to the goods if the goods have been delivered to a buyer in ordinary course of business or a lessee in ordinary course of business and, in any event, defeats the consignee's rights against the bailee.

(d) Delivery of the goods pursuant to a nonnegotiable document of title may be stopped by a seller under Code Section 11-2-705 or a lessor under Code Section 11-2A-526, subject to the requirements of due notification in those Code sections. A bailee that honors the seller's or lessor's instructions is entitled to be indemnified by the seller or lessor against any resulting loss or expense. (Code 1933, § 109A-7—504, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 2010, p. 481, § 1-1/HB 451.)

**The 2010 amendment**, effective May 27, 2010, rewrote this Code section. See the Editor's notes for applicability.

**Editor's notes.** — Ga. L. 2010, p. 481, § 3-1, not codified by the General Assembly, provides that: "This Act applies to a document of title that is issued or a bailment that arises on or after the effective date of this Act. This Act does not apply to a document of title that is issued or a bailment that arises before the effective date of this Act even if the document of title or bailment would be subject to this Act if the document of title had been issued or bailment had arisen on or after the effective date of this Act. This Act does not apply to a right of action that has

accrued before the effective date of this Act." This Act became effective May 27, 2010.

Ga. L. 2010, p. 481, § 3-2, not codified by the General Assembly, provides that: "A document of title issued or a bailment that arises before the effective date of this Act and the rights, documents, and interests flowing from that document or bailment are governed by any statute or other rule amended or repealed by this Act as if such amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute or other rule." This Act became effective May 27, 2010.



**11-7-505. Indorser not guarantor for other parties.**

The indorsement of a tangible document of title issued by a bailee does not make the indorser liable for any default by the bailee or previous indorsers. (Code 1933, § 109A-7—505, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 2010, p. 481, § 1-1/HB 451.)

**The 2010 amendment**, effective May 27, 2010, deleted “a” preceding “not” in the catchline; inserted “tangible” and deleted “by” preceding “previous” near the end. See the Editor’s notes for applicability.

**Editor’s notes.** — Ga. L. 2010, p. 481, § 3-1, not codified by the General Assembly, provides that: “This Act applies to a document of title that is issued or a bailment that arises on or after the effective date of this Act. This Act does not apply to a document of title that is issued or a bailment that arises before the effective date of this Act even if the document of title or bailment would be subject to this Act if the document of title had been issued or bailment had arisen on or after the effective date of this Act. This Act does

not apply to a right of action that has accrued before the effective date of this Act.” This Act became effective May 27, 2010.

Ga. L. 2010, p. 481, § 3-2, not codified by the General Assembly, provides that: “A document of title issued or a bailment that arises before the effective date of this Act and the rights, documents, and interests flowing from that document or bailment are governed by any statute or other rule amended or repealed by this Act as if such amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute or other rule.” This Act became effective May 27, 2010.

**11-7-506. Delivery without indorsement; right to compel indorsement.**

The transferee of a negotiable tangible document of title has a specifically enforceable right to have its transferor supply any necessary indorsement, but the transfer becomes a negotiation only as of the time the indorsement is supplied. (Code 1933, § 109A-7—506, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 2010, p. 481, § 1-1/HB 451.)

**The 2010 amendment**, effective May 27, 2010, inserted “tangible” near the beginning and, near the middle, substituted “its” for “his” and inserted a comma following “indorsement”. See the Editor’s notes for applicability.

**Editor’s notes.** — Ga. L. 2010, p. 481, § 3-1, not codified by the General Assembly, provides that: “This Act applies to a document of title that is issued or a bailment that arises on or after the effective date of this Act. This Act does not apply to a document of title that is issued or a bailment that arises before the effective date of this Act even if the document of title or bailment would be subject to this Act if the document of title had been issued or bailment had arisen on or after

the effective date of this Act. This Act does not apply to a right of action that has accrued before the effective date of this Act.” This Act became effective May 27, 2010.

Ga. L. 2010, p. 481, § 3-2, not codified by the General Assembly, provides that: “A document of title issued or a bailment that arises before the effective date of this Act and the rights, documents, and interests flowing from that document or bailment are governed by any statute or other rule amended or repealed by this Act as if such amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute or other rule.” This Act became effective May 27, 2010.



### 11-7-507. Warranties on negotiation or delivery of document of title.

If a person negotiates or delivers a document of title for value, otherwise than as a mere intermediary under Code Section 11-7-508, unless otherwise agreed, the transferor, in addition to any warranty made in selling or leasing the goods, warrants to its immediate purchaser only that:

- (1) The document is genuine;
- (2) The transferor does not have knowledge of any fact that would impair the document's validity or worth; and
- (3) The negotiation or delivery is rightful and fully effective with respect to the title to the document and the goods it represents. (Code 1933, § 109A-7—507, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 2010, p. 481, § 1-1/HB 451.)

**The 2010 amendment**, effective May 27, 2010, rewrote this Code section. See the Editor's notes for applicability.

**Editor's notes.** — Ga. L. 2010, p. 481, § 3-1, not codified by the General Assembly, provides that: "This Act applies to a document of title that is issued or a bailment that arises on or after the effective date of this Act. This Act does not apply to a document of title that is issued or a bailment that arises before the effective date of this Act even if the document of title or bailment would be subject to this Act if the document of title had been issued or bailment had arisen on or after the effective date of this Act. This Act does not apply to a right of action that has

accrued before the effective date of this Act." This Act became effective May 27, 2010.

Ga. L. 2010, p. 481, § 3-2, not codified by the General Assembly, provides that: "A document of title issued or a bailment that arises before the effective date of this Act and the rights, documents, and interests flowing from that document or bailment are governed by any statute or other rule amended or repealed by this Act as if such amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute or other rule." This Act became effective May 27, 2010.

### 11-7-508. Warranties of collecting bank as to documents of title.

A collecting bank or other intermediary known to be entrusted with documents of title on behalf of another or with collection of a draft or other claim against delivery of documents warrants by the delivery of the documents only its own good faith and authority even if the collecting bank or other intermediary has purchased or made advances against the claim or draft to be collected. (Code 1933, § 109A-7—508, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 2010, p. 481, § 1-1/HB 451.)

**The 2010 amendment**, effective May 27, 2010, added "of title" in the catchline; inserted "of title" near the beginning; and, near the middle, substituted "the delivery" for "such delivery" and substituted

"even if the collecting bank or other" for "even if the collecting bank or other". This rule applies even though the. See the Editor's notes for applicability.

**Editor's notes.** — Ga. L. 2010, p. 481, § 3-1, not codified by the General Assem-

bly, provides that: "This Act applies to a document of title that is issued or a bailment that arises on or after the effective date of this Act. This Act does not apply to a document of title that is issued or a bailment that arises before the effective date of this Act even if the document of title or bailment would be subject to this Act if the document of title had been issued or bailment had arisen on or after the effective date of this Act. This Act does not apply to a right of action that has accrued before the effective date of this Act." This Act became effective May 27, 2010.

Ga. L. 2010, p. 481, § 3-2, not codified by the General Assembly, provides that: "A document of title issued or a bailment that arises before the effective date of this Act and the rights, documents, and interests flowing from that document or bailment are governed by any statute or other rule amended or repealed by this Act as if such amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute or other rule." This Act became effective May 27, 2010.

### 11-7-509. Adequate compliance with commercial contract.

Whether a document of title is adequate to fulfill the obligations of a contract for sale, a contract for lease, or the conditions of a letter of credit is determined by Article 2, 2A, or 5 of this title. (Code 1933, § 109A-7—509, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 2010, p. 481, § 1-1/HB 451.)

**The 2010 amendment**, effective May 27, 2010, substituted "Adequate" for "Receipt or bill; when adequate" at the beginning of the catchline; and rewrote this Code section. See the Editor's notes for applicability.

**Editor's notes.** — Ga. L. 2010, p. 481, § 3-1, not codified by the General Assembly, provides that: "This Act applies to a document of title that is issued or a bailment that arises on or after the effective date of this Act. This Act does not apply to a document of title that is issued or a bailment that arises before the effective date of this Act even if the document of title or bailment would be subject to this Act if the document of title had been issued or bailment had arisen on or after

the effective date of this Act. This Act does not apply to a right of action that has accrued before the effective date of this Act." This Act became effective May 27, 2010.

Ga. L. 2010, p. 481, § 3-2, not codified by the General Assembly, provides that: "A document of title issued or a bailment that arises before the effective date of this Act and the rights, documents, and interests flowing from that document or bailment are governed by any statute or other rule amended or repealed by this Act as if such amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute or other rule." This Act became effective May 27, 2010.

## PART 6

### WAREHOUSE RECEIPTS AND BILLS OF LADING: MISCELLANEOUS PROVISIONS

#### 11-7-601. Lost, stolen, or destroyed documents of title.

(a) If a document of title is lost, stolen, or destroyed, a court may order delivery of the goods or issuance of a substitute document and the

bailee may without liability to any person comply with the order. If the document was negotiable, a court may not order delivery of the goods or the issuance of a substitute document without the claimant's posting security unless it finds that any person that may suffer loss as a result of nonsurrender of possession or control of the document is adequately protected against the loss. If the document was nonnegotiable, the court may require security. The court may also order payment of the bailee's reasonable costs and attorney's fees in any action under this subsection.

(b) A bailee that, without a court order, delivers goods to a person claiming under a missing negotiable document of title is liable to any person injured thereby. If the delivery is not in good faith, the bailee is liable for conversion. Delivery in good faith is not conversion if the claimant posts security with the bailee in an amount at least double the value of the goods at the time of posting to indemnify any person injured by the delivery which files a notice of claim within one year after the delivery. (Code 1933, § 109A-7—601, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 2010, p. 481, § 1-1/HB 451.)

**The 2010 amendment**, effective May 27, 2010, substituted "Lost, stolen, or destroyed documents of title" for "Lost and missing documents" in the catchline; redesignated former subsections (1) and (2) as present subsections (a) and (b), respectively; rewrote present subsection (a); and, in present subsection (b), substituted "that, without a court order," for "who without court order" near the beginning, inserted "of title", substituted "thereby. If the delivery" for "thereby, and if the delivery", and substituted ", the bailee is" for "becomes", and, in the present last sentence, deleted "made in accordance with a filed classification or tariff or, where no classification or tariff is filed, if" preceding "the claimant" and substituted "which files" for "who files" near the end. See the Editor's notes for applicability.

**Editor's notes.** — Ga. L. 2010, p. 481, § 3-1, not codified by the General Assembly, provides that: "This Act applies to a document of title that is issued or a bailment that arises on or after the effective

date of this Act. This Act does not apply to a document of title that is issued or a bailment that arises before the effective date of this Act even if the document of title or bailment would be subject to this Act if the document of title had been issued or bailment had arisen on or after the effective date of this Act. This Act does not apply to a right of action that has accrued before the effective date of this Act." This Act became effective May 27, 2010.

Ga. L. 2010, p. 481, § 3-2, not codified by the General Assembly, provides that: "A document of title issued or a bailment that arises before the effective date of this Act and the rights, documents, and interests flowing from that document or bailment are governed by any statute or other rule amended or repealed by this Act as if such amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute or other rule." This Act became effective May 27, 2010.

## **11-7-602. Judicial process against goods covered by negotiable document of title.**

Unless a document of title was originally issued upon delivery of the goods by a person that did not have power to dispose of them, a lien does not attach by virtue of any judicial process to goods in the possession of



a bailee for which a negotiable document of title is outstanding unless possession or control of the document is first surrendered to the bailee or the document's negotiation is enjoined. The bailee may not be compelled to deliver the goods pursuant to process until possession or control of the document is surrendered to the bailee or to the court. A purchaser of the document for value without notice of the process or injunction takes free of the lien imposed by judicial process. (Code 1933, § 109A-7—602, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 2010, p. 481, § 1-1/HB 451.)

**The 2010 amendment**, effective May 27, 2010, substituted “Judicial process against goods covered by negotiable document of title” for “Attachment of goods covered by a negotiable document” in the catchline; and rewrote this Code section. See the Editor’s notes for applicability.

**Editor’s notes.** — Ga. L. 2010, p. 481, § 3-1, not codified by the General Assembly, provides that: “This Act applies to a document of title that is issued or a bailment that arises on or after the effective date of this Act. This Act does not apply to a document of title that is issued or a bailment that arises before the effective date of this Act even if the document of title or bailment would be subject to this Act if the document of title had been issued or bailment had arisen on or after

the effective date of this Act. This Act does not apply to a right of action that has accrued before the effective date of this Act.” This Act became effective May 27, 2010.

Ga. L. 2010, p. 481, § 3-2, not codified by the General Assembly, provides that: “A document of title issued or a bailment that arises before the effective date of this Act and the rights, documents, and interests flowing from that document or bailment are governed by any statute or other rule amended or repealed by this Act as if such amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute or other rule.” This Act became effective May 27, 2010.

### 11-7-603. Conflicting claims; interpleader.

If more than one person claims title to or possession of the goods, the bailee is excused from delivery until the bailee has a reasonable time to ascertain the validity of the adverse claims or to commence an action for interpleader. The bailee may assert an interpleader either in defending an action for nondelivery of the goods or by original action. (Code 1933, § 109A-7—603, enacted by Ga. L. 1962, p. 156, § 1; Ga. L. 2010, p. 481, § 1-1/HB 451.)

**The 2010 amendment**, effective May 27, 2010, inserted “to” near the beginning, substituted “the bailee has” for “he has had”, substituted “commence an action for interpleader. The bailee may assert an interpleader” for “bring an action to compel all claimants to interplead and may compel such interpleader”, and deleted “, whichever is appropriate” following “action” at the end. See the Editor’s notes for applicability.

**Editor’s notes.** — Ga. L. 2010, p. 481,

§ 3-1, not codified by the General Assembly, provides that: “This Act applies to a document of title that is issued or a bailment that arises on or after the effective date of this Act. This Act does not apply to a document of title that is issued or a bailment that arises before the effective date of this Act even if the document of title or bailment would be subject to this Act if the document of title had been issued or bailment had arisen on or after the effective date of this Act. This Act does

not apply to a right of action that has accrued before the effective date of this Act.” This Act became effective May 27, 2010.

Ga. L. 2010, p. 481, § 3-2, not codified by the General Assembly, provides that: “A document of title issued or a bailment that arises before the effective date of this Act and the rights, documents, and inter-

ests flowing from that document or bailment are governed by any statute or other rule amended or repealed by this Act as if such amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute or other rule.” This Act became effective May 27, 2010.

**ARTICLE 8**  
**INVESTMENT SECURITIES**

**Part 1**

**Short Title and General Matters**

Sec.

11-8-102. Definitions.

11-8-103. Rules for determining whether certain obligations and interests are securities or financial assets.

**Part 6**

**Transition Provisions for Revised  
Article 8 and Conforming  
Amendments to Articles 1, 3, 4, 5, 9,  
and 10**

Sec.

11-8-602. Repeals [Repealed].

**PART 1**

**SHORT TITLE AND GENERAL MATTERS**

**11-8-102. Definitions.**

(a) In this article:

(1) “Adverse claim” means a claim that a claimant has a property interest in a financial asset and that it is a violation of the rights of the claimant for another person to hold, transfer, or deal with the financial asset.

(2) “Bearer form,” as applied to a certificated security, means a form in which the security is payable to the bearer of the security certificate according to its terms but not by reason of an indorsement.

(3) “Broker” means a person defined as a broker or dealer under the federal securities laws, but without excluding a bank acting in that capacity.

(4) “Certificated security” means a security that is represented by a certificate.

(5) “Clearing corporation” means:

(i) A person that is registered as a “clearing agency” under the federal securities laws;

(ii) A federal reserve bank; or

(iii) Any other person that provides clearance or settlement services with respect to financial assets that would require it to register as a clearing agency under the federal securities laws but for an exclusion or exemption from the registration requirement, if its activities as a clearing corporation, including promulgation of rules, are subject to regulation by a federal or state governmental authority.

(6) “Communicate” means to:

(i) Send a signed writing; or

(ii) Transmit information by any mechanism agreed upon by the persons transmitting and receiving the information.

(7) “Entitlement holder” means a person identified in the records of a securities intermediary as the person having a security entitlement against the securities intermediary. If a person acquires a security entitlement by virtue of paragraph (2) or (3) of subsection (b) of Code Section 11-8-501, that person is the entitlement holder.

(8) “Entitlement order” means a notification communicated to a securities intermediary directing transfer or redemption of a financial asset to which the entitlement holder has a security entitlement.

(9) “Financial asset,” except as otherwise provided in Code Section 11-8-103, means:

(i) A security;

(ii) An obligation of a person or a share, participation, or other interest in a person or in property or an enterprise of a person, which is, or is of a type, dealt in or traded on financial markets, or which is recognized in any area in which it is issued or dealt in as a medium for investment; or

(iii) Any property that is held by a securities intermediary for another person in a securities account if the securities intermediary has expressly agreed with the other person that the property is to be treated as a financial asset under this article.

As context requires, the term means either the interest itself or the means by which a person’s claim to it is evidenced, including a certificated or uncertificated security, a security certificate, or a security entitlement.

(10) Reserved.

(11) “Indorsement” means a signature that alone or accompanied by other words is made on a security certificate in registered form or on a separate document for the purpose of assigning, transferring, or



redeeming the security or granting a power to assign, transfer, or redeem it.

(12) “Instruction” means a notification communicated to the issuer of an uncertificated security which directs that the transfer of the security be registered or that the security be redeemed.

(13) “Registered form,” as applied to a certificated security, means a form in which:

(i) The security certificate specifies a person entitled to the security; and

(ii) A transfer of the security may be registered upon books maintained for that purpose by or on behalf of the issuer, or the security certificate so states.

(14) “Securities intermediary” means:

(i) A clearing corporation; or

(ii) A person, including a bank or broker, that in the ordinary course of its business maintains securities accounts for others and is acting in that capacity.

(15) “Security,” except as otherwise provided in Code Section 11-8-103, means an obligation of an issuer or a share, participation, or other interest in an issuer or in property or an enterprise of an issuer:

(i) Which is represented by a security certificate in bearer or registered form, or the transfer of which may be registered upon books maintained for that purpose by or on behalf of the issuer;

(ii) Which is one of a class or series or by its terms is divisible into a class or series of shares, participations, interests, or obligations; and

(iii) Which:

(A) Is, or is of a type, dealt in or traded on securities exchanges or securities markets; or

(B) Is a medium for investment and by its terms expressly provides that it is a security governed by this article.

(16) “Security certificate” means a certificate representing a security.

(17) “Security entitlement” means the rights and property interest of an entitlement holder with respect to a financial asset specified in Part 5 of this article.

(18) “Uncertificated security” means a security that is not represented by a certificate.

(b) Other definitions applying to this article and the Code sections in which they appear are:

“Appropriate person.” Code Section 11-8-107.

“Control.” Code Section 11-8-106.

“Delivery.” Code Section 11-8-301.

“Investment company security.” Code Section 11-8-103.

“Issuer.” Code Section 11-8-201.

“Overissue.” Code Section 11-8-210.

“Protected purchaser.” Code Section 11-8-303.

“Securities account.” Code Section 11-8-501.

(c) In addition, Article 1 of this title contains general definitions and principles of construction and interpretation applicable throughout this article.

(d) The characterization of a person, business, or transaction for purposes of this article does not determine the characterization of the person, business, or transaction for purposes of any other law, regulation, or rule. (Code 1981, § 11-8-102, enacted by Ga. L. 1998, p. 1323, § 1; Ga. L. 2015, p. 996, § 3B-17/SB 65.)

**The 2015 amendment**, effective January 1, 2016, substituted “Reserved” for “‘Good faith,’ for purposes of the obligation of good faith in the performance or enforcement of contracts or duties within this article, means honesty in fact and the observance of reasonable commercial standards of fair dealing” in paragraph (a)(10).

**Editor’s notes.** — Ga. L. 2015, p. 996, § 1-1/SB 65, not codified by the General Assembly, provides: “(a) This Act shall be

known and may be cited as the ‘Debtor-Creditor Uniform Law Modernization Act of 2015.’

“(b) To promote consistency among the states, it is the intent of the General Assembly to modernize certain existing uniform laws promulgated by the Uniform Law Commission affecting debtor and creditor rights, responsibilities, and relationships and other federally recognized laws affecting such rights, responsibilities, and relationships.”

### **11-8-103. Rules for determining whether certain obligations and interests are securities or financial assets.**

(a) A share or similar equity interest issued by a corporation, business trust, joint stock company, or similar entity is a security.

(b) An “investment company security” is a security. “Investment company security” means a share or similar equity interest issued by an entity that is registered as an investment company under the federal

investment company laws, an interest in a unit investment trust that is so registered, or a face-amount certificate issued by a face-amount certificate company that is so registered. Investment company security does not include an insurance policy or endowment policy or annuity contract issued by an insurance company.

(c) An interest in a partnership or limited liability company is not a security unless it is dealt in or traded on securities exchanges or in securities markets, its terms expressly provide that it is a security governed by this article, or it is an investment company security. However, an interest in a partnership or limited liability company is a financial asset if it is held in a securities account.

(d) A writing that is a security certificate is governed by this article and not by Article 3 of this title, even though it also meets the requirements of that article. However, a negotiable instrument governed by Article 3 of this title is a financial asset if it is held in a securities account.

(e) An option or similar obligation issued by a clearing corporation to its participants is not a security, but is a financial asset.

(f) A commodity contract, as defined in subsection (a) of Code Section 11-9-102, is not a security or a financial asset.

(g) A document of title is not a financial asset unless subparagraph (a)(9)(iii) of Code Section 11-8-102 applies. (Code 1981, § 11-8-103, enacted by Ga. L. 1998, p. 1323, § 1; Ga. L. 2001, p. 362, § 17; Ga. L. 2010, p. 481, § 2-18/HB 451.)

**The 2010 amendment**, effective May 27, 2010, added subsection (g). See the Editor's notes for applicability.

**Editor's notes.** — Ga. L. 2010, p. 481, § 3-1, not codified by the General Assembly, provides that: "This Act applies to a document of title that is issued or a bailment that arises on or after the effective date of this Act. This Act does not apply to a document of title that is issued or a bailment that arises before the effective date of this Act even if the document of title or bailment would be subject to this Act if the document of title had been issued or bailment had arisen on or after the effective date of this Act. This Act does not apply to a right of action that has

accrued before the effective date of this Act." This Act became effective May 27, 2010.

Ga. L. 2010, p. 481, § 3-2, not codified by the General Assembly, provides that: "A document of title issued or a bailment that arises before the effective date of this Act and the rights, documents, and interests flowing from that document or bailment are governed by any statute or other rule amended or repealed by this Act as if such amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute or other rule." This Act became effective May 27, 2010.



11-8-113. Statute of frauds inapplicable.

JUDICIAL DECISIONS

**Statute inapplicable.** — Because a stockholder did not seek to enforce an oral contract for the sale of securities, but sought to recover damages for the tortious deprivation of an interest in the corporation, which was already acquired and paid for, the Statute of Frauds in effect at the time of the claim had no bearing on the case. *Monterrey Mexican Rest. of Wise, Inc. v. Leon*, 282 Ga. App. 439, 638 S.E.2d 879 (2006), overruled on other grounds by *Temple v. Hillegass*, 344 Ga. App. 454, 810 S.E.2d 625 (2018).

11-8-115. Securities intermediary and others not liable to adverse claimant.

JUDICIAL DECISIONS

**Collusion.** — Securities broker was not immune from liability for unlawful conversion of a client’s partnership interest which defeated a bank’s security interest since circumstantial evidence was sufficient to show that the broker had actual knowledge of the security interest and substantially assisted the client in the conversion, and thus that the broker concluded with the client in the conversion. *Amegy Bank Nat’l Ass’n v. Deutsche Bank Alex.Brown*, No. 14-12568, 2015 U.S. App. LEXIS 13965 (11th Cir. Aug. 10, 2015) (Unpublished).

PART 3

TRANSFER OF CERTIFICATED AND UNCERTIFICATED SECURITIES

11-8-306. Effect of guaranteeing signature, indorsement, or instruction.

**Law reviews.** — For article, “2008 Annual Review of Case Law Development,” see 14 (No. 6) Ga. St. B.J. 28 (2009).

JUDICIAL DECISIONS

**Liability of corporate defendants acting as signature guarantors.** — In a damages action filed by a decedent-stockholder’s executors arising from the alleged wrongful transfer of the stock, summary judgment in favor of those corporate defendants acting as signature guarantors, as well as on a claim to avoid the stock transfers under O.C.G.A. § 13-3-24, was proper. But, summary judgment was reversed as to the alleged wrongful registration of the transfer of the stock. *Dudley v. Wachovia Bank, N.A.*, 290 Ga. App. 220, 659 S.E.2d 658 (2008).

PART 4  
REGISTRATION

**11-8-404. Wrongful registration.**

**JUDICIAL DECISIONS**

**Summary judgment not appropriate for wrongful registration.** — In a damages action filed by a decedent-stockholder's executors arising from the alleged wrongful transfer of the stock, summary judgment in favor of those corporate defendants acting as signature guarantors, as well as on a claim to avoid the stock transfers under O.C.G.A. § 13-3-24, was proper. But, summary judgment was reversed as to the alleged wrongful registration of the transfer of the stock. *Dudley v. Wachovia Bank, N.A.*, 290 Ga. App. 220, 659 S.E.2d 658 (2008).

**11-8-405. Replacement of lost, destroyed, or wrongfully taken security certificate.**

**Cross references.** — Establishment of lost documents generally, T. 24, C. 11.

**11-8-406. Obligation to notify issuer of lost, destroyed, or wrongfully taken security certificate.**

**JUDICIAL DECISIONS**

**Cited** in *Dudley v. Wachovia Bank, N.A.*, 290 Ga. App. 220, 659 S.E.2d 658 (2008).

**11-8-407. Authenticating trustee, transfer agent, and registrar.**

**JUDICIAL DECISIONS**

**Cited** in *Dudley v. Wachovia Bank, N.A.*, 290 Ga. App. 220, 659 S.E.2d 658 (2008).

PART 6

TRANSITION PROVISIONS FOR REVISED ARTICLE 8 AND  
CONFORMING AMENDMENTS TO ARTICLES 1, 3, 4, 5, 9, AND 10

**11-8-602. Repeals.**

Reserved. Repealed by Ga. L. 2010, p. 579, § 5, effective July 1, 2010.

**Editor's notes.** — This Code section was based on Code 1981, § 11-8-602, enacted by Ga. L. 1998, p. 1323, § 1.

ARTICLE 9

SECURED TRANSACTIONS

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General Provisions		Perfection	
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Short Title, Definitions, and General Concepts		11-9-310.	When filing required to perfect security interest or agricultural lien; security interests and agricultural liens to which filing provisions do not apply.
Sec.		11-9-311.	Perfection of security interests in property subject to certain statutes, regulations, and treaties.
11-9-102.	Definitions and index of definitions.	11-9-312.	Perfection of security interests in chattel paper, deposit accounts, documents, goods covered by documents, instruments, investment property, letter of credit rights, and money; perfection by permissive filing; temporary perfection without filing or transfer of possession.
11-9-105.	Control of electronic chattel paper.	11-9-313.	When possession by or delivery to secured party perfects security interest without filing.
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11-9-111.	Applicability of bulk transfer laws [Repealed].	Subpart 3	
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11-9-208.	Additional duties of secured party having control of collateral.		
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11-9-301.	Law governing perfection and priority of security interests.		
11-9-307.	Location of debtor.		



- Sec.                    signment; restrictions on assignment of accounts, chattel paper, payment intangibles, and promissory notes ineffective.
- 11-9-408. Restrictions on assignment of promissory notes, health care insurance receivables, and certain general intangibles ineffective.
- Part 5**  
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- 11-9-515. Duration and effectiveness of financing statement; effect of lapsed financing statement; record of mortgage as financing statement.
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- Sec.                    nancing statement and amendment; authority may prescribe forms.
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- 11-9-801. Reserved.
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- 11-9-805. Effectiveness of action taken before effective date.
- 11-9-806. When initial financing statement suffices to continue effectiveness of financing statement.
- 11-9-807. Amendment of pre-effective date financing statement.
- 11-9-808. Person entitled to file initial financing statement or continuation statement.
- 11-9-809. Priority.

**Law reviews.** — For comment, “The Twain Shall Meet: A Real Property Approach to Article 9 Perfection,” see 64 Emory L.J. 1103 (2015).

PART 1

GENERAL PROVISIONS

**Law reviews.** — For article, “Revised Article 9 of Uniform Commercial Code Adopted,” see 6 Ga. St. B.J. 22 (2001).

## Subpart 1

## Short Title, Definitions, and General Concepts

**11-9-101. Short title.****JUDICIAL DECISIONS**

**Cited** in *Motors Acceptance Corp. v. Rozier*, 278 Ga. 52, 597 S.E.2d 367 (2004).

**RESEARCH REFERENCES**

**Am. Jur. Proof of Facts.** — Violation of the Truth-In-Lending Act and Regulation Z, 73 POF3d 275.

**ALR.** — Consignment transactions under Uniform Commercial Code Article 9 on secured transactions, 58 A.L.R.6th 289.

**11-9-102. Definitions and index of definitions.**

(a) **Article 9 definitions.** As used in this article, the term:

(1) “Accession” means goods that are physically united with other goods in such a manner that the identity of the original goods is not lost.

(2) “Account,” except as used in “account for,” means a right to payment of a monetary obligation, whether or not earned by performance, (i) for property that has been or is to be sold, leased, licensed, assigned, or otherwise disposed of, (ii) for services rendered or to be rendered, (iii) for a policy of insurance issued or to be issued, (iv) for a secondary obligation incurred or to be incurred, (v) for energy provided or to be provided, (vi) for the use or hire of a vessel under a charter or other contract, (vii) arising out of the use of a credit or charge card or information contained on or for use with the card, or (viii) as winnings in a lottery or other game of chance operated or sponsored by a state, governmental unit of a state, or person licensed or authorized to operate the game by a state or governmental unit of a state. The term includes health care insurance receivables. The term does not include (i) rights to payment evidenced by chattel paper or an instrument, (ii) commercial tort claims, (iii) deposit accounts, (iv) investment property, (v) letter of credit rights or letters of credit, or (vi) rights to payment for money or funds advanced or sold, other than rights arising out of the use of a credit or charge card or information contained on or for use with the card.

(3) “Account debtor” means a person obligated on an account, chattel paper, or general intangible. The term does not include persons obligated to pay a negotiable instrument, even if the instrument constitutes part of chattel paper.

(4) “Accounting,” except as used in “accounting for,” means a record:

(A) Authenticated by a secured party;

(B) Indicating the aggregate unpaid secured obligations as of a date not more than 35 days earlier or 35 days later than the date of the record; and

(C) Identifying the components of the obligations in reasonable detail.

(5) “Agricultural lien” means an interest in farm products:

(A) Which secures payment or performance of an obligation for:

(i) Goods or services furnished in connection with a debtor’s farming operation; or

(ii) Rent on real property leased by a debtor in connection with its farming operation;

(B) Which is created by statute in favor of a person that:

(i) In the ordinary course of its business furnished goods or services to a debtor in connection with a debtor’s farming operation; or

(ii) Leased real property to a debtor in connection with the debtor’s farming operation; and

(C) Whose effectiveness does not depend on the person’s possession of the personal property.

(6) “As-extracted collateral” means:

(A) Oil, gas, or other minerals that are subject to a security interest that:

(i) Is created by a debtor having an interest in the minerals before extraction; and

(ii) Attaches to the minerals as extracted; or

(B) Accounts arising out of the sale at the wellhead or minehead of oil, gas, or other minerals in which the debtor had an interest before extraction.

(7) “Authenticate” means:

(A) To sign; or

(B) With present intent to adopt or accept a record, to attach to or logically associate with such record an electronic sound, symbol, or process.



(8) “Authority” means the Georgia Superior Court Clerks’ Cooperative Authority.

(9) “Bank” means an organization that is engaged in the business of banking. The term includes savings banks, savings and loan associations, credit unions, and trust companies.

(10) “Cash proceeds” means proceeds that are money, checks, deposit accounts, or the like.

(11) “Certificate of title” means a certificate of title with respect to which a statute provides for the security interest in question to be indicated on the certificate as a condition or result of the security interest’s obtaining priority over the rights of a lien creditor with respect to the collateral. The term shall include another record maintained as an alternative to a certificate of title by the governmental unit that issues certificates of title if a statute permits the security interest in question to be indicated on the record as a condition or result of the security interest’s obtaining priority over the rights of a lien creditor with respect to the collateral.

(12) “Chattel paper” means a record or records that evidence both a monetary obligation and a security interest in specific goods, a security interest in specific goods and software used in the goods, a lease of specific goods, or a lease of specific goods and license of software used in the goods. As used in this paragraph, “monetary obligation” means a monetary obligation secured by the goods or owed under a lease of the goods and includes a monetary obligation with respect to software used in the goods. The term does not include:

(A) Charters or other contracts involving the use or hire of a vessel; or

(B) Records that evidence a right to payment arising out of the use of a credit or charge card or information contained on or for use with the card.

If a transaction is evidenced by records that include an instrument or series of instruments, the group of records taken together constitutes chattel paper.

(13) “Collateral” means the property subject to a security interest or agricultural lien. The term includes:

(A) Proceeds to which a security interest attaches;

(B) Accounts, chattel paper, payment intangibles, and promissory notes that have been sold; and

(C) Goods that are the subject of a consignment.

(14) “Commercial tort claim” means a claim arising in tort with respect to which:

(A) The claimant is an organization; or

(B) The claimant is an individual and the claim:

(i) Arose in the course of the claimant's business or profession; and

(ii) Does not include damages arising out of personal injury to or the death of an individual.

(15) "Commodity account" means an account maintained by a commodity intermediary in which a commodity contract is carried for a commodity customer.

(16) "Commodity contract" means a commodity futures contract, an option on a commodity futures contract, a commodity option, or another contract if the contract or option is:

(A) Traded on or subject to the rules of a board of trade that has been designated as a contract market for such a contract pursuant to federal commodities laws; or

(B) Traded on a foreign commodity board of trade, exchange, or market and is carried on the books of a commodity intermediary for a commodity customer.

(17) "Commodity customer" means a person for which a commodity intermediary carries a commodity contract on its books.

(18) "Commodity intermediary" means a person that:

(A) Is registered as a futures commission merchant under federal commodities law; or

(B) In the ordinary course of its business provides clearance or settlement services for a board of trade that has been designated as a contract market pursuant to federal commodities law.

(19) "Communicate" means:

(A) To send a written or other tangible record;

(B) To transmit a record by any means agreed upon by the persons sending and receiving the record; or

(C) In the case of transmission of a record to or by a filing office or the authority, to transmit a record by any means prescribed by filing office rule.

(20) "Consignee" means a merchant to which goods are delivered in a consignment.

(21) "Consignment" means a transaction, regardless of its form, in which a person delivers goods to a merchant for the purpose of sale and:

(A) The merchant:

(i) Deals in goods of that kind under a name other than the name of the person making delivery;

(ii) Is not an auctioneer; and

(iii) Is not generally known by its creditors to be substantially engaged in selling the goods of others;

(B) With respect to each delivery, the aggregate value of the goods is \$1,000.00 or more at the time of delivery;

(C) The goods are not consumer goods immediately before delivery; and

(D) The transaction does not create a security interest that secures an obligation.

(22) “Consignor” means a person that delivers goods to a consignee in a consignment.

(23) “Consumer debtor” means a debtor in a consumer transaction.

(24) “Consumer goods” means goods that are used or bought for use primarily for personal, family, or household purposes.

(25) “Consumer goods transaction” means a consumer transaction in which:

(A) An individual incurs an obligation primarily for personal, family, or household purposes; and

(B) A security interest in consumer goods secures the obligation.

(26) “Consumer obligor” means an obligor who is an individual and who incurred the obligation as part of a transaction entered into primarily for personal, family, or household purposes.

(27) “Consumer transaction” means a transaction in which (i) an individual incurs an obligation primarily for personal, family, or household purposes, (ii) a security interest secures the obligation, and (iii) the collateral is held or acquired primarily for personal, family, or household purposes. The term includes consumer goods transactions.

(28) “Continuation statement” means an amendment of a financing statement which:

(A) Identifies, by its file number, the initial financing statement to which it relates; and

(B) Indicates that it is a continuation statement for, or that it is filed to continue the effectiveness of, the identified financing statement.



(29) “Debtor” means:

(A) A person having an interest, other than a security interest or other lien, in the collateral, whether or not the person is an obligor;

(B) A seller of accounts, chattel paper, payment intangibles, or promissory notes; or

(C) A consignee.

(30) “Deposit account” means a demand, time, savings, passbook, or similar account maintained with a bank. The term does not include investment property or accounts evidenced by an instrument.

(31) “Document” means a document of title or a receipt of the type described in subsection (2) of Code Section 11-7-201.

(32) “Electronic chattel paper” means chattel paper evidenced by a record or records consisting of information stored in an electronic medium.

(33) “Encumbrance” means a right, other than an ownership interest, in real property. The term includes mortgages and other liens on real property.

(34) “Equipment” means goods other than inventory, farm products, or consumer goods.

(35) “Farm products” means goods, other than standing timber, with respect to which the debtor is engaged in a farming operation and which are:

(A) Crops grown, growing, or to be grown, including:

(i) Crops produced on trees, vines, and bushes; and

(ii) Aquatic goods produced in aquacultural operations;

(B) Livestock, born or unborn, including aquatic goods produced in aquacultural operations;

(C) Supplies used or produced in a farming operation; or

(D) Products of crops or livestock in their unmanufactured states.

(36) “Farming operation” means raising, cultivating, propagating, fattening, grazing, or any other farming, livestock, or aquacultural operation.

(37) “File number” means the number assigned to an initial financing statement pursuant to subsection (a) of Code Section 11-9-519.

(38) “Filing office” means an office designated in Code Section 11-9-501 as the place to file a financing statement.

(39) “Filing office rule” means a rule adopted pursuant to Code Section 11-9-526.

(40) “Financing statement” means a record or records composed of an initial financing statement and any filed record relating to the initial financing statement.

(41) “Fixture filing” means the filing of a financing statement covering goods that are or are to become fixtures and satisfying subsections (a) and (b) of Code Section 11-9-502. The term includes the filing of a financing statement covering goods of a transmitting utility which are or are to become fixtures.

(42) “Fixtures” means goods that have become so related to particular real property that an interest in them arises under real property law.

(43) “General intangible” means any personal property, including things in action, other than accounts, chattel paper, commercial tort claims, deposit accounts, documents, goods, instruments, investment property, letter of credit rights, letters of credit, money, and oil, gas, or other minerals before extraction. The term includes payment intangibles and software.

(44) Reserved.

(45) “Goods” means all things that are movable when a security interest attaches. The term includes (i) fixtures, (ii) standing timber that is to be cut and removed under a conveyance or contract for sale, (iii) the unborn young of animals, and (iv) crops grown, growing, or to be grown, even if the crops are produced on trees, vines, or bushes. The term also includes a computer program embedded in goods and any supporting information provided in connection with a transaction relating to the program if (i) the program is associated with the goods in such a manner that it customarily is considered part of the goods, or (ii) by becoming the owner of the goods, a person acquires a right to use the program in connection with the goods. The term does not include a computer program embedded in goods that consist solely of the medium in which the program is embedded. The term also does not include accounts, chattel paper, commercial tort claims, deposit accounts, documents, general intangibles, instruments, investment property, letter of credit rights, letters of credit, money, or oil, gas, or other minerals before extraction.

(46) “Governmental unit” means a subdivision, agency, department, county, parish, municipality, or other unit of the government of the United States, a state, or a foreign country. The term includes an

organization having a separate corporate existence if the organization is eligible to issue debt on which interest is exempt from income taxation under the laws of the United States.

(47) "Health care insurance receivable" means an interest in or claim under a policy of insurance which is a right to payment of a monetary obligation for health care goods or services provided or to be provided.

(48) "Instrument" means a negotiable instrument or any other writing that evidences a right to the payment of a monetary obligation, is not itself a security agreement or lease, and is of a type that in ordinary course of business is transferred by delivery with any necessary indorsement or assignment. The term does not include (i) investment property, (ii) letters of credit, or (iii) writings that evidence a right to payment arising out of the use of a credit or charge card or information contained on or for use with the card.

(49) "Inventory" means goods, other than farm products, which:

(A) Are leased by a person as lessor;

(B) Are held by a person for sale or lease or to be furnished under a contract of service;

(C) Are furnished by a person under a contract of service; or

(D) Consist of raw materials, work in process, or materials used or consumed in a business.

(50) "Investment property" means a security, whether certificated or uncertificated, security entitlement, securities account, commodity contract, or commodity account.

(51) "Jurisdiction of organization," with respect to a registered organization, means the jurisdiction under whose law the organization is formed or organized.

(52) "Letter of credit right" means a right to payment or performance under a letter of credit, whether or not the beneficiary has demanded or is at the time entitled to demand payment or performance. The term does not include the right of a beneficiary to demand payment or performance under a letter of credit.

(53) "Lien creditor" means:

(A) A creditor that has acquired a lien on the property involved by attachment, levy, or the like;

(B) An assignee for benefit of creditors from the time of assignment;

(C) A trustee in bankruptcy from the date of the filing of the petition; or



(D) A receiver in equity from the time of appointment.

(54) “Mortgage” means a consensual interest in real property, including fixtures, which secures payment or performance of an obligation. The term includes a deed to secure debt.

(55) “New debtor” means a person that becomes bound as debtor under subsection (d) of Code Section 11-9-203 by a security agreement previously entered into by another person.

(56) “New value” means (i) money, (ii) money’s worth in property, services, or new credit, or (iii) release by a transferee of an interest in property previously transferred to the transferee. The term does not include an obligation substituted for another obligation.

(57) “Noncash proceeds” means proceeds other than cash proceeds.

(58) “Obligor” means a person that, with respect to an obligation secured by a security interest in or an agricultural lien on the collateral, (i) owes payment or other performance of the obligation, (ii) has provided property other than the collateral to secure payment or other performance of the obligation, or (iii) is otherwise accountable in whole or in part for payment or other performance of the obligation. The term does not include issuers or nominated persons under a letter of credit.

(59) “Original debtor,” except as used in subsection (c) of Code Section 11-9-310, means a person that, as debtor, entered into a security agreement to which a new debtor has become bound under subsection (d) of Code Section 11-9-203.

(60) “Payment intangible” means a general intangible under which the account debtor’s principal obligation is a monetary obligation.

(61) “Person related to,” with respect to an individual, means:

(A) The spouse of the individual;

(B) A brother, brother-in-law, sister, or sister-in-law of the individual;

(C) An ancestor or lineal descendant of the individual or the individual’s spouse; or

(D) Any other relative, by blood or marriage, of the individual or the individual’s spouse who shares the same home with the individual.

(62) “Person related to,” with respect to an organization, means:

(A) A person directly or indirectly controlling, controlled by, or under common control with the organization;

(B) An officer or director of, or a person performing similar functions with respect to, the organization;

(C) An officer or director of, or a person performing similar functions with respect to, a person described in subparagraph (A) of this paragraph;

(D) The spouse of an individual described in subparagraph (A), (B), or (C) of this paragraph; or

(E) An individual who is related by blood or marriage to an individual described in subparagraph (A), (B), (C), or (D) of this paragraph and shares the same home with the individual.

(63) "Proceeds," except as used in subsection (d) of Code Section 11-9-609, means the following property:

(A) Whatever is acquired upon the sale, lease, license, exchange, or other disposition of collateral;

(B) Whatever is collected on, or distributed on account of, collateral;

(C) Rights arising out of collateral;

(D) To the extent of the value of collateral, claims arising out of the loss, nonconformity, or interference with the use of, defects or infringement of rights in, or damage to the collateral; or

(E) To the extent of the value of collateral and to the extent payable to the debtor or the secured party, insurance payable by reason of the loss or nonconformity of, defects or infringement of rights in, or damage to the collateral.

(64) "Promissory note" means an instrument that evidences a promise to pay a monetary obligation, does not evidence an order to pay, and does not contain an acknowledgment by a bank that the bank has received for deposit a sum of money or funds.

(65) "Proposal" means a record authenticated by a secured party which includes the terms on which the secured party is willing to accept collateral in full or partial satisfaction of the obligation it secures pursuant to Code Sections 11-9-620, 11-9-621, and 11-9-622.

(66) "Public finance transaction" means a secured transaction in connection with which:

(A) Debt securities are issued;

(B) All or a portion of the securities issued have an initial stated maturity of at least five years; and

(C) The debtor, obligor, secured party, account debtor or other person obligated on collateral, assignor or assignee of a secured

obligation, or assignor or assignee of a security interest is a state or a governmental unit of a state.

(67) “Public organic record” means a record that is available to the public for inspection and is:

(A) A record consisting of the record initially filed with or issued by a state or the United States to form or organize an organization and any record filed with or issued by such state or the United States which amends or restates the initial record;

(B) An organic record of a business trust consisting of the record initially filed with a state and any record filed with such state which amends or restates the initial record, if a statute of such state governing business trusts requires that the record be filed with such state; or

(C) A record consisting of legislation enacted by the legislature of a state or the Congress of the United States which forms or organizes an organization, any record amending the legislation, and any record filed with or issued by such state or the United States which amends or restates the name of the organization.

(68) “Pursuant to commitment,” with respect to an advance made or other value given by a secured party, means pursuant to the secured party’s obligation, whether or not a subsequent event of default or other event not within the secured party’s control has relieved or may relieve the secured party from its obligation.

(69) “Record,” except as used in “for record,” “of record,” “record or legal title,” and “record owner,” means information that is inscribed on a tangible medium or which is stored in an electronic or other medium and is retrievable in perceivable form.

(70) “Registered organization” means an organization formed or organized solely under the law of a single state or the United States by the filing of a public organic record with, the issuance of a public organic record by, or the enactment of legislation by a state or the United States. The term shall include a business trust that is formed or organized under the law of a single state if a statute of such state governing business trusts requires that the business trust’s organic record be filed with such state.

(71) “Secondary obligor” means an obligor to the extent that:

(A) The obligor’s obligation is secondary; or

(B) The obligor has a right of recourse with respect to an obligation secured by collateral against the debtor, another obligor, or property of either.



(72) "Secured party" means:

(A) A person in whose favor a security interest is created or provided for under a security agreement, whether or not any obligation to be secured is outstanding;

(B) A person that holds an agricultural lien;

(C) A consignor;

(D) A person to which accounts, chattel paper, payment intangibles, or promissory notes have been sold;

(E) A trustee, indenture trustee, agent, collateral agent, or other representative in whose favor a security interest or agricultural lien is created or provided for; or

(F) A person that holds a security interest arising under Code Section 11-2-401, 11-2-505, or subsection (3) of Code Section 11-2-711, subsection (5) of Code Section 11-2A-508, Code Section 11-4-210, or Code Section 11-5-118.

(73) "Security agreement" means an agreement that creates or provides for a security interest.

(74) "Send," in connection with a record or notification, means:

(A) To deposit in the mail, deliver for transmission, or transmit by any other usual means of communication, with postage or cost of transmission provided for, addressed to any address reasonable under the circumstances; or

(B) To cause the record or notification to be received within the time that it would have been received if properly sent under subparagraph (A) of this paragraph.

(75) "Software" means a computer program and any supporting information provided in connection with a transaction relating to the program. The term does not include a computer program that is included in the definition of goods.

(76) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

(77) "Supporting obligation" means a letter of credit right or secondary obligation that supports the payment or performance of an account, chattel paper, a document, a general intangible, an instrument, or investment property.

(78) "Tangible chattel paper" means chattel paper evidenced by a record or records consisting of information that is inscribed on a tangible medium.

(79) “Termination statement” means an amendment of a financing statement which:

(A) Identifies, by its file number, the initial financing statement to which it relates; and

(B) Indicates either that it is a termination statement or that the identified financing statement is no longer effective.

(80) “Transmitting utility” means a person primarily engaged in the business of:

(A) Operating a railroad, subway, street railway, or trolley bus;

(B) Transmitting communications electrically, electromagnetically, or by light;

(C) Transmitting goods by pipeline or sewer; or

(D) Transmitting or producing and transmitting electricity, steam, gas, or water.

(b) **Definitions in other articles.** “Control” as provided in Code Section 11-7-106 and the following definitions in other articles apply to this article:

“Applicant.” Code Section 11-5-102.

“Beneficiary.” Code Section 11-5-102.

“Broker.” Code Section 11-8-102.

“Certificated security.” Code Section 11-8-102.

“Check.” Code Section 11-3-104.

“Clearing corporation.” Code Section 11-8-102.

“Contract for sale.” Code Section 11-2-106.

“Customer.” Code Section 11-4-104.

“Entitlement holder.” Code Section 11-8-102.

“Financial asset.” Code Section 11-8-102.

“Holder in due course.” Code Section 11-3-302.

“Issuer” (with respect to a letter of credit or letter of credit right). Code Section 11-5-102.

“Issuer” (with respect to a security). Code Section 11-8-201.

“Issuer” (with respect to documents of title). Code Section 11-7-102.

“Lease.” Code Section 11-2A-103.

“Lease agreement.” Code Section 11-2A-103.

“Lease contract.” Code Section 11-2A-103.

“Leasehold interest.” Code Section 11-2A-103.

“Lessee.” Code Section 11-2A-103.

“Lessee in ordinary course of business.” Code Section 11-2A-103.

“Lessor.” Code Section 11-2A-103.

“Lessor’s residual interest.” Code Section 11-2A-103.

“Letter of credit.” Code Section 11-5-102.

“Merchant.” Code Section 11-2-104.

“Negotiable instrument.” Code Section 11-3-104.

“Nominated person.” Code Section 11-5-102.

“Note.” Code Section 11-3-104.

“Proceeds of a letter of credit.” Code Section 11-5-114.

“Prove.” Code Section 11-3-103.

“Sale.” Code Section 11-2-106.

“Securities account.” Code Section 11-8-501.

“Securities intermediary.” Code Section 11-8-102.

“Security.” Code Section 11-8-102.

“Security certificate.” Code Section 11-8-102.

“Security entitlement.” Code Section 11-8-102.

“Uncertificated security.” Code Section 11-8-102.

(c) **Article 1 definitions and principles.** Article 1 of this title contains general definitions and principles of construction and interpretation applicable throughout this article. (Code 1981, § 11-9-102, enacted by Ga. L. 2001, p. 362, § 1; Ga. L. 2002, p. 995, § 3; Ga. L. 2010, p. 481, § 2-19/HB 451; Ga. L. 2013, p. 690, § 1/SB 185; Ga. L. 2015, p. 996, § 3B-18/SB 65.)

**The 2010 amendment**, effective May 27, 2010, in subsection (b), substituted the present introductory paragraph for the former provisions, which read: “Other definitions applying to this article and the Code sections in which they appear are” and added the provisions on “‘Issuer’ (with respect to documents of title)”. See the Editor’s notes for applicability.

**The 2013 amendment**, effective July 1, 2013, substituted “With present intent

to adopt or accept a record, to attach to or logically associate with such record an electronic sound, symbol, or process” for “To execute or otherwise adopt a symbol, or encrypt or similarly process a record in whole or in part, with the present intent of the authenticating person to identify the person and adopt or accept a record” in subparagraph (a)(7)(B); added the last sentence in paragraph (a)(11); inserted “formed or” in paragraph (a)(51); redesign-



nated former paragraphs (a)(67) through (a)(79) as current paragraphs (a)(68) through (a)(80), respectively; added present paragraph (a)(67); and rewrote paragraph (a)(70).

**The 2015 amendment**, effective January 1, 2016, substituted “Reserved” for “‘Good faith’ means honesty in fact and the observance of reasonable commercial standards of fair dealing” in paragraph (a)(44).

**Editor’s notes.** — Ga. L. 2010, p. 481, § 3-1, not codified by the General Assembly, provides that: “This Act applies to a document of title that is issued or a bailment that arises on or after the effective date of this Act. This Act does not apply to a document of title that is issued or a bailment that arises before the effective date of this Act even if the document of title or bailment would be subject to this Act if the document of title had been issued or bailment had arisen on or after the effective date of this Act. This Act does not apply to a right of action that has accrued before the effective date of this Act.” This Act became effective May 27, 2010.

Ga. L. 2010, p. 481, § 3-2, not codified by the General Assembly, provides that: “A document of title issued or a bailment that arises before the effective date of this Act and the rights, documents, and interests flowing from that document or bailment are governed by any statute or other rule amended or repealed by this Act as if such amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute or other rule.” This Act became effective May 27, 2010.

Ga. L. 2015, p. 996, § 1-1/SB 65, not codified by the General Assembly, provides: “(a) This Act shall be known and may be cited as the ‘Debtor-Creditor Uniform Law Modernization Act of 2015.’

“(b) To promote consistency among the states, it is the intent of the General Assembly to modernize certain existing uniform laws promulgated by the Uniform Law Commission affecting debtor and creditor rights, responsibilities, and relationships and other federally recognized laws affecting such rights, responsibilities, and relationships.”

JUDICIAL DECISIONS

ANALYSIS

- GENERAL CONSIDERATION
- DEBTOR
- INSTRUMENT
- SECURITY AGREEMENT
- SECURED PARTY

General Consideration

**Determination of good faith for jury.** — Given the disputed evidence as to the good faith of a transaction, summary judgment awards on the priorities of security interests were not appropriate as the matter had to be remanded to the trial court because the good faith of a transaction was peculiarly a question for the trier of fact. *Farm Credit of Northwest Fla., ACA v. Easom Peanut Co.*, 312 Ga. App. 374, 718 S.E.2d 590 (2011), cert. denied, No. S12C0444, 2012 Ga. LEXIS 315 (Ga. 2012).

**Cited** in *Shepard v. State of Ga.*, 267 Ga. App. 604, 600 S.E.2d 691 (2004); *Motors Acceptance Corp. v. Rozier*, 278 Ga.

52, 597 S.E.2d 367 (2004); *Bank of Dawson v. Worth Gin Co.*, 295 Ga. App. 256, 671 S.E.2d 279 (2008).

Debtor

**Assignment to surety.** — Trial court properly granted a surety’s motion for summary judgment because the security interest in the accounts owed was covered by the Uniform Commercial Code, and to the extent that the anti-assignment clauses of the construction contract could be construed to prohibit the roofing company from assigning the company’s right to those accounts to the company’s surety, the contracts were unenforceable as a matter of law under O.C.G.A.

**Debtor** (Cont'd)

§ 11-9-406(d)(1). State Dep't of Corr. v. Developers Sur. & Indem. Co., 324 Ga. App. 371, 750 S.E.2d 697 (2013).

**Instrument**

**Promissory note.** — Under the promissory note, the debtors were consumers who were to pay money to the lender, and the debtor's obligation to do so arose from a transaction involving property that was primarily for the debtors' personal, family, or household purposes; the promissory note was a debt within the plain language of 15 U.S.C. § 1692a(5), and the law firm's letter and enclosed documents were an attempt to collect that debt—the complaint sufficiently alleged that the notice was a communication related to the collection of a debt within the meaning of 15 U.S.C. § 1692e. Even if the firm intended the letter and documents to give notice of the foreclosure to the debtors, the letters also demanded payment on the underlying debt and the fact that the letter and documents related to the enforcement of a security interest did not prevent the letters from also relating to the collection of a debt within the meaning of § 1692e; the complaint contained enough factual content to allow a reasonable inference that the firm was a debt collector because the firm regularly attempted to collect debts.

Reese v. Ellis, Painter, Ratterree & Adams LLP, 678 F.3d 1211 (11th Cir. 2012).

**Security Agreement**

**No writing established.** — Creditor did not establish that the creditor had a valid security interest under Georgia law because there was no evidence of a specific writing, signed by the debtor, that reflected an intent to create a security interest, and that reasonably identified the personal property as collateral. First Nat'l Bank v. Alba (In re Alba), 429 B.R. 353 (Bankr. N.D. Ga. 2008).

**Secured Party**

**Parent was not secured party and had no standing.** — No public record allowed a criminal defendant's parent to perfect an implied trust (based on the parent's allegation that the parent paid for cars but titled them in the son's name for insurance purposes) against bona fide purchaser for value; so, in a O.C.G.A. § 16-13-49 forfeiture proceeding of two cars, the parent was not the statutory "owner" or "interest holder" as those terms were defined in O.C.G.A. § 11-9-102 and O.C.G.A. § 16-13-49(a)(7), (n)(3), (o)(3), (a)(6), and the parent thus lacked standing to contest the forfeiture. McFarley v. State of Ga., 268 Ga. App. 621, 602 S.E.2d 341 (2004).

**RESEARCH REFERENCES**

**Am. Jur. Proof of Facts.** — Consignment, 1 POF2d 223.

**ALR.** — Consignment transactions un-

der Uniform Commercial Code Article 9 on secured transactions, 58 A.L.R.6th 289.

## **11-9-103. Purchase money security interest; application of payments; burden of establishing.**

**Law reviews.** — For article, "The Fourth Annual Emory Bankruptcy Developments Journal Symposium, March 1, 2007: Consumer Bankruptcy Panel: Selected Hot BAPCPA Topics," see 23 Bank.

Dev. J. 517 (2007). For article, "Eleventh Circuit Survey: January 1, 2008 — December 31, 2008: Article: Bankruptcy," see 60 Mercer L. Rev. 1141 (2009).

## JUDICIAL DECISIONS

**Refinancing or consolidation of loans.**

When debtor refinanced a prior purchase of furniture when the debtor financed a second purchase, the seller lost the seller's purchase money security interest status on the balance due from the first purchase because the installment contract failed to specify the order in which add-on costs, i.e., late fee, delivery fee, credit life insurance, and property insurance, abated upon payment. *In re McClow*, No. 09-40164, 2009 Bankr. LEXIS 5581 (Bankr. S.D. Ga. Dec. 17, 2009).

**Additional items purchased with collateral.** — Simultaneous purchase on credit of a vehicle and an extended service contract, and payment of a documentary fee and a certificate of title fee, did not transform the secured creditor's claim into a non-purchase money security interest, disqualifying its claim for treatment under the hanging paragraph at the end of 11 U.S.C. § 1325(a), because the cost of the additional items was part of the price of the vehicle. *In re Murray*, 352 B.R. 340 (Bankr. M.D. Ga. 2006).

**Purchase money interest in negative equity financed as part of trade-in.** — Because the definition of "cash sales price" under O.C.G.A. § 11-9-103(a)(2) included any amount paid to the buyer or to a third party to satisfy a lease on or a lien on or a security interest in a motor vehicle used as a trade-in, that entire amount was included in the purchase money security interest under 11 U.S.C. § 1325(a). *In re Graupner*, 356 B.R. 907 (Bankr. M.D. Ga. 2006), *aff'd*, NO. 4:07-CV-37 (CDL), 2007 U.S. Dist. LEXIS 46144 (M.D. Ga. 2007).

Monies paid on debtor's behalf for an extended service contract and gap insurance were part of the purchase price of the debtor's vehicle for purposes of O.C.G.A. § 11-9-103 and the unnumbered, hanging paragraph following 11 U.S.C. § 1325(a)(9). The service contract was a charge for "servicing" the motor vehicle under O.C.G.A. § 10-1-31(a)(1), and applying the close nexus standard in § 11-9-103 led the court to believe that gap insurance was also included in the purchase money security interest. *In re Spratling*, 377 B.R. 941 (Bankr. M.D. Ga. 2007).

Because a debtor purchased a vehicle for personal use within 910 days of filing a bankruptcy petition under 11 U.S.C. § 1325(a), the cramdown provision of 11 U.S.C. § 506 did not apply; instead, O.C.G.A. § 11-9-103 determined that the purchase money security interest included the negative equity of a trade-in that was integral to the sales transaction. *Graupner v. Nuvell Credit Corp.*, No. 4:07-CV-37 (CDL), 2007 U.S. Dist. LEXIS 46144 (M.D. Ga. June 26, 2007), *aff'd*, 537 F.3d 1295 (11th Cir. 2008).

Under O.C.G.A. §§ 10-1-31(a) and 11-9-103, negative equity in a debtor's trade-in vehicle was properly regarded as a purchase money security interest under the hanging paragraph referencing 11 U.S.C. § 1325(a)(5) in that there was a close nexus to the purchase of a vehicle for personal use within 910 days of filing for Chapter 13 relief. Thus, 11 U.S.C. § 506 did not apply to cram down the creditor's secured claim. *Graupner v. Nuvell Credit Corp.* (In re Graupner), 537 F.3d 1295 (11th Cir. 2008).

## RESEARCH REFERENCES

**ALR.** — Consignment transactions under Uniform Commercial Code Article 9 on secured transactions, 58 A.L.R.6th 289.

Determination of appropriate Chapter 11 "cramdown" rate of interest, 17 A.L.R. Fed. 3d 8.

**11-9-105. Control of electronic chattel paper.**

(a) **General rule; control of electronic chattel paper.** A secured party has control of electronic chattel paper if a system employed for



evidencing the transfer of interests in the chattel paper reliably establishes the secured party as the person to which the chattel paper was assigned.

(b) **Specific facts giving control.** A system satisfies the provisions of subsection (a) of this Code section if the record or records comprising the chattel paper are created, stored, and assigned in such a manner that:

(1) A single authoritative copy of the record or records exists which is unique, identifiable, and, except as otherwise provided in paragraphs (4), (5), and (6) of this subsection, unalterable;

(2) The authoritative copy identifies the secured party as the assignee of the record or records;

(3) The authoritative copy is communicated to and maintained by the secured party or its designated custodian;

(4) Copies or amendments that add or change an identified assignee of the authoritative copy can be made only with the consent of the secured party;

(5) Each copy of the authoritative copy and any copy of a copy is readily identifiable as a copy that is not the authoritative copy; and

(6) Any amendment of the authoritative copy is readily identifiable as authorized or unauthorized. (Code 1981, § 11-9-105, enacted by Ga. L. 2001, p. 362, § 1; Ga. L. 2013, p. 690, § 2/SB 185.)

**The 2013 amendment**, effective July 1, 2013, designated the existing provisions as subsections (a) and (b); in subsection (a), added the subsection heading and added “if a system employed for evidencing the transfer of interests in the chattel paper reliably establishes the secured party as the person to which the chattel paper was assigned” at the end; in the introductory language of subsection (b), added the subsection heading and “A system satisfies the provisions of subsection

(a) of this Code section” at the beginning; substituted “subsection” for “Code section” in paragraph (b)(1); in paragraph (b)(4), substituted “amendments” for “revisions” near the beginning and substituted “consent” for “participation” near the end; and, in paragraph (b)(6), substituted “amendment” for “revision” near the beginning and substituted “as authorized or unauthorized” for “an authorized or unauthorized revision” at the end.

## 11-9-108. Sufficiency of description.

### JUDICIAL DECISIONS

#### Description of collateral in security agreements.

Bankruptcy court found that: (1) the equipment in issue was incorrectly de-

scribed in both the security agreement and the financing statement; and (2) the rights of the debtor, as a hypothetical lien creditor, were superior to the rights of the

creditor. *Deere Credit, Inc. v. Pickle Logging, Inc.* (In re *Pickle Logging, Inc.*), 286 B.R. 181 (Bankr. M.D. Ga. 2002).

## Subpart 2

### Applicability of Article

#### 11-9-109. Scope.

#### JUDICIAL DECISIONS

**Ordinary meaning of “unsecured”.** — Ordinary meaning of “unsecured” is that there is no security interest that can be effective against third parties under the Georgia Uniform Commercial Code, specifically O.C.G.A. § 11-9-109. In re *Estate of Sims*, 259 Ga. App. 786, 578 S.E.2d 498 (2003).

**Bank’s right of setoff superior.** — In a case predicated on the Georgia tort law of conversion, a district court’s entry of summary judgment in favor of a bank was affirmed because O.C.G.A. §§ 11-9-109(a)(1) and (d)(10)(A), and 11-9-340 governed the effectiveness of set-off rights in deposit accounts, brought the case expressly within the authority of the Uniform Commercial Code, and provided that the bank’s setoff right was superior to any security interest of a company in a predecessor company’s deposited funds. *Eleison Composites, LLC v. Wachovia Bank, N.A.*, No. 07-10206, 2008 U.S. App. LEXIS 5045 (11th Cir. Mar. 7, 2008) (Unpublished).

**Insurance proceeds subject to lender’s security agreement.** — Bankruptcy court found that under the security deed the credit company held a valid security interest in the destroyed property and the security deed provided sufficient language to grant the credit company a security interest in the proceeds of the collateral, including any insurance proceeds. *Altegra*

*Credit Co. v. Ford Motor Credit Co.* (In re *Brantley*), 286 B.R. 918 (Bankr. S.D. Ga. 2002).

**Statute of limitations.** — While it appeared that O.C.G.A. § 9-3-24, rather than O.C.G.A. § 11-2-725, would most likely apply to defendant collection attorney’s state court deficiency action against plaintiff consumer, and it was not for the federal court to say what the Georgia courts would hold, the uncertainty meant there was no intentional unfair conduct and the consumer’s Fair Debt Collection Practices Act claim was dismissed. *Almand v. Reynolds & Robin, P.C.*, 485 F. Supp. 2d 1361 (M.D. Ga. 2007).

**Assignment to surety.** — Trial court properly granted a surety’s motion for summary judgment because the security interest in the accounts owed was covered by the Uniform Commercial Code, and to the extent that the anti-assignment clauses of the construction contract could be construed to prohibit the roofing company from assigning the company’s right to those accounts to the company’s surety, the contracts were unenforceable as a matter of law under O.C.G.A. § 11-9-406(d)(1). *State Dep’t of Corr. v. Developers Sur. & Indem. Co.*, 324 Ga. App. 371, 750 S.E.2d 697 (2013).

**Cited in** *All Fleet Refinishing, Inc. v. W. Ga. Nat’l Bank*, 280 Ga. App. 676, 634 S.E.2d 802 (2006).

#### RESEARCH REFERENCES

**ALR.** — Consignment transactions under Uniform Commercial Code Article 9 on secured transactions, 58 A.L.R.6th 289.

**11-9-110. Security interests arising under Article 2 or 2A of this title.**

**JUDICIAL DECISIONS**

**Perfected security interest had priority over attempted reservation of title.** — Peanut growers' attempted reservation of title when the growers' delivered peanuts to a peanut company at a peanut broker's direction amounted to a security interest; however, the growers never perfected the growers' security interests. A cooperative bank's security interest in the peanuts was perfected as the grower had filed financing statements and the security interest had attached so that the bank's perfected security interest had pri-

ority over the growers' unperfected security interests. *Farm Credit of Northwest Fla., ACA v. Easom Peanut Co.*, 312 Ga. App. 374, 718 S.E.2d 590 (2011), cert. denied, No. S12C0444, 2012 Ga. LEXIS 315 (Ga. 2012).

**Term "possession" as used in O.C.G.A. § 11-9-110 includes constructive possession.** — *Farm Credit of Northwest Fla., ACA v. Easom Peanut Co.*, 312 Ga. App. 374, 718 S.E.2d 590 (2011), cert. denied, No. S12C0444, 2012 Ga. LEXIS 315 (Ga. 2012).

**11-9-111. Applicability of bulk transfer laws.**

Repealed by Ga. L. 2015, p. 996, § 3D-2/SB 65, effective July 1, 2015.

**Editor's notes.** — This Code section was based on Code 1981, § 11-9-111, enacted by Ga. L. 2001, p. 362, § 1.

**PART 2**

**EFFECTIVENESS OF SECURITY AGREEMENT;  
ATTACHMENT OF SECURITY INTEREST;  
RIGHTS OF PARTIES TO SECURITY AGREEMENT**

**Subpart 1**

**Effectiveness and Attachment**

**11-9-203. Attachment and enforceability of security interest; proceeds; supporting obligations; formal requisites.**

(a) **Attachment.** A security interest attaches to collateral when it becomes enforceable against the debtor with respect to the collateral, unless an agreement expressly postpones the time of attachment.

(b) **Enforceability.** Except as otherwise provided in subsections (c) through (i) of this Code section, a security interest is enforceable against the debtor and third parties with respect to the collateral only if:

- (1) Value has been given;



(2) The debtor has rights in the collateral or the power to transfer rights in the collateral to a secured party; and

(3) One of the following conditions is met:

(A) The debtor has authenticated a security agreement that provides a description of the collateral and, if the security interest covers timber to be cut, a description of the land concerned;

(B) The collateral is not a certificated security and is in the possession of the secured party under Code Section 11-9-313 pursuant to the debtor's security agreement;

(C) The collateral is a certificated security in registered form and the security certificate has been delivered to the secured party under Code Section 11-8-301 pursuant to the debtor's security agreement; or

(D) The collateral is deposit accounts, electronic chattel paper, investment property, letter of credit rights, or electronic documents, and the secured party has control under Code Section 11-7-106, 11-9-104, 11-9-105, 11-9-106, or 11-9-107 pursuant to the debtor's security agreement.

(c) **Other provisions of this title.** Subsection (b) of this Code section is subject to Code Section 11-4-210 on the security interest of a collecting bank, Code Section 11-5-118 on the security interest of a letter of credit issuer or nominated person, Code Section 11-9-110 on a security interest arising under Article 2 or 2A of this title, and Code Section 11-9-206 on security interests in investment property.

(d) **When person becomes bound by another person's security agreement.** A person becomes bound as debtor by a security agreement entered into by another person if, by operation of law other than this article or by contract:

(1) The security agreement becomes effective to create a security interest in the person's property; or

(2) The person becomes generally obligated for the obligations of the other person, including the obligation secured under the security agreement, and acquires or succeeds to all or substantially all of the assets of the other person.

(e) **Effect of new debtor becoming bound.** If a new debtor becomes bound as debtor by a security agreement entered into by another person:

(1) The agreement satisfies paragraph (3) of subsection (b) of this Code section with respect to existing or after acquired property of the new debtor to the extent the property is described in the agreement; and

- (2) Another agreement is not necessary to make a security interest in the property enforceable.
- (f) **Proceeds and supporting obligations.** The attachment of a security interest in collateral gives the secured party the rights to proceeds provided by Code Section 11-9-315 and is also attachment of a security interest in a supporting obligation for the collateral.
- (g) **Lien securing right to payment.** The attachment of a security interest in a right to payment or performance secured by a security interest or other lien on personal or real property is also attachment of a security interest in the security interest, mortgage, or other lien.
- (h) **Security entitlement carried in securities account.** The attachment of a security interest in a securities account is also attachment of a security interest in the security entitlements carried in the securities account.
- (i) **Commodity contracts carried in commodity account.** The attachment of a security interest in a commodity account is also attachment of a security interest in the commodity contract carried in the commodity account. (Code 1981, § 11-9-203, enacted by Ga. L. 2001, p. 362, § 1; Ga. L. 2010, p. 481, § 2-20/HB 451.)

**The 2010 amendment,** effective May 27, 2010, in subparagraph (b)(3)(D), substituted “letter of credit rights, or electronic documents,” for “or letter of credit rights,” and inserted “11-7-106.” See the Editor’s notes for applicability.

**Editor’s notes.** — Ga. L. 2010, p. 481, § 3-1, not codified by the General Assembly, provides that: “This Act applies to a document of title that is issued or a bailment that arises on or after the effective date of this Act. This Act does not apply to a document of title that is issued or a bailment that arises before the effective date of this Act even if the document of title or bailment would be subject to this Act if the document of title had been issued or bailment had arisen on or after

the effective date of this Act. This Act does not apply to a right of action that has accrued before the effective date of this Act.” This Act became effective May 27, 2010.

Ga. L. 2010, p. 481, § 3-2, not codified by the General Assembly, provides that: “A document of title issued or a bailment that arises before the effective date of this Act and the rights, documents, and interests flowing from that document or bailment are governed by any statute or other rule amended or repealed by this Act as if such amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute or other rule.” This Act became effective May 27, 2010.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION  
SUFFICIENCY OF WRITING  
ATTACHMENT

### General Consideration

#### **Insurance benefits considered “proceeds” and subject to lender’s security interest.**

Bankruptcy court found that under the security deed the credit company held a valid security interest in the destroyed property and the security deed provided sufficient language to grant the credit company a security interest in the proceeds of the collateral, including any insurance proceeds. *Altegra Credit Co. v. Ford Motor Credit Co.* (In re Brantley), 286 B.R. 918 (Bankr. S.D. Ga. 2002).

**Security interest in the proceeds.** — After a Chapter 13 debtors’ vehicle was destroyed in an accident after confirmation of the plan, the failure of the secured creditor to introduce the insurance policy into evidence, meant that the court could not determine if the creditor had an independent right to the proceeds in addition to its Uniform Commercial Code Article 9 rights; the creditor proved only that it had a security interest in the proceeds and, therefore, Article 9 governed and the insurance payout was proceeds of the collateral. In re Jones, No. 99-43196, 2004 Bankr. LEXIS 1520 (Bankr. S.D. Ga. June 4, 2004).

**Language held sufficient to prove security interest.** — Bank that extended credit to a debtor before the debtor declared Chapter 13 bankruptcy, so the debtor could purchase merchandise using a credit card, had an enforceable security interest under O.C.G.A. § 11-9-203 in goods the debtor obtained using the credit card, and a plan the debtor filed for repaying creditors could not be confirmed under 11 U.S.C. § 1325 because the plan treated the bank’s claim as an unsecured claim. An application the debtor completed when the debtor applied for the credit card stated that the debtor granted a business a purchase money security interest in goods purchased on the debtor’s account. *Thomas G. v. HSBC Nev., N.A.* (In re Thomas G.), No. 09-73223-pwb, 2009 Bankr. LEXIS 4325 (Bankr. N.D. Ga. Dec. 21, 2009) (Unpublished).

**Passage of title.** — When the peanut growers completed the performance of the growers’ duties under the growers’ contracts with a peanut broker by delivering

the growers’ peanuts to a peanut company, title passed to the broker. *Farm Credit of Northwest Fla., ACA v. Easom Peanut Co.*, 312 Ga. App. 374, 718 S.E.2d 590 (2011), cert. denied, No. S12C0444, 2012 Ga. LEXIS 315 (Ga. 2012).

### Sufficiency of Writing

#### **Requirements, generally.**

Two creditors who loaned money to a debtor to buy a truck and who were named by the debtor as a “lienholder” on the debtor’s application for a title won a ruling sustaining their objection to the debtor’s proposed Chapter 13 plan in which the creditors’ interest was treated as an unsecured interest, because Georgia law did not require the use of “magic words” to create an enforceable security interest and because the three documents signed by the debtor in connection with the transaction satisfied the requirements in O.C.G.A. § 11-9-203(b)(3)(A) for the creation of an enforceable security interest, and were consistent with the debtor’s testimony that the debtor knew that the creditors would have a lien on the debtor’s truck. In re Flager, No. 07-50293-JDW, 2007 Bankr. LEXIS 2027 (Bankr. M.D. Ga. June 8, 2007).

**Signature on security agreement required for aircraft.** — In a preferential transfer action under 11 U.S.C. § 547(b), while the trustee satisfied the trustee’s burden as to many of the elements and was entitled to a partial summary judgment as to those elements, the trustee was not entitled to summary judgment under 11 U.S.C. § 547(b)(5) regarding the debtor’s conveyance of an aircraft because there were material fact issues as to the existence of a security agreement, the amount of the debt, the value of the aircraft, and whether the security interest was filed with the Federal Aviation Administration (FAA). In this case, pursuant to O.C.G.A. § 11-9-203(b)(3)(A), in order to have an enforceable security interest, there had to be a signed security agreement. *Kelley v. Murphy* (In re McConnell), 455 B.R. 824 (Bankr. M.D. Ga. 2011).

**Written security agreement not established.** — Creditor was not entitled to relief from an automatic stay under 11 U.S.C. § 362 when the creditor could not



**Sufficiency of Writing (Cont'd)**

provide evidence of a written security agreement signed by the debtor for the personal property at issue and the debtor testified that the debtor never signed or intended to give a security interest in the personal property. *First Nat'l Bank v. Alba* (In re Alba), 429 B.R. 353 (Bankr. N.D. Ga. 2008).

**Security agreement in aircraft not established.** — When a trustee sought to avoid as a preferential transfer a debtor's conveyance of an aircraft to defendants, summary judgment was inappropriate as to 11 U.S.C. § 547(b)(5) because there were material fact issues as to the existence of a security agreement, the amount of the debt, the value of the aircraft, and whether the security interest in the aircraft was filed with the Federal Aviation Administration. *Kelley v. Murphy* (In re McConnell), No. 11-5071, 2011 Bankr. LEXIS 3281 (Bankr. M.D. Ga. Aug. 18, 2011).

**Attachment**

**Three elements for attachment.** — For security interests governed by Article

9 of Georgia's Uniform Commercial Code, three conditions must be met before they may be enforceable against anyone, including the debtor: (i) unless the secured party possesses the collateral, there must be a written security agreement signed by the debtor and containing a description of the collateral; (ii) the secured party must have given value; and (iii) the debtor must have rights in the collateral. These three elements were met and the creditor's security interest in the debtor's inventory and its proceeds had been properly attached. *In re Shree Meldikrupa Inc.*, No. 1-EJC, 2016 Bankr. LEXIS 159 (Bankr. S.D. Ga. Jan. 15, 2016).

**Date of signing contract determines rights.** — After the debtor executed three contracts prior to filing the debtor's Chapter 11 bankruptcy petition, the date the contracts were signed determined whether the proceeds of the contracts were subject to the security interest of the debtor's pre-petition creditor under 11 U.S.C. § 552(b)(1) and O.C.G.A. § 11-9-203. *Diversified Traffic Servs. v. Presidential Fin. Corp.* (In re Diversified Traffic Servs.), No. 09-51227, 2010 Bankr. LEXIS 1790 (Bankr. S.D. Ga. May 21, 2010).

**Subpart 2****Rights and Duties****11-9-207. Rights and duties of secured party having possession or control of collateral.**

(a) **Duty of care when secured party in possession.** Except as otherwise provided in subsection (d) of this Code section, a secured party shall use reasonable care in the custody and preservation of collateral in the secured party's possession. In the case of chattel paper or an instrument, reasonable care includes taking necessary steps to preserve rights against prior parties unless otherwise agreed.

(b) **Expenses, risks, duties, and rights when secured party in possession.** Except as otherwise provided in subsection (d) of this Code section, if a secured party has possession of collateral:

(1) Reasonable expenses, including the cost of insurance and payment of taxes or other charges, incurred in the custody, preservation, use, or operation of the collateral are chargeable to the debtor and are secured by the collateral;

(2) The risk of accidental loss or damage is on the debtor to the extent of a deficiency in any effective insurance coverage;

(3) The secured party shall keep the collateral identifiable, but fungible collateral may be commingled; and

(4) The secured party may use or operate the collateral:

(A) For the purpose of preserving the collateral or its value;

(B) As permitted by an order of a court having competent jurisdiction; or

(C) Except in the case of consumer goods, in the manner and to the extent agreed by the debtor.

(c) **Duties and rights when secured party in possession or control.** Except as otherwise provided in subsection (d) of this Code section, a secured party having possession of collateral or control of collateral under Code Section 11-7-106, 11-9-104, 11-9-105, 11-9-106, or 11-9-107:

(1) May hold as additional security any proceeds, except money or funds, received from the collateral;

(2) Shall apply money or funds received from the collateral to reduce the secured obligation, unless remitted to the debtor; and

(3) May create a security interest in the collateral.

(d) **Buyer of certain rights to payment.** If the secured party is a buyer of accounts, chattel paper, payment intangibles, or promissory notes or a consignor:

(1) Subsection (a) of this Code section does not apply unless the secured party is entitled under an agreement:

(A) To charge back uncollected collateral; or

(B) Otherwise to full or limited recourse against the debtor or a secondary obligor based on the nonpayment or other default of an account debtor or other obligor on the collateral; and

(2) Subsections (b) and (c) of this Code section do not apply. (Code 1981, § 11-9-207, enacted by Ga. L. 2001, p. 362, § 1; Ga. L. 2010, p. 481, § 2-21/HB 451.)

**The 2010 amendment**, effective May 27, 2010, inserted “11-7-106,” in the introductory paragraph of subsection (c). See the Editor’s notes for applicability.

**Editor’s notes.** — Ga. L. 2010, p. 481, § 3-1, not codified by the General Assembly, provides that: “This Act applies to a

document of title that is issued or a bailment that arises on or after the effective date of this Act. This Act does not apply to a document of title that is issued or a bailment that arises before the effective date of this Act even if the document of title or bailment would be subject to this

Act if the document of title had been issued or bailment had arisen on or after the effective date of this Act. This Act does not apply to a right of action that has accrued before the effective date of this Act.” This Act became effective May 27, 2010.

Ga. L. 2010, p. 481, § 3-2, not codified by the General Assembly, provides that: “A document of title issued or a bailment

that arises before the effective date of this Act and the rights, documents, and interests flowing from that document or bailment are governed by any statute or other rule amended or repealed by this Act as if such amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute or other rule.” This Act became effective May 27, 2010.

### JUDICIAL DECISIONS

**Cited** in *Motors Acceptance Corp. v. Rozier*, 278 Ga. 52, 597 S.E.2d 367 (2004).

### 11-9-208. Additional duties of secured party having control of collateral.

(a) **Applicability of Code section.** This Code section applies to cases in which there is no outstanding secured obligation and the secured party is not committed to make advances, incur obligations, or otherwise give value.

(b) **Duties of secured party after receiving demand from debtor.** Within ten days after receiving an authenticated demand by the debtor:

(1) A secured party having control of a deposit account under paragraph (2) of subsection (a) of Code Section 11-9-104 shall send to the bank with which the deposit account is maintained an authenticated statement that releases the bank from any further obligation to comply with instructions originated by the secured party;

(2) A secured party having control of a deposit account under paragraph (3) of subsection (a) of Code Section 11-9-104 shall:

(A) Pay the debtor the balance on deposit in the deposit account;  
or

(B) Transfer the balance on deposit into a deposit account in the debtor’s name;

(3) A secured party, other than a buyer, having control of electronic chattel paper under Code Section 11-9-105 shall:

(A) Communicate the authoritative copy of the electronic chattel paper to the debtor or its designated custodian;

(B) If the debtor designates a custodian that is the designated custodian with which the authoritative copy of the electronic chattel paper is maintained for the secured party, communicate to



the custodian an authenticated record releasing the designated custodian from any further obligation to comply with instructions originated by the secured party and instructing the custodian to comply with instructions originated by the debtor; and

(C) Take appropriate action to enable the debtor or its designated custodian to make copies of or revisions to the authoritative copy which add or change an identified assignee of the authoritative copy without the consent of the secured party;

(4) A secured party having control of investment property under paragraph (2) of subsection (d) of Code Section 11-8-106 or subsection (b) of Code Section 11-9-106 shall send to the securities intermediary or commodity intermediary with which the security entitlement or commodity contract is maintained an authenticated record that releases the securities intermediary or commodity intermediary from any further obligation to comply with entitlement orders or directions originated by the secured party;

(5) A secured party having control of a letter of credit right under Code Section 11-9-107 shall send to each person having an unfulfilled obligation to pay or deliver proceeds of the letter of credit to the secured party an authenticated release from any further obligation to pay or deliver proceeds of the letter of credit to the secured party; and

(6) A secured party having control of an electronic document shall:

(A) Give control of the electronic document to the debtor or its designated custodian;

(B) If the debtor designates a custodian that is the designated custodian with which the authoritative copy of the electronic document is maintained for the secured party, communicate to the custodian an authenticated record releasing the designated custodian from any further obligation to comply with instructions originated by the secured party and instructing the custodian to comply with instructions originated by the debtor; and

(C) Take appropriate action to enable the debtor or its designated custodian to make copies of or revisions to the authenticated copy which add or change an identified assignee of the authoritative copy without the consent of the secured party. (Code 1981, § 11-9-208, enacted by Ga. L. 2001, p. 362, § 1; Ga. L. 2010, p. 481, § 2-22/HB 451.)

**The 2010 amendment**, effective May 27, 2010, deleted “and” at the end of paragraph (b)(4); substituted “; and” for a period at the end of paragraph (b)(5); and added paragraph (b)(6). See the Editor’s notes for applicability.

**Editor’s notes.** — Ga. L. 2010, p. 481, § 3-1, not codified by the General Assembly, provides that: “This Act applies to a document of title that is issued or a bailment that arises on or after the effective date of this Act. This Act does not

apply to a document of title that is issued or a bailment that arises before the effective date of this Act even if the document of title or bailment would be subject to this Act if the document of title had been issued or bailment had arisen on or after the effective date of this Act. This Act does not apply to a right of action that has accrued before the effective date of this Act.” This Act became effective May 27, 2010.

Ga. L. 2010, p. 481, § 3-2, not codified

by the General Assembly, provides that: “A document of title issued or a bailment that arises before the effective date of this Act and the rights, documents, and interests flowing from that document or bailment are governed by any statute or other rule amended or repealed by this Act as if such amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute or other rule.” This Act became effective May 27, 2010.

## PART 3

### PERFECTION AND PRIORITY

#### Subpart 1

#### Law Governing Perfection and Priority

#### **11-9-301. Law governing perfection and priority of security interests.**

Except as otherwise provided in Code Sections 11-9-303 through 11-9-306, the following rules determine the law governing perfection, the effect of perfection or nonperfection, and the priority of a security interest in collateral:

(1) Except as otherwise provided in this Code section, while a debtor is located in a jurisdiction, the local law of that jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in collateral;

(2) While collateral is located in a jurisdiction, the local law of that jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a possessory security interest in that collateral;

(3) Except as otherwise provided in paragraph (4) of this Code section, while tangible negotiable documents, goods, instruments, money, or tangible chattel paper is located in a jurisdiction, the local law of that jurisdiction governs:

(A) Perfection of a security interest in the goods by filing a fixture filing;

(B) Perfection of a security interest in timber to be cut;

(C) Perfection of a security interest in crops; and

(D) The effect of perfection or nonperfection and the priority of a nonpossessory security interest in the collateral; and

(4) The local law of the jurisdiction in which the wellhead or minehead is located governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in as-extracted collateral. (Code 1981, § 11-9-301, enacted by Ga. L. 2001, p. 362, § 1; Ga. L. 2010, p. 481, § 2-23/HB 451.)

**The 2010 amendment**, effective May 27, 2010, inserted “tangible” in the middle of the introductory language of paragraph (3). See the Editor’s notes for applicability.

**Editor’s notes.** — Ga. L. 2010, p. 481, § 3-1, not codified by the General Assembly, provides that: “This Act applies to a document of title that is issued or a bailment that arises on or after the effective date of this Act. This Act does not apply to a document of title that is issued or a bailment that arises before the effective date of this Act even if the document of title or bailment would be subject to this Act if the document of title had been issued or bailment had arisen on or after the effective date of this Act. This Act does

not apply to a right of action that has accrued before the effective date of this Act.” This Act became effective May 27, 2010.

Ga. L. 2010, p. 481, § 3-2, not codified by the General Assembly, provides that: “A document of title issued or a bailment that arises before the effective date of this Act and the rights, documents, and interests flowing from that document or bailment are governed by any statute or other rule amended or repealed by this Act as if such amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute or other rule.” This Act became effective May 27, 2010.

### **11-9-303. Law governing perfection and priority of security interests in goods covered by a certificate of title.**

#### **JUDICIAL DECISIONS**

**Cited** in *Provident Bank v. Morequity, Inc.*, 262 Ga. App. 331, 585 S.E.2d 625 (2003).

### **11-9-307. Location of debtor.**

(a) **“Place of business.”** As used in this Code section, the term “place of business” means a place where a debtor conducts its affairs.

(b) **Debtor’s location; general rules.** Except as otherwise provided in this Code section, the following rules determine a debtor’s location:

(1) A debtor who is an individual is located at the individual’s principal residence;

(2) A debtor that is an organization and has only one place of business is located at its place of business; and

(3) A debtor that is an organization and has more than one place of business is located at its chief executive office.

(c) **Limitation of applicability of subsection (b) of this Code section.** Subsection (b) of this Code section applies only if a debtor’s



residence, place of business, or chief executive office, as applicable, is located in a jurisdiction whose law generally requires information concerning the existence of a nonpossessory security interest to be made generally available in a filing, recording, or registration system as a condition or result of the security interest's obtaining priority over the rights of a lien creditor with respect to the collateral. If subsection (b) of this Code section does not apply, the debtor is located in the District of Columbia.

(d) **Continuation of location; cessation of existence, etc.** A person that ceases to exist, have a residence, or have a place of business continues to be located in the jurisdiction specified by subsections (b) and (c) of this Code section.

(e) **Location of registered organization organized under state law.** A registered organization that is organized under the law of a state is located in that state.

(f) **Location of registered organization organized under federal law; bank branches and agencies.** Except as otherwise provided in subsection (i) of this Code section, a registered organization that is organized under the law of the United States and a branch or agency of a bank that is not organized under the law of the United States or a state are located:

(1) In the state that the law of the United States designates, if the law designates a state of location;

(2) In the state that the registered organization, branch, or agency designates, if the law of the United States authorizes the registered organization, branch, or agency to designate its state of location, including by designating its main office, home office, or other comparable office; or

(3) In the District of Columbia, if neither paragraph (1) nor (2) of this subsection applies.

(g) **Continuation of location; change in status of registered organization.** A registered organization continues to be located in the jurisdiction specified by subsection (e) or (f) of this Code section notwithstanding:

(1) The suspension, revocation, forfeiture, or lapse of the registered organization's status as such in its jurisdiction of organization; or

(2) The dissolution, winding up, or cancellation of the existence of the registered organization.

(h) **Location of United States.** The United States is located in the District of Columbia.

(i) **Location of foreign bank branch or agency if licensed in only one state.** A branch or agency of a bank that is not organized under the law of the United States or a state is located in the state in which the branch or agency is licensed, if all branches and agencies of the bank are licensed in only one state.

(j) **Location of foreign air carrier.** A foreign air carrier under the Federal Aviation Act of 1958, as amended, is located at the designated office of the agent upon which service of process may be made on behalf of the carrier.

(k) **Code section applies only to this part.** This Code section applies only for purposes of this part. (Code 1981, § 11-9-307, enacted by Ga. L. 2001, p. 362, § 1; Ga. L. 2013, p. 690, § 3/SB 185.)

**The 2013 amendment,** effective July 1, 2013, added “, including by designating its main office, home office, or other com-

parable office” at the end of paragraph (f)(2).

Subpart 2

Perfection

11-9-308. When security interest or agricultural lien is perfected; continuity of perfection.

JUDICIAL DECISIONS

**Perfected security interest had priority over attempted reservation of title.** — Peanut growers’ attempted reservation of title when the growers delivered peanuts to a peanut company at a peanut broker’s direction amounted to a security interest; however, the growers never perfected the growers’ security interests. a cooperative bank’s security interest in the peanuts was perfected as the growers had

filed financing statements and the security interest had attached so that the bank’s perfected security interest had priority over the growers’ unperfected security interests. *Farm Credit of Northwest Fla., ACA v. Easom Peanut Co.*, 312 Ga. App. 374, 718 S.E.2d 590 (2011), cert. denied, No. S12C0444, 2012 Ga. LEXIS 315 (Ga. 2012).

11-9-309. Security interest perfected upon attachment.

RESEARCH REFERENCES

**ALR.** — Creation and perfection of security interests in insurance proceeds under

Article 9 of Uniform Commercial Code, 47 A.L.R.6th 347.

**11-9-310. When filing required to perfect security interest or agricultural lien; security interests and agricultural liens to which filing provisions do not apply.**

(a) **General rule; perfection by filing.** Except as otherwise provided in subsection (b) of this Code section and subsection (b) of Code Section 11-9-312, a financing statement must be filed to perfect all security interests and agricultural liens.

(b) **Exceptions; filing not necessary.** The filing of a financing statement is not necessary to perfect a security interest:

(1) That is perfected under subsection (d), (e), (f), or (g) of Code Section 11-9-308;

(2) That is perfected under Code Section 11-9-309 when it attaches;

(3) In property subject to a statute, regulation, or treaty described in subsection (a) of Code Section 11-9-311;

(4) In goods in possession of a bailee which is perfected under paragraph (1) or (2) of subsection (d) of Code Section 11-9-312;

(5) In certificated securities, documents, goods, or instruments which is perfected without filing, control, or possession under subsection (e), (f), or (g) of Code Section 11-9-312;

(6) In collateral in the secured party's possession under Code Section 11-9-313;

(7) In a certificated security which is perfected by delivery of the security certificate to the secured party under Code Section 11-9-313;

(8) In deposit accounts, electronic chattel paper, electronic documents, investment property, or letter of credit rights which is perfected by control under Code Section 11-9-314;

(9) In proceeds which is perfected under Code Section 11-9-315; or

(10) That is perfected under Code Section 11-9-316.

(c) **Assignment of perfected security interest.** If a secured party assigns a perfected security interest or agricultural lien, a filing under this article is not required to continue the perfected status of the security interest against creditors of and transferees from the original debtor. (Code 1981, § 11-9-310, enacted by Ga. L. 2001, p. 362, § 1; Ga. L. 2010, p. 481, § 2-24/HB 451.)

**The 2010 amendment**, effective May 27, 2010, inserted “, control,” in paragraph (b)(5); and inserted “electronic documents,” in paragraph (b)(8). See the Editor's notes for applicability.

**Editor's notes.** — Ga. L. 2010, p. 481,



§ 3-1, not codified by the General Assembly, provides that: “This Act applies to a document of title that is issued or a bailment that arises on or after the effective date of this Act. This Act does not apply to a document of title that is issued or a bailment that arises before the effective date of this Act even if the document of title or bailment would be subject to this Act if the document of title had been issued or bailment had arisen on or after the effective date of this Act. This Act does not apply to a right of action that has accrued before the effective date of this Act.” This Act became effective May 27, 2010.

Ga. L. 2010, p. 481, § 3-2, not codified by the General Assembly, provides that: “A document of title issued or a bailment that arises before the effective date of this Act and the rights, documents, and interests flowing from that document or bailment are governed by any statute or other rule amended or repealed by this Act as if such amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute or other rule.” This Act became effective May 27, 2010.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION  
PERFECTION BY POSSESSION

General Consideration

**Creditor did not file financing statement.** — Georgia’s Article 9 of the Uniform Commercial Code requires proper filing of a financing statement in order to perfect an interest in personal property. The creditor did not dispute that a financing statement indicating the creditor’s security interest in any of the debtor’s personal property had not been filed and, therefore, the creditor held an unperfected security interest in the debtor’s personal property, including the debtor’s inventory and its proceeds; thus, the creditor was not an entity with an interest in cash collateral within the meaning of 11 U.S.C. § 363. In re Shree Meldikrupa Inc., No. 1-EJC, 2016 Bankr. LEXIS 159 (Bankr. S.D. Ga. Jan. 15, 2016).

**Pre-petition enforcement.** — Creditor had a valid post-petition lien in rents, profits, and proceeds from a Chapter 11 debtor’s hotel operations, though the creditor took no pre-petition enforcement action under Georgia law, as its lien in the pre-petition rents was valid from the time

of recording, and the lien in post-petition rents was valid from the time of the bankruptcy filing. In re Resort Inns, Inc., No. 04-41721, 2004 Bankr. LEXIS 1580 (Bankr. S.D. Ga. Aug. 30, 2004).

Perfection by Possession

**Perfected security interest had priority over attempted reservation of title.** — Peanut growers’ attempted reservation of title when the growers delivered peanuts to a peanut company at a peanut broker’s direction amounted to a security interest; however, the growers never perfected the growers’ security interests. A cooperative bank’s security interest in the peanuts was perfected as the bank had filed financing statements and the security interest had attached so that the bank’s perfected security interest had priority over the growers’ unperfected security interests. Farm Credit of Northwest Fla., ACA v. Easom Peanut Co., 312 Ga. App. 374, 718 S.E.2d 590 (2011), cert. denied, No. S12C0444, 2012 Ga. LEXIS 315 (Ga. 2012).

RESEARCH REFERENCES

**ALR.** — Creation and perfection of security interests in insurance proceeds under Article 9 of Uniform Commercial Code, 47 A.L.R.6th 347.

**11-9-311. Perfection of security interests in property subject to certain statutes, regulations, and treaties.**

(a) **Security interest subject to other law.** Except as otherwise provided in subsection (d) of this Code section, the filing of a financing statement is not necessary or effective to perfect a security interest in property subject to:

(1) A statute, regulation, or treaty of the United States whose requirements for a security interest's obtaining priority over the rights of a lien creditor with respect to the property preempt subsection (a) of Code Section 11-9-310;

(2) Chapter 3 of Title 40; or

(3) A statute of another jurisdiction which provides for a security interest to be indicated on a certificate of title as a condition or result of the security interest's obtaining priority over the rights of a lien creditor with respect to the property.

(b) **Compliance with other law.** Compliance with the requirements of a statute, regulation, or treaty described in subsection (a) of this Code section for obtaining priority over the rights of a lien creditor is equivalent to the filing of a financing statement under this article. Except as otherwise provided in subsection (d) of this Code section, in Code Section 11-9-313, and in subsections (d) and (e) of Code Section 11-9-316 for goods covered by a certificate of title, a security interest in property subject to a statute, regulation, or treaty described in subsection (a) of this Code section may be perfected only by compliance with those requirements, and a security interest so perfected remains perfected notwithstanding a change in the use or transfer of possession of the collateral.

(c) **Duration and renewal of perfection.** Except as otherwise provided in subsection (d) of this Code section and subsections (d) and (e) of Code Section 11-9-316, duration and renewal of perfection of a security interest perfected by compliance with the requirements prescribed by a statute, regulation, or treaty described in subsection (a) of this Code section are governed by the statute, regulation, or treaty. In other respects, the security interest is subject to this article.

(d) **Inapplicability to certain inventory.** During any period in which collateral subject to a statute specified in paragraph (2) of subsection (a) of this Code section is inventory held for sale or lease by a person or leased by that person as lessor and that person is in the business of selling goods of that kind, this Code section does not apply to a security interest in that collateral created by that person. (Code 1981, § 11-9-311, enacted by Ga. L. 2001, p. 362, § 1; Ga. L. 2013, p. 690, § 4/SB 185.)

**The 2013 amendment**, effective July 1, 2013, in paragraph (a)(3), deleted “certificate of title” preceding “statute” at the beginning and substituted “a certificate of title” for “the certificate” near the middle.

JUDICIAL DECISIONS

**Property subject to motor vehicle certificate of title act.** — Georgia Code is very clear that the filing of a financing statement is not effective to perfect a security interest in property subject to the Motor Vehicle Certificate of Title Act, O.C.G.A. T. 40, C. 3. In re Blair, No. 05-20151, 2005 Bankr. LEXIS 3547 (Bankr. S.D. Ga. June 2, 2005).

**11-9-312. Perfection of security interests in chattel paper, deposit accounts, documents, goods covered by documents, instruments, investment property, letter of credit rights, and money; perfection by permissive filing; temporary perfection without filing or transfer of possession.**

(a) **Perfection by filing permitted.** A security interest in chattel paper, negotiable documents, instruments, or investment property may be perfected by filing.

(b) **Control or possession of certain collateral.** Except as otherwise provided in subsections (c) and (d) of Code Section 11-9-315 for proceeds:

- (1) A security interest in a deposit account may be perfected only by control under Code Section 11-9-314;
- (2) Except as otherwise provided in subsection (d) of Code Section 11-9-308, a security interest in a letter of credit right may be perfected only by control under Code Section 11-9-314; and
- (3) A security interest in money may be perfected only by the secured party’s taking possession under Code Section 11-9-313.

(c) **Goods covered by negotiable document.** While goods are in the possession of a bailee that has issued a negotiable document covering the goods:

- (1) A security interest in the goods may be perfected by perfecting a security interest in the document; and
- (2) A security interest perfected in the document has priority over any security interest that becomes perfected in the goods by another method during that time.

(d) **Goods covered by nonnegotiable document.** While goods are in the possession of a bailee that has issued a nonnegotiable document covering the goods, a security interest in the goods may be perfected by:



(1) Issuance of a document in the name of the secured party;

(2) The bailee's receipt of notification of the secured party's interest; or

(3) Filing as to the goods.

(e) **Temporary perfection; new value.** A security interest in certificated securities, negotiable documents, or instruments is perfected without filing or the taking of possession or control for a period of 20 days from the time it attaches to the extent that it arises for new value given under an authenticated security agreement.

(f) **Temporary perfection; goods or documents made available to debtor.** A perfected security interest in a negotiable document or goods in possession of a bailee, other than one that has issued a negotiable document for the goods, remains perfected for 20 days without filing if the secured party makes available to the debtor the goods or documents representing the goods for the purpose of:

(1) Ultimate sale or exchange; or

(2) Loading, unloading, storing, shipping, transshipping, manufacturing, processing, or otherwise dealing with them in a manner preliminary to their sale or exchange.

(g) **Temporary perfection; delivery of security certificate or instrument to debtor.** A perfected security interest in a certificated security or instrument remains perfected for 20 days without filing if the secured party delivers the security certificate or instrument to the debtor for the purpose of:

(1) Ultimate sale or exchange; or

(2) Presentation, collection, enforcement, renewal, or registration of transfer.

(h) **Expiration of temporary perfection.** After the 20 day period specified in subsection (e), (f), or (g) of this Code section expires, perfection depends upon compliance with this article. (Code 1981, § 11-9-312, enacted by Ga. L. 2001, p. 362, § 1; Ga. L. 2010, p. 481, § 2-25/HB 451.)

**The 2010 amendment,** effective May 27, 2010, inserted "or control" in the middle of subsection (e). See the Editor's notes for applicability.

**Editor's notes.** — Ga. L. 2010, p. 481, § 3-1, not codified by the General Assembly, provides that: "This Act applies to a document of title that is issued or a bailment that arises on or after the effective date of this Act. This Act does not

apply to a document of title that is issued or a bailment that arises before the effective date of this Act even if the document of title or bailment would be subject to this Act if the document of title had been issued or bailment had arisen on or after the effective date of this Act. This Act does not apply to a right of action that has

accrued before the effective date of this Act.” This Act became effective May 27, 2010.

Ga. L. 2010, p. 481, § 3-2, not codified by the General Assembly, provides that: “A document of title issued or a bailment that arises before the effective date of this Act and the rights, documents, and inter-

ests flowing from that document or bailment are governed by any statute or other rule amended or repealed by this Act as if such amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute or other rule.” This Act became effective May 27, 2010.

### RESEARCH REFERENCES

**ALR.** — Perfection of security interests by possession, delivery, or control under revised Article 9 of Uniform Commercial Code, 53 A.L.R.6th 159.

### 11-9-313. When possession by or delivery to secured party perfects security interest without filing.

(a) **Perfection by possession or delivery.** Except as otherwise provided in subsection (b) of this Code section, a secured party may perfect a security interest in tangible negotiable documents, goods, instruments, money, or tangible chattel paper by taking possession of the collateral. A secured party may perfect a security interest in certificated securities by taking delivery of the certificated securities under Code Section 11-8-301.

(b) **Goods covered by certificate of title.** With respect to goods covered by a certificate of title issued by this state, a secured party may perfect a security interest in the goods by taking possession of the goods only in the circumstances described in subsection (d) of Code Section 11-9-316.

(c) **Collateral in possession of person other than debtor.** With respect to collateral other than certificated securities and goods covered by a document, a secured party takes possession of collateral in the possession of a person other than the debtor, the secured party, or a lessee of the collateral from the debtor in the ordinary course of the debtor’s business, when:

(1) The person in possession authenticates a record acknowledging that it holds possession of the collateral for the secured party’s benefit; or

(2) The person takes possession of the collateral after having authenticated a record acknowledging that it will hold possession of collateral for the secured party’s benefit.

(d) **Time of perfection by possession; continuation of perfection.** If perfection of a security interest depends upon possession of the collateral by a secured party, perfection occurs no earlier than the time the secured party takes possession and continues only while the secured party retains possession.

(e) **Time of perfection by delivery; continuation of perfection.** A security interest in a certificated security in registered form is perfected by delivery when delivery of the certificated security occurs under Code Section 11-8-301 and remains perfected by delivery until the debtor obtains possession of the security certificate.

(f) **Acknowledgment not required.** A person in possession of collateral is not required to acknowledge that it holds possession for a secured party's benefit.

(g) **Effectiveness of acknowledgment; no duties or confirmation.** If a person acknowledges that it holds possession for the secured party's benefit:

(1) The acknowledgment is effective under subsection (c) of this Code section or subsection (a) of Code Section 11-8-301, even if the acknowledgment violates the rights of a debtor; and

(2) Unless the person otherwise agrees or law other than this article otherwise provides, the person does not owe any duty to the secured party and is not required to confirm the acknowledgment to another person.

(h) **Secured party's delivery to person other than debtor.** A secured party having possession of collateral does not relinquish possession by delivering the collateral to a person other than the debtor or a lessee of the collateral from the debtor in the ordinary course of the debtor's business if the person was instructed before the delivery or is instructed contemporaneously with the delivery:

(1) To hold possession of the collateral for the secured party's benefit; or

(2) To redeliver the collateral to the secured party.

(i) **Effect of delivery under subsection (h) of this Code section; no duties or confirmation.** A secured party does not relinquish possession, even if a delivery under subsection (h) of this Code section violates the rights of a debtor. A person to which collateral is delivered under subsection (h) of this Code section does not owe any duty to the secured party and is not required to confirm the delivery to another person unless the person otherwise agrees or law other than this article otherwise provides. (Code 1981, § 11-9-313, enacted by Ga. L. 2001, p. 362, § 1; Ga. L. 2010, p. 481, § 2-26/HB 451.)

**The 2010 amendment,** effective May 27, 2010, inserted "tangible" in the middle of the first sentence of subsection (a). See the Editor's notes for applicability.

**Editor's notes.** — Ga. L. 2010, p. 481, § 3-1, not codified by the General Assem-

bly, provides that: "This Act applies to a document of title that is issued or a bailment that arises on or after the effective date of this Act. This Act does not apply to a document of title that is issued or a bailment that arises before the effec-



tive date of this Act even if the document of title or bailment would be subject to this Act if the document of title had been issued or bailment had arisen on or after the effective date of this Act. This Act does not apply to a right of action that has accrued before the effective date of this Act.” This Act became effective May 27, 2010.

Ga. L. 2010, p. 481, § 3-2, not codified by the General Assembly, provides that:

“A document of title issued or a bailment that arises before the effective date of this Act and the rights, documents, and interests flowing from that document or bailment are governed by any statute or other rule amended or repealed by this Act as if such amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute or other rule.” This Act became effective May 27, 2010.

### RESEARCH REFERENCES

**ALR.** — Perfection of security interests by possession, delivery, or control under revised Article 9 of Uniform Commercial Code, 53 A.L.R.6th 159.

### 11-9-314. Perfection by control.

(a) **Perfection by control.** A security interest in investment property, deposit accounts, letter of credit rights, electronic chattel paper, or electronic documents may be perfected by control of the collateral under Code Section 11-7-106, 11-9-104, 11-9-105, 11-9-106, or 11-9-107.

(b) **Specified collateral; time of perfection by control; continuation of perfection.** A security interest in deposit accounts, electronic chattel paper, letter of credit rights, or electronic documents is perfected by control under Code Section 11-7-106, 11-9-104, 11-9-105, or 11-9-107 when the secured party obtains control and remains perfected by control only while the secured party retains control.

(c) **Investment property; time of perfection by control; continuation of perfection.** A security interest in investment property is perfected by control under Code Section 11-9-106 from the time the secured party obtains control and remains perfected by control until:

(1) The secured party does not have control; and

(2) One of the following occurs:

(A) If the collateral is a certificated security, the debtor has or acquires possession of the security certificate;

(B) If the collateral is an uncertificated security, the issuer has registered or registers the debtor as the registered owner; or

(C) If the collateral is a security entitlement, the debtor is or becomes the entitlement holder. (Code 1981, § 11-9-314, enacted by Ga. L. 2001, p. 362, § 1; Ga. L. 2010, p. 481, § 2-27/HB 451.)

**The 2010 amendment**, effective May 27, 2010, in subsection (a), substituted “electronic chattel paper, or electronic documents” for “or electronic chattel paper”

and inserted “11-7-106,”; and, in subsection (b), substituted “letter of credit rights, or electronic documents” for “or letter of credit rights” near the beginning and inserted “11-7-106”. See the Editor’s notes for applicability.

**Editor’s notes.** — Ga. L. 2010, p. 481, § 3-1, not codified by the General Assembly, provides that: “This Act applies to a document of title that is issued or a bailment that arises on or after the effective date of this Act. This Act does not apply to a document of title that is issued or a bailment that arises before the effective date of this Act even if the document of title or bailment would be subject to this Act if the document of title had been issued or bailment had arisen on or after

the effective date of this Act. This Act does not apply to a right of action that has accrued before the effective date of this Act.” This Act became effective May 27, 2010.

Ga. L. 2010, p. 481, § 3-2, not codified by the General Assembly, provides that: “A document of title issued or a bailment that arises before the effective date of this Act and the rights, documents, and interests flowing from that document or bailment are governed by any statute or other rule amended or repealed by this Act as if such amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute or other rule.” This Act became effective May 27, 2010.

## RESEARCH REFERENCES

**ALR.** — Perfection of security interests by possession, delivery, or control under

revised Article 9 of Uniform Commercial Code, 53 A.L.R.6th 159.

## 11-9-315. Secured party’s rights on disposition of collateral and in proceeds.

## JUDICIAL DECISIONS

### Proceeds of collateral.

Creditor that had purchased the debtor’s accounts receivable did not hold the first priority lien against the assets, and could not assert equitable subrogation, because the creditor exercised inexcusable neglect in failing to perfect the creditor’s own lien. Debtor’s estate retained an interest in receivables under O.C.G.A. § 11-9-315(a)(1). *Kerr v. Commer. Credit Group, Inc. (In re Siskey Hauling Co.)*, 456 B.R. 597 (Bankr. N.D. Ga. 2011).

### Lien attached to proceeds.

As a cotton gin bought a farmer’s cotton crop with actual knowledge, as defined by O.C.G.A. § 11-1-201(25), (27), of a bank’s security interest therein, but still withheld some of the proceeds of the sale under O.C.G.A. § 11-9-315(a)(1), the gin

was liable to the bank for conversion and was not entitled to summary judgment. *Bank of Dawson v. Worth Gin Co.*, 295 Ga. App. 256, 671 S.E.2d 279 (2008).

**Debtor not a fiduciary.** — Where a farmer did not require that the proceeds of the debtor’s sales of the farmer’s seeds be kept in a separate account, and the debtor paid the debtor’s company’s operating expenses with the proceeds of the sale of the farmer’s seeds, the debtor was not a fiduciary under 11 U.S.C. § 523(a)(4) and the debt was discharged in the debtor’s bankruptcy; neither O.C.G.A. § 11-9-315(a)(1) nor O.C.G.A. § 11-7-204(1) imposed any fiduciary duties on the debtor. *Bennett v. Wright (In re Wright)*, 282 B.R. 510 (Bankr. M.D. Ga. 2002).

## RESEARCH REFERENCES

**ALR.** — Creation and perfection of security interests in insurance proceeds un-

der Article 9 of Uniform Commercial Code, 47 A.L.R.6th 347.

**11-9-316. Effect of change in governing law.**

(a) **General rule; effect on perfection of change in governing law.** A security interest perfected pursuant to the law of the jurisdiction designated in paragraph (1) of Code Section 11-9-301 or subsection (c) of Code Section 11-9-305 remains perfected until the earliest of:

(1) The time perfection would have ceased under the law of that jurisdiction;

(2) The expiration of four months after a change of the debtor's location to another jurisdiction; or

(3) The expiration of one year after a transfer of collateral to a person that thereby becomes a debtor and is located in another jurisdiction.

(b) **Security interest perfected or unperfected under law of new jurisdiction.** If a security interest described in subsection (a) of this Code section becomes perfected under the law of the other jurisdiction before the earliest time or event described in that subsection, it remains perfected thereafter. If the security interest does not become perfected under the law of the other jurisdiction before the earliest time or event, it becomes unperfected and is deemed never to have been perfected as against a purchaser of the collateral for value.

(c) **Possessory security interest in collateral moved to new jurisdiction.** A possessory security interest in collateral, other than goods covered by a certificate of title and as-extracted collateral consisting of goods, remains continuously perfected if:

(1) The collateral is located in one jurisdiction and subject to a security interest perfected under the law of that jurisdiction;

(2) Thereafter the collateral is brought into another jurisdiction; and

(3) Upon entry into the other jurisdiction, the security interest is perfected under the law of the other jurisdiction.

(d) **Goods covered by certificate of title from this state.** Except as otherwise provided in subsection (e) of this Code section, a security interest in goods covered by a certificate of title which is perfected by any method under the law of another jurisdiction when the goods become covered by a certificate of title from this state remains perfected until the security interest would have become unperfected under the law of the other jurisdiction had the goods not become so covered.

(e) **When subsection (d) of this Code section security interest becomes unperfected against purchasers.** A security interest described in subsection (d) of this Code section becomes unperfected as



against a purchaser of the goods for value and is deemed never to have been perfected as against a purchaser of the goods for value if the applicable requirements for perfection under subsection (b) of Code Section 11-9-311 or Code Section 11-9-313 are not satisfied before the earlier of:

(1) The time the security interest would have become unperfected under the law of the other jurisdiction had the goods not become covered by a certificate of title from this state; or

(2) The expiration of four months after the goods had become so covered.

**(f) Change in jurisdiction of bank, issuer, nominated person, securities intermediary, or commodity intermediary.** A security interest in deposit accounts, letter of credit rights, or investment property which is perfected under the law of the bank's jurisdiction, the issuer's jurisdiction, a nominated person's jurisdiction, the securities intermediary's jurisdiction, or the commodity intermediary's jurisdiction, as applicable, remains perfected until the earlier of:

(1) The time the security interest would have become unperfected under the law of that jurisdiction; or

(2) The expiration of four months after a change of the applicable jurisdiction to another jurisdiction.

**(g) Subsection (f) of this Code section security interest perfected or unperfected under law of new jurisdiction.** If a security interest described in subsection (f) of this Code section becomes perfected under the law of the other jurisdiction before the earlier of the time or the end of the period described in that subsection, it remains perfected thereafter. If the security interest does not become perfected under the law of the other jurisdiction before the earlier of that time or the end of that period, it becomes unperfected and is deemed never to have been perfected as against a purchaser of the collateral for value.

**(h) Effect on filed financing statement of change in governing law.** The following rules apply to collateral to which a security interest attaches within four months after the debtor changes its location to another jurisdiction:

(1) A financing statement filed before the change pursuant to the law of the jurisdiction designated in paragraph (1) of Code Section 11-9-301 or subsection (c) of Code Section 11-9-305 is effective to perfect a security interest in the collateral if the financing statement would have been effective to perfect a security interest in the collateral had the debtor not changed its location; and

(2) If a security interest perfected by a financing statement that is effective under paragraph (1) of this subsection becomes perfected

under the law of the other jurisdiction before the earlier of the time the financing statement would have become ineffective under the law of the jurisdiction designated in paragraph (1) of Code Section 11-9-301 or subsection (c) of Code Section 11-9-305 or the expiration of the four-month period, it remains perfected thereafter. If the security interest does not become perfected under the law of the other jurisdiction before the earlier time or event, it becomes unperfected and is deemed never to have been perfected as against a purchaser of the collateral for value.

**(i) Effect of change in governing law on financing statement filed against original debtor.** If a financing statement naming an original debtor is filed pursuant to the law of the jurisdiction designated in paragraph (1) of Code Section 11-9-301 or subsection (c) of Code Section 11-9-305 and the new debtor is located in another jurisdiction, the following rules apply:

(1) The financing statement is effective to perfect a security interest in collateral acquired by the new debtor before, and within four months after, the new debtor becomes bound under subsection (d) of Code Section 11-9-203 if the financing statement would have been effective to perfect a security interest in the collateral had the collateral been acquired by the original debtor; and

(2) A security interest perfected by the financing statement and which becomes perfected under the law of the other jurisdiction before the earlier of the time the financing statement would have become ineffective under the law of the jurisdiction designated in paragraph (1) of Code Section 11-9-301 or subsection (c) of Code Section 11-9-305 or the expiration of the four-month period remains perfected thereafter. A security interest that is perfected by the financing statement but which does not become perfected under the law of the other jurisdiction before the earlier time or event becomes unperfected and is deemed never to have been perfected as against a purchaser of the collateral for value. (Code 1981, § 11-9-316, enacted by Ga. L. 2001, p. 362, § 1; Ga. L. 2013, p. 690, § 5/SB 185.)

**The 2013 amendment**, effective July 1, 2013, substituted “Effect of change” for “Continued perfection of security interest

following change” in the catchline; and added subsections (h) and (i).

## Subpart 3

## Priority

**11-9-317. Interests that take priority over or take free of security interest or agricultural lien.**

(a) **Conflicting security interests and rights of lien creditors.** A security interest or agricultural lien is subordinate to the rights of:

(1) A person entitled to priority under Code Section 11-9-322; and

(2) Except as otherwise provided in subsection (e) of this Code section, a person that becomes a lien creditor before the earlier of the time:

(A) The security interest or agricultural lien is perfected; or

(B) A financing statement covering the collateral is filed.

(b) **Buyers that receive delivery.** Except as otherwise provided in subsection (e) of this Code section, a buyer, other than a secured party, of tangible chattel paper, tangible documents, goods, instruments, or a certificated security takes free of a security interest or agricultural lien if the buyer gives value and receives delivery of the collateral without knowledge of the security interest or agricultural lien and before it is perfected.

(c) **Lessees that receive delivery.** Except as otherwise provided in subsection (e) of this Code section, a lessee of goods takes free of a security interest or agricultural lien if the lessee gives value and receives delivery of the collateral without knowledge of the security interest or agricultural lien and before it is perfected.

(d) **Licensees and buyers of certain collateral.** A licensee of a general intangible or a buyer, other than a secured party, of collateral other than tangible chattel paper, tangible documents, goods, instruments, or a certificated security takes free of a security interest if the licensee or buyer gives value without knowledge of the security interest and before it is perfected.

(e) **Purchase money security interest.** Except as otherwise provided in Code Sections 11-9-320 and 11-9-321, if a person files a financing statement with respect to a purchase money security interest before or within 20 days after the debtor receives delivery of the collateral, the security interest takes priority over the rights of a buyer, lessee, or lien creditor which arise between the time the security interest attaches and the time of filing. (Code 1981, § 11-9-317, enacted by Ga. L. 2001, p. 362, § 1; Ga. L. 2010, p. 481, § 2-28/HB 451; Ga. L. 2013, p. 690, § 6/SB 185.)



**The 2010 amendment**, effective May 27, 2010, inserted “tangible” near the middle of subsection (b); and inserted “electronic documents,” in the middle of subsection (d). See the Editor’s notes for applicability.

**The 2013 amendment**, effective July 1, 2013, substituted “certificated security” for “security certificate” in subsection (b); and substituted “collateral other than tangible chattel paper, tangible documents, goods, instruments, or a” for “accounts, electronic chattel paper, electronic documents, general intangibles, or investment property other than a” in subsection (d).

**Editor’s notes.** — Ga. L. 2010, p. 481, § 3-1, not codified by the General Assembly, provides that: “This Act applies to a document of title that is issued or a bailment that arises on or after the effective date of this Act. This Act does not apply to a document of title that is issued or a bailment that arises before the effective

date of this Act even if the document of title or bailment would be subject to this Act if the document of title had been issued or bailment had arisen on or after the effective date of this Act. This Act does not apply to a right of action that has accrued before the effective date of this Act.” This Act became effective May 27, 2010.

Ga. L. 2010, p. 481, § 3-2, not codified by the General Assembly, provides that: “A document of title issued or a bailment that arises before the effective date of this Act and the rights, documents, and interests flowing from that document or bailment are governed by any statute or other rule amended or repealed by this Act as if such amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute or other rule.” This Act became effective May 27, 2010.

## JUDICIAL DECISIONS

### **Knowledge of security interest.**

As a cotton gin bought a farmer’s cotton crop with actual knowledge, as defined by O.C.G.A. § 11-1-201(25), (27), of a bank’s security interest therein, but still withheld some of the proceeds of the sale, under O.C.G.A. § 11-9-315(a)(1), the gin was liable to the bank for conversion and was not entitled to summary judgment. *Bank of Dawson v. Worth Gin Co.*, 295 Ga. App. 256, 671 S.E.2d 279 (2008).

**Deemed unperfected security interests.** — Although a bank’s security interests in equipment were properly perfected

and remained so throughout a buyer’s acquisition of the equipment from the debtor, those security interests were deemed never to have been perfected as against a purchaser for value when the bank failed to file timely continuation statements, under O.C.G.A. § 11-9-515(b), and the buyer took free of the security interests under O.C.G.A. § 11-9-317(b) because the buyer did not have actual knowledge of the security interests. *Four County Bank v. Tidewater Equip. Co.*, 331 Ga. App. 753, 771 S.E.2d 437 (2015).

## **11-9-320. Buyer of goods.**

## JUDICIAL DECISIONS

**Sale of collateral.** — Bona fide purchaser’s, a corporation, purchase of a machine did not fall within an exception to the general rule that a security interest continued after the sale of the collateral, as a similar argument in *Superior Bank v.*

*Human Services Employees Credit Union*, 252 Ga. App. 489, 556 S.E.2d 155 (2001) was rejected. *Intermet Corp. v. Fin. Fed. Credit, Inc.*, 263 Ga. App. 622, 588 S.E.2d 810 (2003).

## RESEARCH REFERENCES

**Am. Jur. Proof of Facts.** — Status as “Buyer in Ordinary Course of Business,” 2 POF2d 165.

### 11-9-322. Priorities among conflicting security interests in and agricultural liens on same collateral.

## JUDICIAL DECISIONS

**Determining priority in destroyed property covered by insurance.** — Bankruptcy court found that under the security deed the credit company held a valid security interest in the destroyed property and the security deed provided sufficient language to grant the credit company a security interest in the proceeds of the collateral, including any insurance proceeds. *Altegra Credit Co. v. Ford Motor Credit Co. (In re Brantley)*, 286 B.R. 918 (Bankr. S.D. Ga. 2002).

**Perfected security interest had priority over attempted reservation of title.** — Peanut growers’ attempted reservation of title when the growers’ delivered

peanuts to a peanut company at a peanut broker’s direction amounted to a security interest; however, the growers never perfected their security interests. A cooperative bank’s security interest in the peanuts was perfected as the grower had filed financing statements and the security interest had attached so that the bank’s perfected security interest had priority over the growers’ unperfected security interests. *Farm Credit of Northwest Fla., ACA v. Easom Peanut Co.*, 312 Ga. App. 374, 718 S.E.2d 590 (2011), cert. denied, No. S12C0444, 2012 Ga. LEXIS 315 (Ga. 2012).

#### 11-9-322.1. Crops produced with new value.

## RESEARCH REFERENCES

**Am. Jur. Proof of Facts.** — Value of Growing Crop, 20 POF2d 115.

### 11-9-326. Priority of security interests created by new debtor.

(a) **Subordination of security interest created by new debtor.** Subject to subsection (b) of this Code section, a security interest that is created by a new debtor in collateral in which the new debtor has or acquires rights and is perfected solely by a filed financing statement that would be ineffective to perfect the security interest but for the application of paragraph (1) of subsection (i) of Code Section 11-9-316 or Code Section 11-9-508 is subordinate to a security interest in the same collateral which is perfected other than by such a filed financing statement.

(b) **Priority under other provisions; multiple original debtors.** The other provisions of this part determine the priority among conflicting security interests in the same collateral perfected by filed financing statements described in subsection (a) of this Code section. However, if

the security agreements to which a new debtor became bound as debtor were not entered into by the same original debtor, the conflicting security interests rank according to priority in time of the new debtor's having become bound. (Code 1981, § 11-9-326, enacted by Ga. L. 2001, p. 362, § 1; Ga. L. 2013, p. 690, § 7/SB 185.)

**The 2013 amendment**, effective July 1, 2013, rewrote subsection (a), which formerly read: "*Subordination of security interests created by new debtor*: Subject to subsection (b) of this Code section, a security interest created by a new debtor which is perfected by a filed financing statement that is effective solely under Code Section 11-9-508 in collateral in which a new debtor has or acquires rights

is subordinate to a security interest in the same collateral which is perfected other than by a filed financing statement that is effective solely under Code Section 11-9-508."; and substituted "described in subsection (a) of this Code section" for "that are effective solely under Code Section 11-9-508" in the first sentence of subsection (b).

### 11-9-333. Priority of certain liens.

(a) **Year's support; property taxes; other state taxes; other taxes or judgments.** Except as is expressly provided to the contrary elsewhere in this article and in subsection (b) of this Code section, a perfected security interest in collateral takes priority over each and all of the liens, claims, and rights described in Code Section 44-14-320, relating to the establishment of certain liens, as now or hereafter amended; former Code Section 53-7-91 as such existed on December 31, 1997, if applicable; and Code Section 53-7-40, relating to the priority of debts against the estate of a decedent, as now or hereafter amended; provided, nevertheless, that:

(1) Year's support to the family, duly set apart in the collateral prior to the perfection of the subject security interest, takes priority over such security interest;

(2) A lien for property taxes duly assessed upon the subject collateral, either prior or subsequent to the perfection of the subject security interest, takes priority over security interest;

(3) A lien for all state taxes takes priority over such security interest, except where such security interest is perfected by filing a financing statement relative thereto prior to such time as the execution for such state taxes shall be filed in the manner provided by law; provided, nevertheless, that, with respect to priority rights between such tax liens and security interests where under this article the same are perfected other than by filing a financing statement, the same shall be determined as provided by law prior to January 1, 1964; and

(4) A lien for other unpaid taxes or a duly rendered judgment of a court having jurisdiction shall have the same priority with regard to



a security interest as it would have if the tax lien or judgment were a conflicting security interest within the meaning of Code Section 11-9-322 or an encumbrance within the meaning of Code Section 11-9-334, which conflicting security interest was perfected by filing or which encumbrance arose at the time the tax lien or judgment was duly recorded in the place designated by statute applicable thereto.

(b) **Mechanics' liens on farm machinery.** A mechanics' lien on farm machinery or equipment arising on or after July 1, 1985, shall have priority over any perfected security interest in such farm machinery or equipment unless a financing statement has been filed as provided in Code Section 11-9-501 and unless the financing statement describes the particular piece of farm machinery or equipment to which the perfected security interest applies. Such description may include the make, model, and serial number of the piece of farm machinery or equipment. However, such description shall be sufficient whether or not it is specific if it reasonably identifies what is described and a mistake in such description shall not invalidate the description if it provides a key to identifying the farm machinery or equipment. (Code 1981, § 11-9-333, enacted by Ga. L. 2001, p. 362, § 1; Ga. L. 2011, p. 752, § 11/HB 142; Ga. L. 2017, p. 723, § 10/HB 337.)

**The 2011 amendment,** effective May 13, 2011, part of an Act to revise, modernize, and correct the Code, substituted "hereafter amended; former Code Section 53-7-91 as such existed on December 31, 1997, if applicable; and Code Section 53-7-40," for "hereafter amended, and Code Section 53-7-91 of the 'Pre-1998 Probate Code,' if applicable, or Code Section 53-7-40 of the 'Revised Probate Code of 1998,'" in subsection (a).

**The 2017 amendment,** effective January 1, 2018, in paragraph (a)(3), deleted "other" preceding "state taxes" near the beginning, and substituted "filed" for "entered on the execution docket in the place and" in the middle.

**Editor's notes.** — Ga. L. 2017, p. 723, § 1/HB 337, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'State Tax Execution Modernization Act.'"

## JUDICIAL DECISIONS

**Bailee's lien inferior to recorded security interest.** — Bailee's lien was inferior to a cooperative banks' duly recorded security interest. Farm Credit of

Northwest Fla., *ACA v. Easom Peanut Co.*, 312 Ga. App. 374, 718 S.E.2d 590 (2011), cert. denied, No. S12C0444, 2012 Ga. LEXIS 315 (Ga. 2012).

## 11-9-334. Priority of security interests in fixtures and crops.

## JUDICIAL DECISIONS

**Interest of security holder in fixtures not subject to summary judgment.** — Trial court erred by granting the landlord summary judgment on the security interest holder's claims for conversion and reasonable hire because for some rea-

sonable period of time the tenant's interest in the trade fixture took priority over whatever interest the landlord might have received under O.C.G.A. § 44-7-12 when the landlord took possession of the premises; what constituted a reasonable

time was not subject to summary judgment. *Heany v. Bennett Street Properties*,

L.P., 336 Ga. App. 290, 785 S.E.2d 1 (2016).

### **11-9-337. Priority of security interests in goods covered by certificate of title.**

#### **JUDICIAL DECISIONS**

**Trial court erred in concluding that the security interest holder** had a valid, perfected security interest in the vehicle that the car buyer purchased; ordinarily, its security interest would have been noted on the certificate of title issued at time of purchase, but the state motor vehicle department made a clerical error and did not include the security interest holder's security interest on the certificate

of title and, as a result, the buyer was able to purchase the car free of the security interest holder's security interest pursuant to O.C.G.A. § 11-9-337, which provided an exception to enforcement of a security interest pursuant to O.C.G.A. § 40-3-50 for people taking delivery of a good without knowledge of a security interest. *Metzger v. Americredit Fin. Svcs.*, 273 Ga. App. 453, 615 S.E.2d 120 (2005).

### **11-9-338. Priority of security interest or agricultural lien perfected by filed financing statement providing certain incorrect information.**

If a security interest or agricultural lien is perfected by a filed financing statement providing information described in paragraph (5) of subsection (b) of Code Section 11-9-516 which is incorrect at the time the financing statement is filed:

(1) The security interest or agricultural lien is subordinate to a conflicting perfected security interest in the collateral to the extent that the holder of the conflicting security interest gives value in reasonable reliance upon the incorrect information; and

(2) A purchaser, other than a secured party, of the collateral takes free of the security interest or agricultural lien to the extent that, in reasonable reliance upon the incorrect information, the purchaser gives value and, in the case of tangible chattel paper, tangible documents, goods, instruments, or a security certificate, receives delivery of the collateral. (Code 1981, § 11-9-338, enacted by Ga. L. 2001, p. 362, § 1; Ga. L. 2010, p. 481, § 2-29/HB 451.)

**The 2010 amendment**, effective May 27, 2010, substituted "tangible chattel paper, tangible documents" for "chattel paper, documents" near the end of paragraph (2). See the Editor's notes for applicability.

**Editor's notes.** — Ga. L. 2010, p. 481, § 3-1, not codified by the General Assembly, provides that: "This Act applies to a document of title that is issued or a bailment that arises on or after the effective date of this Act. This Act does not apply to a document of title that is issued or a bailment that arises before the effective date of this Act even if the document of title or bailment would be subject to this Act if the document of title had been issued or bailment had arisen on or after the effective date of this Act. This Act does not apply to a right of action that has accrued before the effective date of this Act."

tive date of this Act. This Act does not apply to a document of title that is issued or a bailment that arises before the effective date of this Act even if the document of title or bailment would be subject to this Act if the document of title had been issued or bailment had arisen on or after the effective date of this Act. This Act does not apply to a right of action that has accrued before the effective date of this Act.

Act.” This Act became effective May 27, 2010.

Ga. L. 2010, p. 481, § 3-2, not codified by the General Assembly, provides that: “A document of title issued or a bailment that arises before the effective date of this Act and the rights, documents, and interests flowing from that document or

bailment are governed by any statute or other rule amended or repealed by this Act as if such amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute or other rule.” This Act became effective May 27, 2010.

## Subpart 4

### Rights of Bank

#### **11-9-340. Effectiveness of right of recoupment or set-off against deposit account.**

### JUDICIAL DECISIONS

**Bank’s right of setoff superior.** — In a case predicated on the Georgia tort law of conversion, a district court’s entry of summary judgment in favor of a bank was affirmed because O.C.G.A. §§ 11-9-109(a)(1) and (d)(10)(A), and 11-9-340 governed the effectiveness of set-off rights in deposit accounts, brought the case expressly within the authority of the

Uniform Commercial Code, and provided that the bank’s setoff right was superior to any security interest of a company in a predecessor company’s deposited funds. *Eleison Composites, LLC v. Wachovia Bank, N.A.*, No. 07-10206, 2008 U.S. App. LEXIS 5045 (11th Cir. Mar. 7, 2008) (Unpublished).

## PART 4

### RIGHTS OF THIRD PARTIES

#### **11-9-406. Discharge of account debtor; notification of assignment; identification and proof of assignment; restrictions on assignment of accounts, chattel paper, payment intangibles, and promissory notes ineffective.**

(a) **Discharge of account debtor; effect of notification.** Subject to subsections (b) through (i) of this Code section, an account debtor on an account, chattel paper, or a payment intangible may discharge its obligation by paying the assignor until, but not after, the account debtor receives a notification, authenticated by the assignor or the assignee, that the amount due or to become due has been assigned and that payment is to be made to the assignee. After receipt of the notification, the account debtor may discharge its obligation by paying the assignee and may not discharge the obligation by paying the assignor.

(b) **When notification ineffective.** Subject to subsection (h) of this Code section, notification is ineffective under subsection (a) of this Code section:



(1) If it does not reasonably identify the rights assigned;

(2) To the extent that an agreement between an account debtor and a seller of a payment intangible limits the account debtor's duty to pay a person other than the seller and the limitation is effective under law other than this article; or

(3) At the option of an account debtor, if the notification notifies the account debtor to make less than the full amount of any installment or other periodic payment to the assignee, even if:

(A) Only a portion of the account, chattel paper, or payment intangible has been assigned to that assignee;

(B) A portion has been assigned to another assignee; or

(C) The account debtor knows that the assignment to that assignee is limited.

(c) **Proof of assignment.** Subject to subsection (h) of this Code section, if requested by the account debtor, an assignee shall seasonably furnish reasonable proof that the assignment has been made. Unless the assignee complies, the account debtor may discharge its obligation by paying the assignor, even if the account debtor has received a notification under subsection (a) of this Code section.

(d) **Term restricting assignment generally ineffective.** Except as otherwise provided in subsection (e) of this Code section and Code Sections 11-2A-303, 11-9-407, and 53-12-80 through 53-12-83 and subject to subsection (h) of this Code section, a term in an agreement between an account debtor and an assignor or in a promissory note shall be ineffective to the extent that it:

(1) Prohibits, restricts, or requires the consent of the account debtor or person obligated on the promissory note to the assignment or transfer of, or the creation, attachment, perfection, or enforcement of a security interest in, the account, chattel paper, payment intangible, or promissory note; or

(2) Provides that the assignment, transfer, creation, attachment, perfection, or enforcement of the security interest may give rise to a default, breach, right of recoupment, claim, defense, termination, right of termination, or remedy under the account, chattel paper, payment intangible, or promissory note.

(e) **Inapplicability of subsection (d) of this Code section to certain sales.** Subsection (d) of this Code section does not apply to the sale of a payment intangible or promissory note, other than a sale pursuant to a disposition under Code Section 11-9-610 or an acceptance of collateral under Code Section 11-9-620.

(f) **Legal restrictions on assignment generally ineffective.** Except as otherwise provided in Code Sections 11-2A-303 and 11-9-407 and subject to subsections (h) and (i) of this Code section, a rule of law, statute, or regulation that prohibits, restricts, or requires the consent of a government, governmental body or official, or account debtor to the assignment or transfer of, or creation of a security interest in, an account or chattel paper is ineffective to the extent that the rule of law, statute, or regulation:

(1) Prohibits, restricts, or requires the consent of the government, governmental body or official, or account debtor to the assignment or transfer of, or the creation, attachment, perfection, or enforcement of a security interest, in the account or chattel paper; or

(2) Provides that the assignment, transfer, creation, attachment, perfection, or enforcement of the security interest may give rise to a default, breach, right of recoupment, claim, defense, termination, right of termination, or remedy under the account or chattel paper.

(g) **Paragraph (3) of subsection (b) not waivable.** Subject to subsection (h) of this Code section, an account debtor may not waive or vary its option under paragraph (3) of subsection (b) of this Code section.

(h) **Rule for individual under other law.** This Code section is subject to law other than this article which establishes a different rule for an account debtor who is an individual and who incurred the obligation primarily for personal, family, or household purposes.

(i) **Inapplicability to health care insurance receivable.** This Code section does not apply to an assignment of a health care insurance receivable. (Code 1981, § 11-9-406, enacted by Ga. L. 2001, p. 362, § 1; Ga. L. 2010, p. 579, § 6/SB 131; Ga. L. 2013, p. 690, § 8/SB 185.)

**The 2010 amendment,** effective July 1, 2010, in the introductory paragraph of subsection (d), substituted “and 53-12-80 through 53-12-83” for “and 53-12-28” in the middle and substituted “shall be” for “is” near the end.

**The 2013 amendment,** effective July 1, 2013, added “, other than a sale pursuant to a disposition under Code Section 11-9-610 or an acceptance of collateral under Code Section 11-9-620” at the end of subsection (e).

## JUDICIAL DECISIONS

**Assignment to surety.** — Trial court properly granted a surety’s motion for summary judgment because the security interest in the accounts owed was covered by the Uniform Commercial Code, and to the extent that the anti-assignment clauses of the construction contract could be construed to prohibit the roofing com-

pany from assigning the surety’s right to those accounts to the surety, the contracts were unenforceable as a matter of law under O.C.G.A. § 11-9-406(d)(1). *State Dep’t of Corr. v. Developers Sur. & Indem. Co.*, 324 Ga. App. 371, 750 S.E.2d 697 (2013).

**Cited** in Callaway Blue Springs, LLLP

v. West Basin Capital, LLC, 341 Ga. App.  
535, 801 S.E.2d 325 (2017).

### RESEARCH REFERENCES

**ALR.** — Construction and application of U.C.C. § 9-406 and former U.C.C. § 9-318(3) providing that account debtor is authorized to pay assignor until receipt of notification to pay assignee, 35 A.L.R.6th 437.

### **11-9-408. Restrictions on assignment of promissory notes, health care insurance receivables, and certain general intangibles ineffective.**

(a) **Term restricting assignment generally ineffective.** Except as otherwise provided in subsection (b) of this Code section or in Code Section 53-12-80, a term in a promissory note or in an agreement between an account debtor and a debtor which relates to a health care insurance receivable or a general intangible, including a contract, permit, license, or franchise, and which term prohibits, restricts, or requires the consent of the person obligated on the promissory note or the account debtor to the assignment or transfer of, or creation, attachment, or perfection of a security interest in, the promissory note, health care insurance receivable, or general intangible, shall be ineffective to the extent that the term:

(1) Would impair the creation, attachment, or perfection of a security interest; or

(2) Provides that the assignment, transfer, creation, attachment, or perfection of the security interest may give rise to a default, breach, right of recoupment, claim, defense, termination, right of termination, or remedy under the promissory note, health care insurance receivable, or general intangible.

(b) **Applicability of subsection (a) of this Code section to sales of certain rights to payment.** Subsection (a) of this Code section applies to a security interest in a payment intangible or promissory note only if the security interest arises out of a sale of the payment intangible or promissory note, other than a sale pursuant to a disposition under Code Section 11-9-610 or an acceptance of collateral under Code Section 11-9-620.

(c) **Legal restrictions on assignment generally ineffective.** Except as otherwise provided in Code Section 53-12-80, a rule of law, statute, or regulation that prohibits, restricts, or requires the consent of a government, governmental body or official, person obligated on a promissory note, or account debtor to the assignment or transfer of, or creation of a security interest in, a promissory note, health care insurance receivable, or general intangible, including a contract, per-



mit, license, or franchise between an account debtor and a debtor, shall be ineffective to the extent that the rule of law, statute, or regulation:

(1) Would impair the creation, attachment, or perfection of a security interest; or

(2) Provides that the assignment, transfer, creation, attachment, or perfection of the security interest may give rise to a default, breach, right of recoupment, claim, defense, termination, right of termination, or remedy under the promissory note, health care insurance receivable, or general intangible.

**(d) Limitation on ineffectiveness under subsections (a) and (c) of this Code section.** To the extent that a term in a promissory note or in an agreement between an account debtor and a debtor which relates to a health care insurance receivable or general intangible or a rule of law, statute, or regulation described in subsection (c) of this Code section would be effective under law other than this article but is ineffective under subsection (a) or (c) of this Code section, the creation, attachment, or perfection of a security interest in the promissory note, health care insurance receivable, or general intangible:

(1) Is not enforceable against the person obligated on the promissory note or the account debtor;

(2) Does not impose a duty or obligation on the person obligated on the promissory note or the account debtor;

(3) Does not require the person obligated on the promissory note or the account debtor to recognize the security interest, pay or render performance to the secured party, or accept payment or performance from the secured party;

(4) Does not entitle the secured party to use or assign the debtor's rights under the promissory note, health care insurance receivable, or general intangible, including any related information or materials furnished to the debtor in the transaction giving rise to the promissory note, health care insurance receivable, or general intangible;

(5) Does not entitle the secured party to use, assign, possess, or have access to any trade secrets or confidential information of the person obligated on the promissory note or the account debtor; and

(6) Does not entitle the secured party to enforce the security interest in the promissory note, health care insurance receivable, or general intangible. (Code 1981, § 11-9-408, enacted by Ga. L. 2001, p. 362, § 1; Ga. L. 2010, p. 579, § 7/SB 131; Ga. L. 2013, p. 690, § 9/SB 185.)

**The 2010 amendment**, effective July 1, 2010, in the introductory paragraphs of subsections (a) and (c), substituted "Code Section 53-12-80" for "Code Section

53-12-28” and substituted “shall be ineffective” for “is ineffective” near the end; deleted “assignment, transfer,” preceding “creation, attachment,” in paragraph (c)(1); and inserted “assignment, transfer,” near the beginning of paragraph (c)(2).

**The 2013 amendment**, effective July 1, 2013, added “, other than a sale pursuant to a disposition under Code Section 11-9-610 or an acceptance of collateral under Code Section 11-9-620” at the end of subsection (b).

## PART 5

## FILING

### Subpart 1

#### Filing Office; Contents and Effectiveness of Financing Statement

#### 11-9-501. Filing office.

### JUDICIAL DECISIONS

**Compliance.** — Trial court properly granted summary judgment pursuant to O.C.G.A. § 9-11-56 to colt possessors in a tortious interference with a contract claim by a horse trainer, wherein the trainer alleged that the trainer had a contract to keep the recently born colt in exchange for continued services to the mare’s owner; the court found that there was no showing that the possessors were aware of a contract regarding the ownership of the colt,

the possessors had followed the necessary procedures for filing a financing statement under O.C.G.A. §§ 11-9-501 through 11-9-504, they had allegedly foreclosed on their lien on the mare by the time that they became aware of the trainer’s claim, pursuant to O.C.G.A. § 44-14-490, and the trainer did not record a lien against the colt pursuant to O.C.G.A. § 44-14-511. *Medlin v. Morganstern*, 268 Ga. App. 116, 601 S.E.2d 359 (2004).

#### 11-9-502. Contents of financing statement; record of mortgage as fixture filing or financing statement; time of filing financing statement.

(a) **Sufficiency of financing statement.** Subject to subsection (b) of this Code section, a financing statement is sufficient only if it:

- (1) Provides the name of the debtor;
- (2) Provides the name of the secured party or a representative of the secured party;
- (3) Indicates the collateral covered by the financing statement; and
- (4) Where both (A) the collateral described consists only of consumer goods as defined in paragraph (24) of subsection (a) of Code Section 11-9-102 and (B) the secured obligation is originally \$5,000.00 or less, gives the maturity date of the secured obligation or specifies that such obligation is not subject to a maturity date.

(b) **Real property related financing statements.** Except as otherwise provided in subsection (b) of Code Section 11-9-501, to be sufficient, a financing statement that covers as-extracted collateral, growing crops, or timber to be cut, or which is filed as a fixture filing and covers goods that are or are to become fixtures, must satisfy subsection (a) of this Code section and also:

- (1) Indicate that it covers this type of collateral;
- (2) Indicate that it is to be filed for record in the real property records;
- (3) Provide a description of the real property to which the collateral is related sufficient to give constructive notice of a mortgage under the law of this state if the description were contained in a record of the mortgage of the real property; and
- (4) If the debtor does not have an interest of record in the real property, provide the name of a record owner.

(c) **Record of mortgage as fixture filing or financing statement.** A record of a mortgage filed prior to January 1, 1995, which was effective as a fixture filing when recorded remains effective as a fixture filing, and a record of a mortgage recorded on or after July 1, 2013, is effective, from the date of recording, as a financing statement filed as a fixture filing or as a financing statement covering as-extracted collateral or timber to be cut only if:

- (1) The record indicates the goods or accounts that it covers;
- (2) The goods are or are to become fixtures related to the real property described in the record or the collateral is related to the real property described in the record and is as-extracted collateral or timber to be cut;
- (3) The record satisfies the requirements for a financing statement in this Code section, but:
  - (A) The record need not indicate that it is to be filed in the real property records; and
  - (B) The record sufficiently provides the name of a debtor who is an individual if it provides the individual name of the debtor or the surname and first personal name of the debtor, even if the debtor is an individual to whom paragraph (4) of subsection (a) of Code Section 11-9-503 applies; and
- (4) The record is duly recorded.

(d) **Filing before security agreement or attachment.** A financing statement may be filed before a security agreement is made or a security interest otherwise attaches. (Code 1981, § 11-9-502, enacted



by Ga. L. 2001, p. 362, § 1; Ga. L. 2002, p. 995, § 7; Ga. L. 2013, p. 690, § 10/SB 185.)

**The 2013 amendment**, effective July 1, 2013, substituted the present provisions of subsection (c) for the former provisions, which read: “Real estate mortgages as fixture filings. A real estate mortgage may not be filed as a fixture filing, but one filed prior to January 1,

1995, which was effective as a fixture filing when filed, remains effective as a fixture filing until the mortgage is released or satisfied of record or its effectiveness otherwise terminates as to the real estate.”

### JUDICIAL DECISIONS

**Question of fact as to whether financing statement seriously misleading.** — In a suit involving the defendant defaulting on loans secured by property that was allegedly tortuously converted by sale, the grant of summary judgment to the plaintiff was reversed, in part, because an issue of material fact remained as to whether the financing statement was valid as to the name provided on the financing statement and whether the incorrect name made the statement seriously misleading. *Rebel Auction Co. v. Citizens Bank*, 343 Ga. App. 81, 805 S.E.2d 913 (2017).

**Security interest not perfected.** — Where a search of the county records did not reveal a financing statement due to a mistake in the name of the debtor shown on the financing statement, the security

interest in the funds relating to the financing statement was not perfected, and the money was awarded to a judgment creditor in an interpleader action. *Receivables Purchasing Co. v. R & R Directional Drilling, L.L.C.*, 263 Ga. App. 649, 588 S.E.2d 831 (2003).

Because an attorney who handled a closing in the capacity of an escrow agent for the client’s business had no actual or constructive notice of a creditor’s security interest in the business due to the improper filing pursuant to O.C.G.A. §§ 11-9-502, 11-9-503, and 11-9-506, because the debtor’s name was not properly listed and the interest was accordingly not perfected, claims as to conversion of the business closing proceeds failed. *All Bus. Corp. v. Choi*, 280 Ga. App. 618, 634 S.E.2d 400 (2006).

### 11-9-503. Name of debtor and secured party.

(a) **Sufficiency of debtor’s name.** A financing statement sufficiently provides the name of the debtor:

(1) Except as otherwise provided in paragraph (3) of this subsection, if the debtor is a registered organization or the collateral is held in a trust that is a registered organization, only if the financing statement provides the name that is stated to be the registered organization’s name on the public organic record most recently filed with or issued or enacted by the registered organization’s jurisdiction of organization which purports to state, amend, or restate the registered organization’s name;

(2) Subject to subsection (f) of this Code section, if the collateral is being administered by the personal representative of a decedent, only if the financing statement provides, as the name of the debtor, the name of the decedent and, in a separate part of the financing

statement, indicates that the collateral is being administered by a personal representative;

(3) If the collateral is held in a trust that is not a registered organization, only if the financing statement:

(A) Provides, as the name of the debtor:

(i) If the organic record of the trust specifies a name for the trust, the name specified; or

(ii) If the organic record of the trust does not specify a name for the trust, the name of the settlor or testator; and

(B) In a separate part of the financing statement:

(i) If the name is provided in accordance with division (3)(A)(i) of this subsection, indicates that the collateral is held in a trust; or

(ii) If the name is provided in accordance with division (3)(A)(ii) of this subsection, provides additional information sufficient to distinguish the trust from other trusts having one or more of the same settlors or the same testator and indicates that the collateral is held in a trust, unless the additional information so indicates;

(4) Subject to subsection (g) of this Code section, if the debtor is an individual to whom this state has issued a driver's license that has not expired, only if the financing statement provides the name of the individual which is indicated on the driver's license;

(5) If the debtor is an individual to whom paragraph (4) of this subsection does not apply, only if the financing statement provides the individual name of the debtor or the surname and first personal name of the debtor; and

(6) In other cases:

(A) If the debtor has a name, only if the financing statement provides the organizational name of the debtor; and

(B) If the debtor does not have a name, only if it provides the names of the partners, members, associates, or other persons comprising the debtor, in a manner that each name provided would be sufficient if the person named were the debtor.

(b) **Additional debtor related information.** A financing statement that provides the name of the debtor in accordance with subsection (a) of this Code section is not rendered ineffective by the absence of:

(1) A trade name or other name of the debtor; or

(2) Unless required under subparagraph (a)(6)(B) of this Code section, names of partners, members, associates, or other persons comprising the debtor.

(c) **Debtor's trade name insufficient.** A financing statement that provides only the debtor's trade name does not sufficiently provide the name of the debtor.

(d) **Representative capacity.** Failure to indicate the representative capacity of a secured party or representative of a secured party does not affect the sufficiency of a financing statement.

(e) **Multiple debtors and secured parties.** A financing statement may provide the name of more than one debtor and the name of more than one secured party.

(f) **Name of decedent.** The name of the decedent indicated on the order appointing the personal representative of the decedent issued by the court having jurisdiction over the collateral is sufficient as the "name of the decedent" under paragraph (2) of subsection (a) of this Code section.

(g) **Multiple driver's licenses.** If this state has issued to an individual more than one driver's license of a kind described in paragraph (4) of subsection (a) of this Code section, the one that was issued most recently is the one to which such paragraph refers.

(h) **Definition.** As used in this Code section, the term "name of the settlor or testator" means:

(1) If the settlor is a registered organization, the name that is stated to be the settlor's name on the public organic record most recently filed with or issued or enacted by the settlor's jurisdiction of organization which purports to state, amend, or restate the settlor's name; or

(2) In other cases, the name of the settlor or testator indicated in the trust's organic record. (Code 1981, § 11-9-503, enacted by Ga. L. 2001, p. 362, § 1; Ga. L. 2013, p. 690, § 11/SB 185.)

**The 2013 amendment**, effective July 1, 2013, substituted the present provisions of paragraphs (a)(1) through (a)(3), for the former provisions, which read: "(1) If the debtor is a registered organization, only if the financing statement provides the name of the debtor indicated on the public record of the debtor's jurisdiction of organization which shows the debtor to have been organized;

"(2) If the debtor is a decedent's estate, only if the financing statement provides

the name of the decedent and indicates that the debtor is an estate;

"(3) If the debtor is a trust or a trustee acting with respect to property held in trust, only if the financing statement:

"(A) Provides the name specified for the trust in its organic documents or, if no name is specified, provides the name of the settlor and additional information sufficient to distinguish the debtor from other trusts having one or more of the same settlors; and



“(B) Indicates, in the debtor’s name or otherwise, that the debtor is a trust or is a trustee acting with respect to property held in trust; and”; added present paragraphs (a)(4) and (a)(5); redesignated former paragraph (a)(4) as paragraph (a)(6); substituted “the financing statement provides the organizational” for “it provides

the individual or organizational” in subparagraph (a)(6)(A); added “, in a manner that each name provided would be sufficient if the person named were the debtor” at the end of subparagraph (a)(6)(B); substituted “subparagraph (a)(6)(B)” for “subparagraph (a)(4)(B)” in paragraph (b)(2); and added subsections (f) through (h).

### JUDICIAL DECISIONS

#### **Name indicated on driver’s license.**

— Name “indicated on the driver’s license” refers only to the name typed on the driver’s license and does not include the name signed by the debtor. *Pierce v. Farm Bureau Bank (In re Pierce)*, 581 B.R. 912 (Bankr. S.D. Ga. 2018).

**Security interest not perfected.** — Where a search of the county records did not reveal a financing statement due to a mistake in the name of the debtor shown on the financing statement, the security interest in the funds relating to the financing statement was not perfected, and the money was awarded to a judgment creditor in an interpleader action. *Receivables Purchasing Co. v. R & R Directional Drilling, L.L.C.*, 263 Ga. App. 649, 588 S.E.2d 831 (2003).

Because an attorney who handled a closing in the capacity of an escrow agent for the client’s business had no actual or constructive notice of a creditor’s security

interest in the business due to the improper filing pursuant to O.C.G.A. §§ 11-9-502, 11-9-503, and 11-9-506, because the debtor’s name was not properly listed and the interest was accordingly not perfected, claims as to conversion of the business closing proceeds failed. *All Bus. Corp. v. Choi*, 280 Ga. App. 618, 634 S.E.2d 400 (2006).

**Question of fact as to whether financing statement seriously misleading.** — In a suit involving the defendant defaulting on loans secured by property that was allegedly tortuously converted by sale, the grant of summary judgment to the plaintiff was reversed, in part, because an issue of material fact remained as to whether the financing statement was valid as to the name provided on the financing statement and whether the incorrect name made the statement seriously misleading. *Rebel Auction Co. v. Citizens Bank*, 343 Ga. App. 81, 805 S.E.2d 913 (2017).

### RESEARCH REFERENCES

**ALR.** — Sufficiency and effectiveness of designation of debtor in financing statement under Uniform Commercial Code

§§ 9-503 and 9-506 (revised 2000), 28 A.L.R.6th 461.

## 11-9-504. Indication of collateral.

### JUDICIAL DECISIONS

**Construction with O.C.G.A. § 10-1-36.** — Trial court properly granted judgment to a debtor, finding that a reposessor failed to comply with O.C.G.A. § 10-1-36, and therefore was precluded from collecting a deficiency from the debtor following the sale of the debtor’s vehicle, as the reposessor waived strict compliance with § 10-1-36 by admitting

that it received a facsimile notice sent by the debtor, and raised no issue as to the timeliness of the notice or whether it was received by the proper person, and failed to send the required notice thereunder to the debtor’s address shown on the contract or later designated by the debtor, opting instead to send said notice to a post office box. *Consumer Portfolio Servs. v.*

Rouse, 282 Ga. App. 314, 638 S.E.2d 442 (2006).

**Notice not required to lessee of vehicle.** — Lessor was not required to comply with the notice provisions of O.C.G.A. §§ 10-1-36 and 11-9-504 because the motor vehicle lease agreement the lessor entered into with the lessee was intended to be a true lease and not to evince a secured transaction; the lessor retained a mean-

ingful reversionary interest in the car because the option price was more than nominal since the purchase option price was approximately one-third of the car's value, and the agreement contained no provision purporting to grant the lessee equity in the vehicle prior to exercise of the purchase option. *Aniebue v. Jaguar Credit Corp.*, 308 Ga. App. 1, 708 S.E.2d 4 (2011).

## 11-9-506. Effect of errors or omissions.

### JUDICIAL DECISIONS

**Mistake in name of debtor.** — Where a search of the county records did not reveal a financing statement due to a mistake in the name of the debtor shown on the financing statement, the security interest in the funds relating to the financing statement was not perfected, and the money was awarded to a judgment creditor in an interpleader action. *Receivables Purchasing Co. v. R & R Directional Drilling, L.L.C.*, 263 Ga. App. 649, 588 S.E.2d 831 (2003).

Because an attorney who handled a closing in the capacity of an escrow agent for the client's business had no actual or constructive notice of a creditor's security interest in the business due to the improper filing pursuant to O.C.G.A. §§ 11-9-502, 11-9-503, and 11-9-506, because the debtor's name was not properly listed and the interest was accordingly not perfected, claims as to conversion of the business closing proceeds failed. *All Bus. Corp. v. Choi*, 280 Ga. App. 618, 634 S.E.2d 400 (2006).

Bank failed to provide in the bank's Financing Statement the name indicated on the debtor's driver's license as required by O.C.G.A. § 11-9-503(a)(4). Therefore, the bank's Financing Statement was seriously misleading under O.C.G.A. § 11-9-506(b). *Pierce v. Farm Bureau Bank (In re Pierce)*, 581 B.R. 912 (Bankr. S.D. Ga. 2018).

**Question of fact as to whether financing statement seriously misleading.** — In a suit involving the defendant defaulting on loans secured by property that was allegedly tortuously converted by sale, the grant of summary judgment to the plaintiff was reversed, in part, because an issue of material fact remained as to whether the financing statement was valid as to the name provided on the financing statement and whether the incorrect name made the statement seriously misleading. *Rebel Auction Co. v. Citizens Bank*, 343 Ga. App. 81, 805 S.E.2d 913 (2017).

### RESEARCH REFERENCES

**ALR.** — Sufficiency and effectiveness of designation of debtor in financing statement under Uniform Commercial Code

§§ 9-503 and 9-506 (revised 2000), 28 A.L.R.6th 461.

## 11-9-507. Effect of certain events on effectiveness of financing statement.

(a) **Disposition.** A filed financing statement remains effective with respect to collateral that is sold, exchanged, leased, licensed, or otherwise disposed of and in which a security interest or agricultural lien

continues, even if the secured party knows of or consents to the disposition.

(b) **Information becoming seriously misleading.** Except as otherwise provided in subsection (c) of this Code section and Code Section 11-9-508, a financing statement is not rendered ineffective if, after the financing statement is filed, the information provided in the financing statement becomes seriously misleading under Code Section 11-9-506.

(c) **Change in debtor's name.** If the name that a filed financing statement provides for a debtor becomes insufficient as the name of the debtor under subsection (a) of Code Section 11-9-503 so that the financing statement becomes seriously misleading under Code Section 11-9-506:

(1) The financing statement is effective to perfect a security interest in collateral acquired by the debtor before, or within four months after, the filed financing statement becomes seriously misleading; and

(2) The financing statement is not effective to perfect a security interest in collateral acquired by the debtor more than four months after the filed financing statement becomes seriously misleading, unless an amendment to the financing statement which renders the financing statement not seriously misleading is filed within four months after the financing statement became seriously misleading. (Code 1981, § 11-9-507, enacted by Ga. L. 2001, p. 362, § 1; Ga. L. 2013, p. 690, § 12/SB 185.)

**The 2013 amendment**, effective July 1, 2013, in subsection (c), substituted “the name that a filed financing statement provides for a debtor becomes insufficient as the name of the debtor under subsection (a) of Code Section 11-9-503 so that the” for “a debtor so changes its name that

a filed” at the beginning of the introductory language; substituted “filed financing statement becomes seriously misleading” for “change” in paragraphs (c)(1) and (c)(2); and substituted “financing statement became seriously misleading” for “change” at the end of paragraph (c)(2).

## 11-9-510. Effectiveness of filed record.

### JUDICIAL DECISIONS

**Effect of fixture filing.** — Under Georgia law, a fixture filing contained sufficient information to put a purchaser on notice of the existence of a bond trustee's prior unrecorded interest in the real property under an indenture, and the references in the fixture filing to the assignment and pledge of the debtor's interest would excite the attention of a purchaser

and trigger the duty to inquire further into the interest held by the bond trustee. That inquiry would include an examination of the indenture that would give the purchaser notice of the bond trustee's mortgage and, thus, the mortgage lien was enforceable against a bona fide purchaser, and the mortgage lien was not avoidable under the Bankruptcy Code.



Detention Mgmt., LLC v. UMB Bank, NA  
(In re Mun. Corr., LLC), 501 B.R. 119  
(Bankr. N.D. Ga. 2013).

### 11-9-513. Termination statement.

#### RESEARCH REFERENCES

**ALR.** — Consignment transactions under Uniform Commercial Code Article 9 on secured transactions, 58 A.L.R.6th 289.

### 11-9-515. Duration and effectiveness of financing statement; effect of lapsed financing statement; record of mortgage as financing statement.

(a) **Five-year effectiveness.** Except as otherwise provided in subsection (d) of this Code section, a filed financing statement is effective for a period of five years after the date of filing or until the twentieth day after any earlier maturity date required to be specified on the filed financing statement.

(b) **Lapse and continuation of financing statement.** The effectiveness of a filed financing statement lapses on the expiration of the period of its effectiveness unless before the lapse a continuation statement is filed pursuant to subsection (c) of this Code section. Upon lapse, a financing statement ceases to be effective and any security interest or agricultural lien that was perfected by the financing statement becomes unperfected, unless the security interest is perfected otherwise. If the security interest or agricultural lien becomes unperfected upon lapse, it is deemed never to have been perfected as against a purchaser of the collateral for value.

(c) **When continuation statement may be filed.** A continuation statement may be filed only within six months before the expiration of the five-year period specified in subsection (a) of this Code section or the occurrence of any earlier maturity date required to be specified on a filed financing statement.

(d) **Effect of filing continuation statement.** Except as otherwise provided in Code Section 11-9-510, upon timely filing of a continuation statement, the effectiveness of the initial financing statement continues for a period of five years commencing on the day on which the financing statement would have become ineffective in the absence of the filing or, where both (1) the collateral described consists only of consumer goods as defined in paragraph (24) of subsection (a) of Code Section 11-9-102 and (2) the secured obligation is originally \$5,000.00 or less, any earlier maturity date of the secured obligation specified on such continuation statement. Upon the expiration of the five-year period or the earlier

occurrence of a required specified maturity date, the financing statement lapses in the same manner as provided in subsection (b) of this Code section, unless, before the lapse, another continuation statement is filed pursuant to subsection (c) of this Code section. Succeeding continuation statements may be filed in the same manner to continue the effectiveness of the initial financing statement.

(e) **Record of mortgage as financing statement.** A record of a mortgage that is effective as a financing statement filed as a fixture filing under subsection (c) of Code Section 11-9-502 remains effective as a financing statement filed as a fixture filing until the mortgage is released or satisfied of record or its effectiveness otherwise terminates as to the real property. (Code 1981, § 11-9-515, enacted by Ga. L. 2001, p. 362, § 1; Ga. L. 2013, p. 690, § 13/SB 185.)

**The 2013 amendment,** effective July 1, 2013, added subsection (e).

### JUDICIAL DECISIONS

**Failure to file timely continuation statement.** — Although a bank's security interests in equipment were properly perfected and remained so throughout a buyer's acquisition of the equipment from the debtor, those security interests were deemed never to have been perfected as against a purchaser for value when the bank failed to file timely continuation statements, under O.C.G.A.

§ 11-9-515(b), and the buyer took free of the security interests under O.C.G.A. § 11-9-317(b) because the buyer did not have actual knowledge of the security interests. *Four County Bank v. Tidewater Equip. Co.*, 331 Ga. App. 753, 771 S.E.2d 437 (2015).

**Cited** in *Hamburger v. PFM Capital Mgmt.*, 286 Ga. App. 382, 649 S.E.2d 779 (2007).

### 11-9-516. What constitutes filing; effectiveness of filing.

(a) **What constitutes filing.** Except as otherwise provided in subsection (b) of this Code section, communication of a record to a filing office and tender of the filing fee or acceptance of the record by the filing office constitutes filing.

(b) **Refusal to accept record; filing does not occur.** Filing does not occur with respect to a record that a filing office refuses to accept because:

- (1) The record is not communicated by a method or medium of communication authorized by the filing office;
- (2) An amount equal to or greater than the applicable filing fee is not tendered;
- (3) The authority is unable to index the record because:
  - (A) In the case of an initial financing statement, the record does not provide a name for the debtor;

(B) In the case of an amendment or information statement, the record:

- (i) Does not identify the initial financing statement as required by Code Section 11-9-512 or 11-9-518, as applicable;
- (ii) Identifies an initial financing statement whose effectiveness has lapsed under Code Section 11-9-515;
- (iii) Identifies more than one initial financing statement; or
- (iv) Indicates that it is presented to accomplish more than one action, such as amendment and continuation;

(C) In the case of an initial financing statement that provides the name of a debtor identified as an individual or an amendment that provides a name of a debtor identified as an individual which was not previously provided in the financing statement to which the record relates, the record does not identify the debtor's surname; or

(D) In the case of a record filed or recorded in the filing office described in paragraph (1) of subsection (a) of Code Section 11-9-501, the record does not provide a sufficient description of the real property to which it relates;

(4) In the case of an initial financing statement or an amendment that adds a secured party of record, the record does not provide a name and mailing address for the secured party of record;

(5) In the case of an initial financing statement or an amendment that provides a name of a debtor which was not previously provided in the financing statement to which the amendment relates, the record does not:

(A) Provide a mailing address for the debtor; or

(B) Indicate whether the name provided as the name of the debtor is the name of an individual or an organization; or

(6) In the case of an assignment reflected in an initial financing statement under subsection (a) of Code Section 11-9-514 or an amendment filed under subsection (b) of Code Section 11-9-514, the record does not provide a name and mailing address for the assignee.

**(c) Rules applicable to subsection (b) of this Code section.** For purposes of subsection (b) of this Code section:

(1) A record does not provide information if the filing office is unable to read or decipher the information; and

(2) A record that does not indicate that it is an amendment or accurately identify an initial financing statement to which it relates,



as required by Code Section 11-9-512, 11-9-514, or 11-9-518, is an initial financing statement.

(d) **Refusal to accept record; record effective as filed record.** A record that is communicated to the filing office with tender of the filing fee, but which the filing office refuses to accept for a reason other than one set forth in subsection (b) of this Code section, is effective as a filed record except as against a purchaser of the collateral which gives value in reasonable reliance upon the absence of the record from the files. (Code 1981, § 11-9-516, enacted by Ga. L. 2001, p. 362, § 1; Ga. L. 2013, p. 690, § 14/SB 185.)

**The 2013 amendment**, effective July 1, 2013, substituted “information statement” for “correction statement” in the introductory language of subparagraph (b)(3)(B); substituted “surname” for “last name” in subparagraph (b)(3)(C); and, in paragraph (b)(5), added “or” at the end of subparagraph (b)(5)(A), inserted “name provided as the name of the” and “the

name of” in subparagraph (b)(5)(B), and deleted former paragraph (b)(5)(C), which read: “(C) If the financing statement indicates that the debtor is an organization, provide:

“(i) A type of organization for the debtor; or

“(ii) A jurisdiction of organization for the debtor; or”.

### **11-9-518. Inaccurate or wrongfully filed record.**

(a) **Statement with respect to record indexed under person’s name.** A person may file in the filing office an information statement with respect to a record indexed under the person’s name if the person believes that the record is inaccurate or was wrongfully filed. The information statement shall be filed in the filing office of the county where the record was filed.

(b) **Contents of statement under subsection (a) of this Code section.** An information statement under subsection (a) of this Code section must:

(1) Identify the record to which it relates by the file number assigned to the initial financing statement to which the record relates;

(2) Indicate that it is an information statement; and

(3) Provide the basis for the person’s belief that the record is inaccurate and indicate the manner in which the person believes the record should be amended to cure any inaccuracy or provide the basis for the person’s belief that the record was wrongfully filed.

(c) **Statement by secured party of record.** A person may file in the filing office an information statement with respect to a record filed there if such person is a secured party of record with respect to the financing statement to which the record relates and believes that the

person that filed the record was not entitled to do so under subsection (d) of Code Section 11-9-509.

(d) **Contents of statement under subsection (c) of this Code section.** An information statement under subsection (c) of this Code section must:

(1) Identify the record to which it relates by the file number assigned to the initial financing statement to which the record relates;

(2) Indicate that it is an information statement; and

(3) Provide the basis for the person's belief that the person that filed the record was not entitled to do so under subsection (d) of Code Section 11-9-509.

(e) **Record not affected by information statement.** The filing of an information statement does not affect the effectiveness of an initial financing statement or other filed record. (Code 1981, § 11-9-518, enacted by Ga. L. 2001, p. 362, § 1; Ga. L. 2013, p. 690, § 15/SB 185.)

**The 2013 amendment**, effective July 1, 2013, in subsection (a), substituted "Statement with respect to record indexed under person's name" for "Correction statement" in the subsection heading, substituted "in the filing office an information" for "a correction" in the first sentence, and substituted "information" for "correction" in the second sentence; in subsection (b), substituted the present provisions of the introductory paragraph

for the former provisions, which read: "Sufficiency of correction statement. A correction statement must:" and substituted "an information" for "a correction" in paragraph (b)(2); added present subsections (c) and (d); redesignated former subsection (c) as present subsection (e); and in subsection (e), substituted "information" for "correction" in the subsection heading and substituted "an information" for "a correction" near the beginning.

## Subpart 2

### Duties and Operation of Filing Office and Central Indexing System

#### **11-9-521. Uniform form of written financing statement and amendment; authority may prescribe forms.**

(a) **Initial financing statement form.** Except for a reason set forth in subsection (b) of Code Section 11-9-516, a filing office that accepts written records may not refuse to accept a written initial financing statement in the form and format set forth in the final official text of the 2010 amendments to Article 9 of the Uniform Commercial Code promulgated by the American Law Institute and the National Conference of Commissioners on Uniform State Laws, and such form and format are incorporated into this subsection by reference.

(b) **Amendment form.** Except for a reason set forth in subsection (b) of Code Section 11-9-516, a filing office that accepts written records may

not refuse to accept a written record amending an initial financing statement if such record is in the form and format set forth in the final official text of the 2010 amendments to Article 9 of the Uniform Commercial Code promulgated by the American Law Institute and the National Conference of Commissioners on Uniform State Laws, and such form and format are incorporated into this subsection by reference.

(c) **Authority's forms.** The authority may prescribe forms for initial financing statements and amendments. Subject to the provisions of subsections (a) and (b) of this Code section, all written financing statements and amendments must be presented for filing on forms prescribed by the authority. (Code 1981, § 11-9-521, enacted by Ga. L. 2001, p. 362, § 1; Ga. L. 2002, p. 415, § 11; Ga. L. 2013, p. 690, § 16/SB 185.)

**The 2013 amendment,** effective July 1, 2013, substituted “set forth in the final official text of the 2010 amendments to Article 9” for “set out in Section 9-521(a) of the Official Text of Revised Article 9, 2000 Revision,” in the middle of subsection (a);

and substituted “set forth in the final official text of the 2010 amendments to Article 9” for “set out in Section 9-521(b) of the Official Text of Revised Article 9, 2000 Revision,” in the middle of subsection (b).

### 11-9-523. Information from filing office and central indexing system; sale or license of records.

#### JUDICIAL DECISIONS

**Mistake in name of debtor.** — Where a search of the county records did not reveal a financing statement due to a mistake in the name of the debtor shown on the financing statement, the security interest in the funds relating to the fi-

nancing statement was not perfected, and the money was awarded to a judgment creditor in an interpleader action. *Receivables Purchasing Co. v. R & R Directional Drilling, L.L.C.*, 263 Ga. App. 649, 588 S.E.2d 831 (2003).

### 11-9-526. Rules.

(a) **Adoption of filing office rules.** The authority shall adopt and publish in print or electronically rules to implement this article, including rules to administer, maintain, and modify the central indexing system. The filing office rules must be consistent with this article.

(b) **Harmonization of rules.** To keep the filing office rules, practices of the filing offices, and practices of the authority in harmony with the rules and practices in other jurisdictions that enact substantially this part, and to keep the technology used by the filing offices and the authority compatible with the technology used in other jurisdictions that enact substantially this part, the authority, so far as is consistent with the purposes, policies, and provisions of this article, in adopting, amending, and repealing filing office rules, shall:



- (1) Consult with filing offices in other jurisdictions that enact substantially this part; and
- (2) Consult the most recent version of the Model Rules promulgated by the International Association of Corporate Administrators or any successor organization; and
- (3) Take into consideration the rules and practices of, and the technology used by, filing offices in other jurisdictions that enact substantially this part.

(c) **Notification system for farm products.** The authority shall not be authorized to adopt rules to implement a notification system for farm products in conformity with the requirements of Section 1324 of the federal Food Security Act of 1985, P.L. 99-198, as now in effect or as hereafter amended, and shall not be authorized to request certification of such notification system by the secretary of the United States Department of Agriculture. (Code 1981, § 11-9-526, enacted by Ga. L. 2001, p. 362, § 1; Ga. L. 2010, p. 838, § 10/SB 388.)

The 2010 amendment, effective June 1, 2010, inserted “in print or electronically” in the first sentence of subsection 3, 2010, inserted “in print or electronically” (a).

PART 6  
DEFAULT

Subpart 1

Default and Enforcement of Security Interest

**11-9-601. Rights after default; judicial enforcement; consignor or buyer of accounts, chattel paper, payment intangibles, or promissory notes.**

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION  
DEFAULT

General Consideration

**Filing suit after repossession without first disposing of collateral.**  
Trial court did not err in granting summary judgment to a bank, a secured creditor, that brought an action for money judgment on a note while holding the collateral pledged by a corporation and an individual because O.C.G.A. §§ 11-9-601(c) and 11-9-609(a)(1) allowed

a secured creditor in possession of a debtor’s collateral to employ a number of different remedial steps until the debt was satisfied. *Okefenokee Aircraft, Inc. v. Primesouth Bank*, 296 Ga. App. 782, 676 S.E.2d 394 (2009).

Default

**Pre-petition enforcement** under Georgia law of an assignment of rents

**Default** (Cont'd)

from a hotel's operation is not essential to the existence of a post-petition lien under 11 U.S.C. § 552(b)(2). In re Resort Inns, Inc., No. 04-41721, 2004 Bankr. LEXIS 1580 (Bankr. S.D. Ga. Aug. 30, 2004).

**Default found.** — Summary judgment was properly entered for a credit union on an owner's claim for wrongful possession as the owner defaulted on the owner's

agreement with the credit union by failing to pay the storage fees for the car, which resulted in a garageman's lien; under O.C.G.A. § 11-9-601(a), as the owner was in default, the credit union could, pursuant to O.C.G.A. § 11-9-609(a), take possession of the collateral, and under O.C.G.A. § 11-9-610, the credit union could sell it. *Endsley v. Robins Fed. Credit Union*, 267 Ga. App. 512, 600 S.E.2d 441 (2004).

**11-9-607. Collection and enforcement by secured party.**

(a) **Collection and enforcement generally.** If so agreed, and in any event after default, a secured party:

(1) May notify an account debtor or other person obligated on collateral to make payment or otherwise render performance to or for the benefit of the secured party;

(2) May take any proceeds to which the secured party is entitled under Code Section 11-9-315;

(3) May enforce the obligations of an account debtor or other person obligated on collateral and exercise the rights of the debtor with respect to the obligation of the account debtor or other person obligated on collateral to make payment or otherwise render performance to the debtor and with respect to any property that secures the obligations of the account debtor or other person obligated on the collateral;

(4) If it holds a security interest in a deposit account perfected by control under paragraph (1) of subsection (a) of Code Section 11-9-104, may apply the balance of the deposit account to the obligation secured by the deposit account; and

(5) If it holds a security interest in a deposit account perfected by control under paragraph (2) or (3) of subsection (a) of Code Section 11-9-104, may instruct the bank to pay the balance of the deposit account to or for the benefit of the secured party.

(b) **Nonjudicial enforcement of mortgage.** If necessary to enable a secured party to exercise under paragraph (3) of subsection (a) of this Code section the right of a debtor to enforce a mortgage nonjudicially, the secured party may record in the office in which a record of the mortgage is recorded:

(1) A copy of the security agreement that creates or provides for a security interest in the obligation secured by the mortgage; and

(2) The secured party's sworn affidavit in recordable form stating that:

(A) A default has occurred with respect to the obligation secured by the mortgage; and

(B) The secured party is entitled to enforce the mortgage nonjudicially.

(c) **Commercially reasonable collection and enforcement.** A secured party shall proceed in a commercially reasonable manner if the secured party:

(1) Undertakes to collect from or enforce an obligation of an account debtor or other person obligated on collateral; and

(2) Is entitled to charge back uncollected collateral or otherwise to full or limited recourse against the debtor or a secondary obligor.

(d) **Expenses of collection and enforcement.** A secured party may deduct from the collections made pursuant to subsection (c) of this Code section reasonable expenses of collection and enforcement, including reasonable attorney's fees and legal expenses incurred by the secured party.

(e) **Duties to secured party not affected.** This Code section does not determine whether an account debtor, bank, or other person obligated on collateral owes a duty to a secured party. (Code 1981, § 11-9-607, enacted by Ga. L. 2001, p. 362, § 1; Ga. L. 2013, p. 690, § 17/SB 185.)

**The 2013 amendment,** effective July 1, 2013, inserted "with respect to the ob-

ligation secured by the mortgage" in subparagraph (b)(2)(A).

## 11-9-609. Secured party's right to take possession after default.

### JUDICIAL DECISIONS

#### ANALYSIS

#### GENERAL CONSIDERATION

#### SELF-HELP REPOSSESSION

#### General Consideration

**Possession proper.** — Summary judgment was properly entered for a credit union on an owner's claim for wrongful possession as the owner defaulted on the owner's agreement with the credit union by failing to pay the storage fees for the car, which resulted in a garageman's lien; under O.C.G.A. § 11-9-601(a), as the owner was in default, the credit union could, pursuant to O.C.G.A. § 11-9-609(a), take possession of the collateral, and under O.C.G.A. § 11-9-610,

the credit union could sell it. *Endsley v. Robins Fed. Credit Union*, 267 Ga. App. 512, 600 S.E.2d 441 (2004).

#### Suing on contract after repossession but prior to selling collateral.

Trial court did not err in granting summary judgment to a bank, a secured creditor, that brought an action for money judgment on a note while holding the collateral pledged by a corporation and an individual because O.C.G.A. §§ 11-9-601(c) and 11-9-609(a)(1) allowed a secured creditor in possession of a debtor's collateral to employ a number of dif-



**General Consideration (Cont'd)**

ferent remedial steps until the debt was satisfied. *Okefenokee Aircraft, Inc. v. Primesouth Bank*, 296 Ga. App. 782, 676 S.E.2d 394 (2009).

**Breach of the peace.**

Trial court erred in granting summary judgment in favor of a creditor as to whether it could be held vicariously liable for an independent contractor's acts in attempting to repossess a debtor's car because the creditor had a non-delegable statutory duty under O.C.G.A. § 11-9-609 to not breach the peace in repossessing the car, and if the contractor's attempt to repossess the car was in violation of the statute, the creditor would be chargeable with that conduct since it was done in violation of a duty imposed upon it by statute; there is nothing in § 11-9-609 that allows a secured party to avoid liability for a wrongful repossession by simply delegating this duty to an independent contractor. *Lewis v. Nicholas Fin., Inc.*, 300 Ga. App. 888, 686 S.E.2d 468 (2009).

**Cited** in *Camelot Club Condo. Assoc. v. Afari-Opoku*, 340 Ga. App. 618, 798 S.E.2d 241 (2017).

**Self-Help Repossession**

**Threats by agents to defaulting party.** — Threats to have plaintiffs arrested if they did not disclose the location of a vehicle they purchased to individuals who were hired to repossess the vehicle were insufficient by themselves to show that the individuals making the statements violated former O.C.G.A. § 11-9-503. *Cornelius v. Nuvell Fin. Servs. Corp.*, 256 Ga. App. 171, 568 S.E.2d 82 (2002) (decided under former Code Section 11-9-503).

**Insurers for repossession company entitled to recover from insurers of repossession management company.** — Insurers' claim that other insurers who had paid a judgment against both insureds for breach of the peace during a repossession under O.C.G.A. § 11-9-609 had no right of reimbursement because fault had not been apportioned under O.C.G.A. § 51-12-33 was rejected; the insurers had a right to recover contribution as subrogees. *Renaissance Recovery Solutions, LLC v. Monroe Guar. Ins. Co.*, No. 114-102, 2016 U.S. Dist. LEXIS 91036 (S.D. Ga. July 13, 2016).

**11-9-610. Disposition of collateral after default.****JUDICIAL DECISIONS****ANALYSIS****GENERAL CONSIDERATION****RIGHT TO DEFICIENCY JUDGMENT****General Consideration**

**Sale commercially reasonable.** — Trial court did not err in concluding that a credit union's sale of a car was done in a commercially reasonable manner under O.C.G.A. § 11-9-610(b) where: (1) the car had been vandalized, including the stripping of its interior; (2) the car was not drivable; (3) a Texas credit union attempted to sell the car to its membership for eight weeks without results; (4) the credit union then contacted more than three body shops seeking a bid on the car; and (5) only one shop responded, and that bid was accepted. *Endsley v. Robins Fed.*

*Credit Union*, 267 Ga. App. 512, 600 S.E.2d 441 (2004).

Because a bank utilized professionals in the industry to assist in the sale of the debtor's equipment, and it did not rush to dispose of the equipment, but ultimately sold it to the person whom the debtor and its guarantor contended would most likely tender the highest bid for the equipment, the sale was conducted in a commercially reasonable manner under O.C.G.A. §§ 11-9-627(b) and 11-9-610. *AKA Mgmt. v. Branch Banking & Trust Co.*, 275 Ga. App. 615, 621 S.E.2d 576 (2005).

Assuming that the sale of collateral was a public sale within the meaning of

O.C.G.A. § 11-1-201(31.1), the sale occurred in a commercially reasonable manner, under O.C.G.A. § 11-9-627, because the sale was consistent with the reasonable commercial practices of dealers in similar equipment. Moreover, the sale qualified as a valid private sale under O.C.G.A. § 11-9-613 and the creditor did not have to comply with the statute's public-sale provisions regarding time and advertising. *Colonial Pac. Leasing Corp. v. N & N Partners, LLC*, 981 F. Supp. 2d 1345 (N.D. Ga. Nov. 4, 2013).

**Issue of fact as to commercial reasonableness of sale.** — Evidence from an owner of an equipment purchaser, who had 22 years of experience in the industry and who claimed that a finance company's sale of equipment upon repossession did not bring the equipment's full value, raised a genuine issue of fact as to commercial reasonableness; accordingly, a grant of summary judgment to the finance company on the company's claim for a deficiency judgment was error. *Mason Logging Co. v. GE Capital Corp.*, 322 Ga. App. 708, 746 S.E.2d 180 (2013).

**Evidence of fair and reasonable value insufficient.** — Documents in evidence showing only the sale price of the car were insufficient to establish the car's fair and reasonable value. No witness testified as to the basis for the opinion or opined that the appraised value of the car was the car's fair and reasonable value in that market at the time of the repossession or the sale. *Versey v. Citizens Trust*

*Bank*, 306 Ga. App. 479, 702 S.E.2d 479 (2010).

**Cited in** *Motors Acceptance Corp. v. Rozier*, 278 Ga. 52, 597 S.E.2d 367 (2004).

### Right to Deficiency Judgment

**Deficiency admitted by failure to respond to requests to admissions.** —

In a finance corporation's suit to recover a deficiency balance on an installment sales contract for a log loader, the trial court properly granted the corporation summary judgment upon concluding that no genuine issues of material fact existed based on the defending trucking company and the company's president failing to answer the requests for admissions that were served simultaneously with the complaint. By failing to respond and never challenging the trial court's denial of the motion to withdraw the admissions filed by the trucking company and the company's president, the following allegations were deemed admitted: that true and correct copies of the relevant documents, including the demand for payment were received; that the president executed the installment sales contract and the guaranty; that the president failed to make payments thereunder; that the principal balance due under the contract and guaranty was \$34,442.44 as of a certain date; and that the money was owed to the finance corporation. *JJM Trucking, Inc. v. Caterpillar Fin. Servs. Corp.*, 295 Ga. App. 560, 672 S.E.2d 529 (2009).

## 11-9-611. Notification before disposition of collateral.

### JUDICIAL DECISIONS

#### ANALYSIS

#### REASONABLE NOTIFICATION OF SALE

##### Reasonable Notification of Sale

**Receipt of notice admitted by failure to respond to requests for admissions.** — In a finance corporation's suit to recover a deficiency balance on an installment sales contract for a log loader, the trial court properly granted the corporation summary judgment upon concluding that no genuine issues of material fact

existed based on the defending trucking company and the company's president failing to answer the requests for admissions that were served simultaneously with the complaint. By failing to respond and never challenging the trial court's denial of the motion to withdraw the admissions filed by the trucking company and the company's president, the follow-

**Reasonable Notification of Sale (Cont'd)**

ing allegations were deemed admitted: that true and correct copies of the relevant documents, including the demand for payment were received; that the president executed the installment sales contract and the guaranty; that the president

failed to make payments thereunder; that the principal balance due under the contract and guaranty was \$34,442.44 as of a certain date; and that the money was owed to the finance corporation. *JJM Trucking, Inc. v. Caterpillar Fin. Servs. Corp.*, 295 Ga. App. 560, 672 S.E.2d 529 (2009).

**11-9-613. Contents and form of notification before disposition of collateral; general.**

**JUDICIAL DECISIONS**

**Valid private sale.** — Assuming that the sale of collateral was a public sale within the meaning of O.C.G.A. § 11-1-201(31.1), the sale occurred in a commercially reasonable manner, under O.C.G.A. § 11-9-627, because the sale was consistent with the reasonable commercial practices of dealers in similar equipment. Moreover, the sale qualified as a valid private sale under O.C.G.A. § 11-9-613 and the creditor did not have to comply with the statute's public-sale

provisions regarding time and advertising. *Colonial Pac. Leasing Corp. v. N & N Partners, LLC*, 981 F. Supp. 2d 1345 (N.D. Ga. Nov. 4, 2013).

**Misstatement in a notification of sale.** — Misstatement in the notifications of sale — that the secured creditor's subsidiary was the secured creditor — was a minor error that was not seriously misleading. *Colonial Pac. Leasing Corp. v. N & N Partners, LLC*, 981 F. Supp. 2d 1345 (N.D. Ga. Nov. 4, 2013).

**11-9-615. Application of proceeds of disposition; liability for deficiency and right to surplus.**

**JUDICIAL DECISIONS**

**Cited in** *Motors Acceptance Corp. v. Rozier*, 278 Ga. 52, 597 S.E.2d 367 (2004).

**11-9-616. Explanation of calculation of surplus or deficiency.**

**JUDICIAL DECISIONS**

**Deficiency admitted by failure to respond to requests for admissions.** — In a finance corporation's suit to recover a deficiency balance on an installment sales contract for a log loader, the trial court properly granted the corporation summary judgment upon concluding that no genuine issues of material fact existed based on the defending trucking company and the company's president failing to answer the requests for admissions that were served simultaneously with the complaint. By failing to respond

and never challenging the trial court's denial of the motion to withdraw the admissions filed by the trucking company and the company's president, the following allegations were deemed admitted: that true and correct copies of the relevant documents, including the demand for payment were received; that the president executed the installment sales contract and the guaranty; that the president failed to make payments thereunder; that the principal balance due under the contract and guaranty was \$34,442.44 as of a



certain date; and that the money was owed to the finance corporation. *JJM Trucking, Inc. v. Caterpillar Fin. Servs. Corp.*, 295 Ga. App. 560, 672 S.E.2d 529 (2009).

11-9-617. Rights of transferee of collateral.

JUDICIAL DECISIONS

**Termination of debtor’s ownership interest.** — Where a debtor’s vehicle was part of the debtor’s bankruptcy estate under Georgia law, return of the same was proper despite the creditor’s objections, as ownership remained with the debtor until the creditor disposed of or elected to retain the collateral in accordance with the procedures of the Georgia Uniform Commercial Code. *Motors Acceptance Corp. v. Rozier*, 278 Ga. 52, 597 S.E.2d 367 (2004).

11-9-619. Transfer of record or legal title.

JUDICIAL DECISIONS

**Cited** in *Motors Acceptance Corp. v. Rozier*, 278 Ga. 52, 597 S.E.2d 367 (2004).

11-9-620. Acceptance of collateral in full or partial satisfaction of obligation; compulsory disposition of collateral.

JUDICIAL DECISIONS

**Exercise of rights under O.C.G.A. § 11-9-620 as affecting successor liability doctrine.** — Corporate debtor that declared Chapter 11 bankruptcy was not liable to an LLC for unpaid rent that was owed by a lock and key company, even though the same individual owned both companies and the debtor had accepted collateral the lock and key company owned in full satisfaction of debt the company owed. The debtor’s decision to accept collateral the lock and key company owned in full satisfaction of the company’s debt was permitted under O.C.G.A. § 11-9-620 and was not a fraudulent attempt to avoid liabilities the lock and key company owed, the debtor was not a “mere continuation” of the lock and key company, and a contrary conclusion would have elevated form over substance and abridged the equitable principles that were codified in O.C.G.A. § 23-1-3. *Acme Sec., Inc. v. CLN Props., LLC* (In re *Acme Sec., Inc.*), 484 B.R. 475 (Bankr. N.D. Ga. 2012).

11-9-623. Right to redeem collateral.

JUDICIAL DECISIONS

**Bankruptcy.** — Chapter 13 debtor’s equipment and furnishings repossessed pre-petition by a creditor remained property of the estate and rightfully subject to turnover pursuant to 11 U.S.C. § 542; the debtor could regain possession of the collateral that had been repossessed by re-deeming the collateral pursuant to O.C.G.A. § 11-9-623. *Dierkes v. Crawford Orthodontic Care, P.C.* (In re *Dierkes*), No. 05-60983-MGD, 2005 Bankr. LEXIS 485 (Bankr. N.D. Ga. Feb. 15, 2005).  
**Cited** in *Motors Acceptance Corp. v. Rozier*, 278 Ga. 52, 597 S.E.2d 367 (2004).

## Subpart 2

## Noncompliance with Article

**11-9-625. Remedies for secured party's failure to comply with article.**

(a) **Judicial orders concerning noncompliance.** If it is established that a secured party is not proceeding in accordance with this article, a court may order or restrain collection, enforcement, or disposition of collateral on appropriate terms and conditions.

(b) **Damages for noncompliance.** Subject to subsections (c), (d), and (f) of this Code section, a person is liable for damages in the amount of any loss caused by a failure to comply with this article. Loss caused by a failure to comply may include loss resulting from the debtor's inability to obtain, or increased costs of, alternative financing.

(c) **Persons entitled to recover damages; statutory damages if collateral is consumer goods.** Except as otherwise provided in Code Section 11-9-628:

(1) A person that, at the time of the failure, was a debtor, was an obligor, or held a security interest in or other lien on the collateral may recover damages under subsection (b) of this Code section for its loss; and

(2) If the collateral is consumer goods, a person that was a debtor or a secondary obligor at the time a secured party failed to comply with this part may recover for that failure in any event an amount not less than the credit service charge plus 10 percent of the principal amount of the obligation or the time price differential plus 10 percent of the cash price.

(d) **Recovery when deficiency eliminated or reduced.** A debtor whose deficiency is eliminated under Code Section 11-9-626 may recover damages for the loss of any surplus. However, a debtor or secondary obligor whose deficiency is eliminated or reduced under Code Section 11-9-626 may not otherwise recover under subsection (b) of this Code section for noncompliance with the provisions of this part relating to collection, enforcement, disposition, or acceptance.

(e) **Statutory damages; noncompliance with specified provisions.** In addition to any damages recoverable under subsection (b) of this Code section, the debtor, consumer obligor, or person named as a debtor in a filed record, as applicable, may recover \$250.00 in each case from a person that:

(1) Fails to comply with Code Section 11-9-208;

(2) Fails to comply with Code Section 11-9-209;

(3) Files a record that the person is not entitled to file under subsection (a) of Code Section 11-9-509;

(4) Fails to cause the secured party of record to file or send a termination statement as required by subsection (a) or (c) of Code Section 11-9-513;

(5) Fails to comply with paragraph (1) of subsection (b) of Code Section 11-9-616 and whose failure is part of a pattern, or consistent with a practice, of noncompliance; or

(6) Fails to comply with paragraph (2) of subsection (b) of Code Section 11-9-616.

(f) **Statutory damages; noncompliance with Code Section 11-9-210.** A debtor or consumer obligor may recover damages under subsection (b) of this Code section and, in addition, \$250.00 in each case from a person that, without reasonable cause, fails to comply with a request under Code Section 11-9-210. A recipient of a request under Code Section 11-9-210 which never claimed an interest in the collateral or obligations that are the subject of a request under that Code section has a reasonable excuse for failure to comply with the request within the meaning of this subsection.

(g) **Limitation of security interest; noncompliance with Code Section 11-9-210.** If a secured party fails to comply with a request regarding a list of collateral or a statement of account under Code Section 11-9-210, the secured party may claim a security interest only as shown in the list or statement included in the request as against a person that is reasonably misled by the failure. (Code 1981, § 11-9-625, enacted by Ga. L. 2001, p. 362, § 1; Ga. L. 2013, p. 690, § 18/SB 185.)

**The 2013 amendment,** effective July 1, 2013, substituted “if collateral is consumer goods” for “in consumer goods

transaction” in the heading of subsection (c).

## JUDICIAL DECISIONS

**State remedy precludes federal due process claim.** — Because Georgia provided a remedy for improper repossession pursuant to O.C.G.A. § 11-9-625, a former arrestee, who claimed that police officers interfered with the arrestee’s possessory interests in a vehicle at the time of the arrest, had no federal due process claim with respect to the repossession of the vehicle. *Carroll v. Henry County*, 336 B.R. 578 (N.D. Ga. 2006).

**claim for damages.** — Debtor was judicially estopped from pursuing the debtor’s claim for damages under O.C.G.A. § 11-9-625 arising from a company’s sale of the debtor’s car following the car’s repossession because any recovery would not inure to the benefit of the debtor’s creditors, who were not fully compensated when a bankruptcy court discharged the debtor’s debts; the debtor’s claim that the company sold the debtor’s car for an unreasonably low price arose at least two

**Judicial estoppel barred debtor’s**



years before the debtor filed for bankruptcy protection, and because the cause of action accrued prior to the debtor's commencement of the debtor's bankruptcy action, the debtor was required to disclose the car in the debtor's schedule of assets to be included as property of the

bankruptcy estate under 11 U.S.C. § 541. *Sevostiyanova v. Tempest Recovery Servs.*, 307 Ga. App. 868, 705 S.E.2d 878 (2011).

**Cited** in *Motors Acceptance Corp. v. Rozier*, 278 Ga. 52, 597 S.E.2d 367 (2004).

**11-9-626. Action in which deficiency or surplus is in issue.**

**Law reviews.** — For article, “Georgia Foreclosure Confirmation Proceedings in Today’s Recessionary Real Estate World:

Back to the Future,” see 16 (No. 4) Ga. St. B.J. 11 (2010).

**JUDICIAL DECISIONS**

**Commercially reasonable disposition as prerequisite for deficiency judgment.**

Assuming that the sale of collateral was a public sale within the meaning of O.C.G.A. § 11-1-201(31.1), the sale occurred in a commercially reasonable manner, under O.C.G.A. § 11-9-627, because the sale was consistent with the reason-

able commercial practices of dealers in similar equipment. Moreover, the sale qualified as a valid private sale under O.C.G.A. § 11-9-613 and the creditor did not have to comply with the statute’s public-sale provisions regarding time and advertising. *Colonial Pac. Leasing Corp. v. N & N Partners, LLC*, 981 F. Supp. 2d 1345 (N.D. Ga. Nov. 4, 2013).

**11-9-627. Determination of whether conduct was commercially reasonable.**

**JUDICIAL DECISIONS**

**ANALYSIS**

**COMMERCIAL REASONABLENESS OF DISPOSITION  
BURDEN OF PROOF**

**Commercial Reasonableness of  
Disposition**

**Commercially reasonable disposition required.**

Because a bank utilized professionals in the industry to assist in the sale of the debtor’s equipment, and it did not rush to dispose of the equipment, but ultimately sold it to the person whom the debtor and its guarantor contended would most likely tender the highest bid for the equipment, said sale was conducted in a commercially reasonable manner under O.C.G.A. §§ 11-9-627(b) and 11-9-610. *AKA Mgmt. v. Branch Banking & Trust Co.*, 275 Ga. App. 615, 621 S.E.2d 576 (2005).

**Evidence of car’s fair and reasonable value insufficient.** — Documents

in evidence showing only the sale price of the car were insufficient to establish the car’s fair and reasonable value. No witness testified as to the basis for the opinion or opined that the appraised value of the car was the car’s fair and reasonable value in that market at the time of the repossession or the sale. *Versey v. Citizens Trust Bank*, 306 Ga. App. 479, 702 S.E.2d 479 (2010).

**Sale occurred in a commercially reasonable manner.** — Assuming that the sale of collateral was a public sale within the meaning of O.C.G.A. § 11-1-201(31.1), the sale occurred in a commercially reasonable manner, under O.C.G.A. § 11-9-627, because the sale was consistent with the reasonable commercial practices of dealers in similar equip-

ment. Moreover, the sale qualified as a valid private sale under O.C.G.A. § 11-9-613 and the creditor did not have to comply with the statute's public-sale provisions regarding time and advertising. *Colonial Pac. Leasing Corp. v. N & N Partners, LLC*, 981 F. Supp. 2d 1345 (N.D. Ga. Nov. 4, 2013).

### **Burden of Proof**

#### **Debtor's burden after creditor files a deficiency claim.**

Evidence from an owner of an equip-

ment purchaser, who had 22 years of experience in the industry and who claimed that a finance company's sale of equipment upon repossession did not bring the equipment's full value, raised a genuine issue of fact as to commercial reasonableness; accordingly, a grant of summary judgment to the finance company on the company's claim for a deficiency judgment was error. *Mason Logging Co. v. GE Capital Corp.*, 322 Ga. App. 708, 746 S.E.2d 180 (2013).

## **PART 7**

### **2001 TRANSITION**

**Editor's notes.** — Ga. L. 2013, p. 690, § 19/SB 185, effective July 1, 2013, renamed Part 7 as "2001 Transition".

## **PART 8**

### **2013 TRANSITION**

**Effective date.** — This part became effective July 1, 2013.

#### **11-9-801. Reserved.**

Reserved. (Code 1981, § 11-9-801, enacted by Ga. L. 2013, p. 690, § 20/SB 185.)

#### **11-9-802. Savings clause.**

(a) **Pre-effective date transactions or liens.** Except as otherwise provided in this part, this article, as in effect on July 1, 2013, applies to a transaction or lien within its scope, even if the transaction or lien was entered into or created before July 1, 2013.

(b) **Pre-effective date proceedings.** This article, as in effect on July 1, 2013, does not affect an action, case, or proceeding commenced before July 1, 2013. (Code 1981, § 11-9-802, enacted by Ga. L. 2013, p. 690, § 20/SB 185.)

#### **11-9-803. Security interest perfected before effective date.**

(a) **Continuing perfection; perfection requirements satisfied.** A security interest that is a perfected security interest immediately

before July 1, 2013, is a perfected security interest under this article, as in effect on July 1, 2013, if, on July 1, 2013, the applicable requirements for attachment and perfection under this article, as in effect on July 1, 2013, are satisfied without further action.

(b) **Continuing perfection; perfection requirements not satisfied.** Except as otherwise provided in Code Section 11-9-805, if, immediately before July 1, 2013, a security interest is a perfected security interest, but the applicable requirements for perfection under this article, as in effect on July 1, 2013, are not satisfied on July 1, 2013, the security interest remains perfected thereafter only if the applicable requirements for perfection under this article, as in effect on July 1, 2013, are satisfied before July 1, 2014. (Code 1981, § 11-9-803, enacted by Ga. L. 2013, p. 690, § 20/SB 185.)

#### **11-9-804. Security interest unperfected before effective date.**

A security interest that is an unperfected security interest immediately before July 1, 2013, becomes a perfected security interest:

(1) Without further action, on July 1, 2013, if the applicable requirements for perfection under this article, as in effect on July 1, 2013, are satisfied before or at that time; or

(2) When the applicable requirements for perfection are satisfied if the requirements are satisfied after that time. (Code 1981, § 11-9-804, enacted by Ga. L. 2013, p. 690, § 20/SB 185.)

#### **11-9-805. Effectiveness of action taken before effective date.**

(a) **Pre-effective date filing effective.** The filing of a financing statement before July 1, 2013, is effective to perfect a security interest to the extent the filing would satisfy the applicable requirements for perfection under this article, as in effect on July 1, 2013.

(b) **When pre-effective date filing becomes ineffective.** Changes made to this article effective July 1, 2013, do not render ineffective an effective financing statement that, before July 1, 2013, is filed and satisfies the applicable requirements for perfection under the law of the jurisdiction governing perfection as provided under the former provisions of this article in effect prior to July 1, 2013. However, except as otherwise provided in subsections (c) and (d) of this Code section and Code Section 11-9-806, the financing statement ceases to be effective:

(1) If the financing statement is filed in this state, at the time the financing statement would have ceased to be effective under the former provisions of this article in effect prior to July 1, 2013; or

(2) If the financing statement is filed in another jurisdiction, at the earlier of:



(A) The time the financing statement would have ceased to be effective under the law of that jurisdiction; or

(B) June 30, 2018.

(c) **Continuation statement.** The filing of a continuation statement on or after July 1, 2013, does not continue the effectiveness of a financing statement filed before July 1, 2013. However, upon the timely filing of a continuation statement on or after July 1, 2013, and in accordance with the law of the jurisdiction governing perfection as provided in this article, as in effect on July 1, 2013, the effectiveness of a financing statement filed in the same office in that jurisdiction before July 1, 2013, continues for the period provided by the law of that jurisdiction.

(d) **Application of subparagraph (b)(2)(B) of this Code section to transmitting utility financing statement.** Subparagraph (b)(2)(B) of this Code section shall apply to a financing statement that, before July 1, 2013, is filed against a transmitting utility and satisfies the applicable requirements for perfection under the law of the jurisdiction governing perfection as provided in the former provisions of this article, as in effect prior to July 1, 2013, only to the extent that the provisions of this article, as in effect on July 1, 2013, provide that the law of a jurisdiction other than the jurisdiction in which the financing statement is filed governs perfection of a security interest in collateral covered by the financing statement.

(e) **Application of Part 5 of this article.** A financing statement that includes a financing statement filed before July 1, 2013, and a continuation statement filed on or after July 1, 2013, is effective only to the extent that it satisfies the requirements of Part 5 of this article, as in effect on July 1, 2013, for an initial financing statement. A financing statement that indicates that the debtor is a decedent's estate indicates that the collateral is being administered by a personal representative within the meaning of paragraph (2) of subsection (a) of Code Section 11-9-503, as in effect on July 1, 2013. A financing statement that indicates that the debtor is a trust or is a trustee acting with respect to property held in trust indicates that the collateral is held in a trust within the meaning of paragraph (3) of subsection (a) of Code Section 11-9-503, as in effect on July 1, 2013. (Code 1981, § 11-9-805, enacted by Ga. L. 2013, p. 690, § 20/SB 185.)

**11-9-806. When initial financing statement suffices to continue effectiveness of financing statement.**

(a) **Initial financing statement in lieu of continuation statement.** The filing of an initial financing statement in the office specified in Code Section 11-9-501 continues the effectiveness of a financing statement filed before July 1, 2013, if:

(1) The filing of an initial financing statement in that office would be effective to perfect a security interest under this article, as in effect on July 1, 2013;

(2) The pre-effective date financing statement was filed in an office in another state; and

(3) The initial financing statement satisfies subsection (c) of this Code section.

(b) **Period of continued effectiveness.** The filing of an initial financing statement under subsection (a) of this Code section continues the effectiveness of the pre-effective date financing statement:

(1) If the initial financing statement is filed before July 1, 2013, for the period provided in former Code Section 11-9-515, as in effect prior to July 1, 2013, with respect to an initial financing statement; and

(2) If the initial financing statement is filed on or after July 1, 2013, for the period provided in Code Section 11-9-515, as in effect on July 1, 2013, with respect to an initial financing statement.

(c) **Requirements for initial financing statement under subsection (a) of this Code section.** To be effective for purposes of subsection (a) of this Code section, an initial financing statement must:

(1) Satisfy the requirements of Part 5 of this article, as in effect on July 1, 2013, for an initial financing statement;

(2) Identify the pre-effective date financing statement by indicating the office in which the financing statement was filed and providing the dates of filing and file numbers, if any, of the financing statement and of the most recent continuation statement filed with respect to the financing statement; and

(3) Indicate that the pre-effective date financing statement remains effective. (Code 1981, § 11-9-806, enacted by Ga. L. 2013, p. 690, § 20/SB 185.)

### **11-9-807. Amendment of pre-effective date financing statement.**

(a) **“Pre-effective date financing statement.”** As used in this Code section, the term “pre-effective date financing statement” means a financing statement filed before July 1, 2013.

(b) **Applicable law.** On or after July 1, 2013, a person may add or delete collateral covered by, continue or terminate the effectiveness of, or otherwise amend the information provided in, a pre-effective date financing statement only in accordance with the law of the jurisdiction governing perfection as provided in Part 3 of this article, as in effect on July 1, 2013. However, the effectiveness of a pre-effective date financing

statement also may be terminated in accordance with the law of the jurisdiction in which the financing statement is filed.

(c) **Method of amending: general rule.** Except as otherwise provided in subsection (d) of this Code section, if the law of this state governs perfection of a security interest, the information in a pre-effective date financing statement may be amended on or after July 1, 2013, only if:

(1) The pre-effective date financing statement and an amendment are filed in the office specified in Code Section 11-9-501;

(2) An amendment is filed in the office specified in Code Section 11-9-501 concurrently with, or after the filing in that office of, an initial financing statement that satisfies subsection (c) of Code Section 11-9-806; or

(3) An initial financing statement that provides the information as amended and satisfies subsection (c) of Code Section 11-9-806 is filed in the office specified in Code Section 11-9-501.

(d) **Method of amending: continuation.** If the law of this state governs perfection of a security interest, the effectiveness of a pre-effective date financing statement may be continued only under subsections (c) and (e) of Code Section 11-9-805 or Code Section 11-9-806.

(e) **Method of amending: additional termination rule.** Whether or not the law of this state governs perfection of a security interest, the effectiveness of a pre-effective date financing statement filed in this state may be terminated on or after July 1, 2013, by filing a termination statement in the office in which the pre-effective date financing statement is filed, unless an initial financing statement that satisfies subsection (c) of Code Section 11-9-806 has been filed in the office specified by the law of the jurisdiction governing perfection as provided in Part 3 of this article, as in effect on July 1, 2013, as the office in which to file a financing statement. (Code 1981, § 11-9-807, enacted by Ga. L. 2013, p. 690, § 20/SB 185.)

### **11-9-808. Person entitled to file initial financing statement or continuation statement.**

A person may file an initial financing statement or a continuation statement under this part if:

(1) The secured party of record authorizes the filing; and

(2) The filing is necessary under this part:

(A) To continue the effectiveness of a financing statement filed before July 1, 2013; or



(B) To perfect or continue the perfection of a security interest. (Code 1981, § 11-9-808, enacted by Ga. L. 2013, p. 690, § 20/SB 185.)

### 11-9-809. Priority.

This article, as in effect on July 1, 2013, determines the priority of conflicting claims to collateral. However, if the relative priorities of the claims were established before July 1, 2013, the former provisions of this article, as in effect prior to July 1, 2013, determine priority. (Code 1981, § 11-9-809, enacted by Ga. L. 2013, p. 690, § 20/SB 185.)

## ARTICLE 11

### REVISED ARTICLE 9 AND CONFORMING AMENDMENTS TO OTHER ARTICLES

Sec.

11-11-101. Effective date.

### 11-11-101. Effective date.

This Act shall become effective at 12:01 A.M. on July 1, 1978. (Code 1933, § 109A-11—101, enacted by Ga. L. 1978, p. 1081, § 8; Ga. L. 1980, p. 443, § 7; Ga. L. 2015, p. 996, § 3B-19/SB 65.)

**The 2015 amendment**, effective January 1, 2016, substituted the present provisions of this Code section for the former provisions, which read: “(1) This Act shall become effective at 12:01 A.M. on July 1, 1978.

“(2) As used in this article:

“(a) ‘Old Article 9 of this title’ means Code Sections 11-1-105, 11-1-201(9), 11-1-201(37), 11-2-107, 11-5-116, and Article 9 of this title, as they are in effect on June 30, 1978, immediately prior to the effective date of this Act.

“(b) ‘Revised Article 9 of this title’ means Code Sections 11-1-105, 11-1-201(9), 11-1-201(37), 11-1-209, 11-2-107, 11-5-116, and Article 9 of this

title as said provisions are enacted pursuant to this Act.”

**Editor’s notes.** — Ga. L. 2015, p. 996, § 1-1/SB 65, not codified by the General Assembly, provides: “(a) This Act shall be known and may be cited as the ‘Debtor-Creditor Uniform Law Modernization Act of 2015.’

“(b) To promote consistency among the states, it is the intent of the General Assembly to modernize certain existing uniform laws promulgated by the Uniform Law Commission affecting debtor and creditor rights, responsibilities, and relationships and other federally recognized laws affecting such rights, responsibilities, and relationships.”















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